

**APPLICATION FOR NOMINATION TO
JUDICIAL OFFICE**

**SECTION I: PUBLIC INFORMATION
(QUESTIONS 1 THROUGH 71)**

PERSONAL INFORMATION

1. Full Name: **Sean Earl Brearcliffe**
2. Have you ever used or been known by any other name? **No.** If so, state name:
3. Office Address: **Arizona Superior Court in Pima County,
Division 25
110 W. Congress St.
Tucson, AZ 85701**
4. How long have you lived in Arizona? What is your home zip code?
24 total years (1987-1989, 1995-present). 85749
5. Identify the county you reside in and the years of your residency.
Pima County, 1987-1989, 1995-present
(I physically resided in Pima County between 1987-1989 while in the Air Force serving at Davis-Monthan Air Force Base. My legal residency during that time, however, was still in the State of California)
6. If nominated, will you be 30 years old before taking office? yes no
If nominated, will you be younger than age 65 at the time the nomination is sent to the Governor? yes no

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

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

Republican Party, 1982-present

8. Gender: **Male**

Race/Ethnicity: **Caucasian**

EDUCATIONAL BACKGROUND

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

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

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

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

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

University of Maryland University College – Europe
IM Bosseldorn 30, 69126
Heidelberg, Germany
1985-86; No degree obtained

(During my U.S. Air Force service overseas, I attended the extension campus on RAF Mildenhall, Suffolk, U.K.)

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

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

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

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

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

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

PROFESSIONAL BACKGROUND AND EXPERIENCE

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

Supreme Court of Arizona; May, 1996

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

Ninth Circuit Court of Appeals; April, 2012

Pro hac vice admissions:

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

13. a. Have you ever been denied admission to the bar of any state due to failure to pass the character and fitness screening? **No.** If so, explain.
- b. Have you ever had to retake a bar examination in order to be admitted to the bar of any state? **No.** If so, explain any circumstances that may have hindered your performance.
14. Describe your employment history since completing your undergraduate degree. List your current position first. If you have not been employed continuously since completing your undergraduate degree, describe what you did during any periods of unemployment or other professional inactivity in excess of three months. Do not attach a resume.

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

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

A. *Arizona Superior Court, 2013-present (as of June 1, 2017):*

See Tab A: Attachment 1, lists of judicial officers and assignments for the Arizona Superior Court in Pima County, effective date February 6, 2017.

In addition to those judicial officers on the list, Judge Greg Sakall joined the Court on May 1, 2017, and is assigned to the Family Law Bench. Also, Judge K.C. Stanford, who had been at Juvenile Court, has since retired.

B. *Rusing Lopez & Lizardi, PLLC, 1998-2013 (as of June 2013):*

**Partners: *Michael J. Rusing
Patricio P. Lopez
Oscar S. Lizardi***

***Hon. J. William Brammer, Jr. (ret.)
Timothy Reckart
Daniel Quigley
John Sundt
Edward Moomjian
Tamara Crockett***

Associates:

***Rebecca O'Brien
Todd Hardy
Jeff Baxter
Sarah Stanton
Tessa Riley
Kanika Rankin***

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

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

business and contract disputes	±70%
construction	±10%

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

Since becoming a Superior Court Judge in 2013, I have served three years on the Family Law Bench and, since July 1, 2016, I have served on the Criminal Bench.

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

None other than those listed in response to Question 16, above.

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

None.

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

From 2013 through 2016, I was assigned as a Judge to the Family Law Bench. On a daily basis, I drafted decrees, orders, opinions and judgments in the cases assigned to my Division. These ranged from brief substantive and procedural orders to lengthy under-advisement decisions and complex decrees.

Since 2016, I have been assigned as a Judge to the Criminal Bench. In that role, I routinely and daily draft orders, rulings on motions, judgments, and appellate rulings in case assigned to my Division and Criminal Rule 32 petitions for post-conviction relief (motions seeking new trials or re-sentencing) in cases I have presided over.

As a retained judge generally, I draft rulings on Criminal Rule 32 petitions in cases presided over by judges who have since left the Court.

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

Title 25, Arizona Revised Statutes.

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

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

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

In my role as Member, and then as National Chairman, of the Federal Bar Association's Professional Ethics Committee, from 2010 to 2013, I initiated and oversaw the pilot project of drafting FBA commentary to the American Bar Association's Model Rules of Professional Conduct.

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

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

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

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

Sole Counsel: 16

Chief Counsel: 1

Associate Counsel: 0

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

Sole Counsel: 20*

Chief Counsel: 3*

Associate Counsel: 3*

***These figures are of formally arbitrated or mediated matters, including court-officiated settlement conferences, in which I was involved while in private practice. As a Superior Court Judge, I serve as a settlement conference judge/mediator in scheduled settlement conferences several times each year. Those are not included in the numbers above.**

22. List at least three but no more than five contested matters you negotiated to settlement. State as to each case: (1) the date or period of the proceedings; (2) the names, e-mail addresses, and telephone numbers of all counsel involved and the party each represented; (3) a summary of the substance of each case; and (4) a statement of any particular significance of the case.

A. **Novus Retail, LLC v. Sonora Group, Inc. and Sonora Properties, LLC (Arizona Superior Court in Pima County, C20096536)**

and its related case

Sunrise Oil v. D&D Properties, LLC, Sonora Properties, LLC and GE Capital Commercial, Inc. (Arizona Superior Court in Santa Cruz County, CV10-239)

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

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

Sean E. Brearcliffe

(then of Rusing Lopez & Lizardi, PLLC)

b. Attorneys for Plaintiff Novus Retail:

**Peter Collins, Jr.
Gust Rosenfeld, PLC,
One S. Church Ave., Ste. 1900,
Tucson, AZ 85701,
(520) 628-7073
*pcollins@gustlaw.com***

**Robert Savage
(then of Gust Rosenfeld, PLC)
209 S. Palace Gardens Dr.
Tucson, AZ 85748-2113
(520) 490-7849
*rsavagelaw@gmail.com***

c. Attorney for Plaintiffs Novus Retail and Sunrise Oil:

**Jeff Brei
Brei Law Firm
4574 N. First Ave., Ste. 150,
Tucson, AZ 85718
(520) 297-4411
*jeff@breilaw.com***

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

**Susanne Ingold
Burch & Cracchiolo, PA
702 E. Osborn Rd., Ste. 200,
P.O. Box 16882,
Phoenix, AZ 85011
(602) 274-7611
*singold@bcattorneys.com***

e. Attorney for Defendant GE Capital Commercial, Inc.:

**Brian Cospers
Fidelity National Law Group
2355 E. Camelback Rd., Ste. 900,
Phoenix, AZ 85016
(602) 889-8164
*brian.cospers@fnf.com***

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

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

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

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

(2) a. *Attorneys for Plaintiff Patricia Lewis:*

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

Cynthia T. Kuhn
(then of Rusing & Lopez, PLLC (nka Rusing Lopez & Lizardi, PLLC))
Judge, Arizona Superior Court in Pima County
110 W. Congress St.,
Tucson, AZ 85701
(520) 724-9904
ckuhn@sc.pima.gov

b. *Attorney for Defendants Signal Gates, et al.:*

Stefano D. Corradini
Leshner & Corradini, PLLC
5151 E. Broadway Blvd., Ste. 1510
Tucson, AZ 85711
(520) 747-7790
modena61@aol.com

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

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

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

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

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

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

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

b. *Attorneys for Defendants Cities Edge Architects and John Hafner:*

P. Douglas Folk
(then of Folk & Associates)
Clark Hill, PLC
14850 N. Scottsdale Rd., Ste. 500,
Scottsdale, AZ 85254-3464
(480) 684-1100

dfolk@clarkhill.com

Benjamin Hodgson
(then of Folk & Associates)
Righi Fitch Law Group
2111 E. Highland Ave., Ste. 3440
Phoenix, AZ 85016
(602) 385-6776
benjamin@righilaw.com

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

Michael J. Childers
(then of Turley Swan Childers Righi & Torrens, PC)
Perry Childers Hanlon & Hudson, PLC
722 Osborn Rd., Ste. 100,
Phoenix, AZ 85014
(602) 254-1444
mchilders@pchhlaw.com

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

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

D. Reid Garrey
Andrew Peshek (primary counsel)
Garrey Woner Hoffmaster & Peshek, PC
6611 N. Scottsdale Rd.,
Scottsdale, AZ 85250
(480) 483-9700
reid.garrey@gwhplaw.com
apeshek@gwhplaw.com

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

the consultant/construction manager and architect as the only practical remedy. The consultant/construction manager disclaimed responsibility for construction supervision. The architect was cooperative, but denied liability for design defects and improper approval of pay applications.

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

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

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

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

(2) a. *Attorneys for Plaintiff Linda LeGendre*

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

John Thal (primary co-counsel)
Clifford Atkinson
Atkinson Thal & Baker, PC (fka Atkinson & Thal, PC)
201 Third St. NW, Ste. 1850,
Albuquerque, NM 87102
(505) 764-8111
jthal@atb-law.com
catkinson@atb-law.com

Michael Kaemper
(formerly of Atkinson & Thal, PC)
Rodey Law Firm
201 Third St., NW #2200
Albuquerque, NM 87102
(505) 768-7351
mkaemper@rodey.com

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

b. Attorneys for Defendant Old Dominion Freight Line, Inc.:

Robert T. Booms (primary counsel)
J. Duke Thornton
Butt Thornton & Baehr, PC,
P.O. Box 3170,
Albuquerque, NM 87190-3170
(505) 884-0777
rtbooms@btblaw.com
jdthornton@btblaw.com

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

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

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

The approximate number of cases in which you appeared before:

Federal Courts: **37 (an additional 24 appearances in bankruptcy courts)**

State Courts of Record: **140**

Municipal/Justice Courts: **10**

The approximate percentage of those cases which have been:

Civil: **99%**

Criminal: **<1%**

The approximate number of those cases in which you were:

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

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

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

The approximate percentage of those cases in which:

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

15-20%

You argued a motion described above

75% of the cases in which dispositive motions were filed were orally argued. The remainder were resolved on the papers without argument.

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

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

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

A jury rendered a verdict:

6 cases

The number of cases you have taken to trial:

Limited jurisdiction court	1
Superior court	15
Federal district court	0
Jury	6

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

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

The approximate number of your appeals which have been:

Civil:	12*
Criminal:	1
Other:	0

The approximate number of matters in which you appeared:

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

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

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

25. Have you served as a judicial law clerk or staff attorney to a court? **No**. If so, identify the court, judge, and the dates of service and describe your role.

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

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

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

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

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

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

b. *Attorney for Plaintiff AD Group Southern & Ellsworth, LLC:*

**John Harris
Harris Law Firm, PC
P.O. Box 4081,
Scottsdale, AZ 85261
(602) 418-9687
*jdharris.esq.az@gmail.com***

c. *Attorney for Defendant CNL Bank, NA:*

**L. Richard Williams
Beus Gilbert, PLLC
701 N. 44th St.,
Phoenix, AZ 85008
(480) 429-3000
*rwilliams@beusgilbert.com,***

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

The plaintiff claimed that Unicorp and Eck 41 (Florida companies) were contractually obligated to pay one-half of the cost for the construction of off-site improvements (sewer, traffic control, ingress-egress roadway improvements, etc.) for its entire commercial development – costing in excess of one million dollars – as consideration for the sale-price reduction for the property my clients purchased. Unicorp’s position was that it was not liable because it had assigned its contract rights and obligations to a single-asset entity, Eck 41, with the plaintiff’s full knowledge and consent. Eck 41’s position was that, though it was contractually responsible for off-site construction costs, those costs were limited to those for ingress and egress to the individual pad it purchased – costing a few thousand dollars at best – and not for such costs for the entire development (which included a Lowe’s home improvement store and other commercial properties). I achieved a dismissal of the claims against my client Unicorp by summary judgment, thus vindicating its position on the assignment. Ultimately, I also achieved for my client Eck 41 the dismissal of claims against it by separate summary judgment, after oral argument, on the basis of the statute of limitations.

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

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

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

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

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

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

Oscar S. Lizardi
Rusing Lopez & Lizardi, PLLC
6363 N. Swan Rd., Ste. 151,
Tucson, AZ 85718
(520) 792-4800
olizardi@rllaz.com

b. Attorneys for Plaintiffs Bryan and Stephanie Hudson:

**Brenden Griffin (primary counsel)
(then of Gabroy Rollman & Bossé, PC.)
Judge, Arizona Superior Court in Pima County
2225 E. Ajo Way
Tucson, AZ 85713
(520) 724-3906
*brenden.griffin@pcjcc.pima.gov***

**John Gabroy (ret.)
(then of Gabroy Rollman & Bossé, PC., nka
Bossé Rollman, P.C.
3507 N. Campbell Ave., Ste. 111
Tucson, AZ 85719
(520) 320-1300)
*(current contact information unknown)***

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

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

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

- (1) The case was filed in 2005; resolved by motion for summary judgment in 2007; appealed and affirmed in 2008**
- (2) Arizona Superior Court in Pima County; Judge John E. Davis**

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

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

b. ***Attorney for Plaintiffs Fernando and Olivia Chiquette:***

John G. Stompoly
(then of Stompoly Stroud & Erickson, PC)
Law Offices of John G. Stompoly, PLLC
2850 N. Swan Rd., Ste. 120,
Tucson, AZ 85712-6302
(520) 628-8300
johnstompoly@stompoly.com

c. ***Attorney for Defendant International Church of Foursquare Gospel:***

Jack Redhair
(then of Redhair & Leader)
The Redhair Law Group, PC
7440 N. Oracle Road, Bldg. 3,
Tucson, AZ 85704
(520) 622-0433
monica@redhairlaw.com,

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

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

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

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

- (1) The case was filed in 2010; resolved by bench trial in 2011
- (2) Arizona Superior Court in Pima County; Judge Kenneth Lee
- (3) a. *Attorney for Plaintiff Baird Builders, Inc.*

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

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

William M. Fischbach III (primary counsel)
J. Lawrence McCormley
Lance R. Broberg
Tiffany & Bosco, PA
2525 E. Camelback Rd., 3rd Flr.,
Phoenix, AZ 85016
(602) 255-6000
wmf@tblaw.com (Fischbach)
jlm@tblaw.com (McCormley)
lrb@tblaw.com (Broberg)

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

Baird Builders was hired by the tenant, Pro Fitness, to build out tenant improvements under its new lease with the landlords Philbrick DK Ranch and Dave Grabbert Ranch. After the tenant improvements were finished, and after only a few weeks of operations, the tenant shuttered its doors, leaving the builder unpaid. Baird Builders had perfected its lien rights against the properties and brought its action both for lien foreclosure and for breach of contract. The tenant filed for bankruptcy protection leaving only the defendant landlords as parties. Prior to suit, the parties' counsel exchanged detailed correspondence laying out each party's

respective litigation position in an attempt to resolve the case, but the matter could not be resolved and suit was necessary. Motion practice did not narrow the issues nor dispose of the case. The matter was tried to Judge Kenneth Lee, who issued a verdict for Baird Builders, ordering foreclosure and sale of the properties. Additionally, because my client had made extensive efforts at the outset of the case to settle the dispute, Judge Lee awarded Baird Builders its full attorneys' fees incurred.

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

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

Mediator/Arbitrator/Judge pro tem: The extent of my service as an arbitrator was as a court-appointed arbitrator in the Superior Court, under Rule 73, Arizona Rules of Civil Procedure. Between 2004 and 2013, I was assigned a dozen cases, and held evidentiary hearings in four of the matters.

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

Arizona Superior Court Judge (2013 to present):

From June, 2013, through the end of June, 2016, I served on the Pima County Superior Court Family Law Bench. Family law cases include divorce/dissolution, legal separation and annulment, child custody (legal decision-making and parenting

time), child support establishment, modification and enforcement, and orders of protection and injunctions against harassment (both *ex parte* and contested).

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

In each year on the Family Law Bench, I averaged roughly ten trials per month of varying degrees of complexity and length.

Since July 1, 2016, I have served on the Pima County Superior Court Criminal Bench. This work covers misdemeanor and felony offenses, jury trials, Rule 32 Petitions for Post-Conviction Relief (in cases I have presided over) and criminal appeals from the Justice Court and municipal courts. As a criminal trial judge, on a daily basis, I take pleas, impose sentences, resolve substantive and procedural motions, resolve motions to terminate probation, resolve petitions to set aside convictions and restore civil rights, and preside over jury trials. In presiding over jury trials, I am required to select and instruct juries, rule on evidentiary objections and procedural and substantive motions – both before and during the trial -- take verdicts, and sentence anyone convicted. In handling criminal appeals from lower courts, I review the court record, read briefs, take oral argument, research the law and draft appellate rulings.

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

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

A. Claudia Arevalo v. Angelica Valenzuela (SP20140422)

- (1) The case was filed and resolved in 2014**
- (2) Arizona Superior Court in Pima County**

(3) Attorneys for Claudia Arevalo:

**Scott Myers
Heather Strickland
Myers Strickland, PLLC
3180 E. Grant Rd.,
Tucson, AZ 85716
(520) 327-6041
scott@myersstrickland.com
heather@myersstrickland.com**

(4) The parties in this case were parties to a "surrogate parentage contract," under which the Petitioner ("Arevalo") provided her fertilized egg to be implanted in the womb of the Respondent ("Valenzuela) who would then carry the baby to term and surrender any parental rights she had to Arevalo. Valenzuela had the baby, and then this lawsuit was filed for a judicial declaration that Arevalo was the legal mother and that Valenzuela was not. The matter was uncontested. Valenzuela did not claim she was the natural mother of the child or try to invalidate the contract; indeed, she agreed to the relief Arevalo asked for.

(5) This case was significant because, despite the fact that both parties were in full agreement, the chief issue was the enforceability of the surrogate parentage contract. The Arizona Legislature had, among other things, made surrogate parentage contracts illegal under A.R.S. § 25-218. Division 1 of the Arizona Court of Appeals, in *Soos v. Superior Court*, 182 Ariz. 470 (App. 1994), held that A.R.S. § 25-218 was invalid and unconstitutional under the 14th Amendment's Equal Protection clause. The *Soos* court did not expressly state, though, whether the law was unconstitutional and invalid in whole or just in part. If wholly invalid, the section making surrogate parentage contracts illegal would have been invalid, and such contracts would be enforceable. If only invalid in part, then such a contract would still be illegal and unenforceable -- even if the parties themselves wanted it enforced.

As stated in my Ruling, I determined that *Soos* only invalidated the statute in part and that surrogate parentage contracts remain illegal in Arizona. Consequently, I found that I could not enforce the contract. I also found, however, that Arizona law allowed for a maternity finding separate and apart from, and without referring to, the surrogate parentage contract. Because I could make a maternity finding without relying on the contract, and because there was sufficient evidence that Arevalo was the biological mother, I declared Arevalo the legal mother.

B. John G. Nagore v. Mildred C. Cassidy (D20114494)

- (1) The case was before me in 2014-2016
- (2) Arizona Superior Court in Pima County
- (3) a. *Attorney for Petitioner John Nagore:*

John Eli Aboud
Aboud & Aboud, PC
1661 N. Swan Rd., Ste. 234,
Tucson, AZ 85712
(520) 623-5721
johneli@aboudlaw.com

-
-
- b. *Attorney for Respondent Mildred Cassidy:*

Brian K. Kimminau
Thrush Law Group
4011 E. Broadway Blvd., Ste 101
Tucson, AZ 85711
(520) 327-3442
bkimminau@thrushlawgroup.com

(4) This was a divorce case with complicated issues concerning multiple pieces of real estate, waste of community resources and offset, allocation of debt, and division of pensions. The parties, Nagore and Cassidy, had been married for eight years when the Petition for Dissolution was filed. Over those years, they either bought property jointly or, with community funds and effort, improved each other's separate property. Before marriage, Nagore had worked as a firefighter and earned a separate property interest in a pension. After they married, both Nagore and Cassidy earned an interest in the pension until Nagore retired.

One of the primary issues in the case was whether or not I should apply an offset to Nagore's pension to give him credit for a portion of his pension equal to what would have accrued had he contributed to social security. Arizona case law (*Kelly v. Kelly*, 198 Ariz. 307 (2000)) allows for such an offset because social security earnings are not divisible on dissolution and, under certain pension plans, one may opt out of social security and instead contribute that amount to the pension. Here, Nagore argued that he was entitled to the offset under *Kelly* and Cassidy argued that he should not get the offset because it was "inequitable." Another issue was whether Nagore should be given credit for work performed on Cassidy's separate properties (each since either lost to foreclosure or sold). Another issue was the allocation of a debt owed to Nagore's parents (which had been the subject of a separate civil lawsuit between Cassidy and Nagore's mother).

(5) The significance of the case is that it served as an example of the complex issues that arise and face Judges on the Family Law Bench in divorce cases.

C. *State of Arizona v. Michael Flores (CR20101123)*

- (1) The case was resolved in 2013
- (2) Arizona Superior Court in Pima County
- (3) a. *Attorney for the State of Arizona:*

Nicolette Kneup
Deputy Pima County Attorney
32 N. Stone, Suite 1400,
Tucson, AZ 85701
(520) 740-5600
nicolette.kneup@pcao.pima.gov

-
-
- b. *Attorney for Defendant Flores:*

Lisa Hise
(then of the Pima County Public Defender)
33 N. Stone Ave., 21st Floor, Tucson, AZ 85701
(520) 243-6800
(current contact information unknown)

(4) The issue in the case was that the Defendant ("Flores") elected to check himself into a hospital in Glendale and skip the second day of his two-day trial. He talked with his attorney about the down-side of not appearing, and took his attorney's advice that being in the hospital might gain him sympathy with the jury. Notwithstanding, once convicted, he complained that the trial should not have gone on without him and that his attorney improperly failed to determine whether or not he was competent to make the decision to skip trial. I found that Flores and his attorney had made a tactical choice to miss trial, that Flores had voluntarily waived his presence at trial, and that the lawyer's performance met the acceptable standard. I dismissed the Petition. The Court of Appeals upheld my ruling in CA-CR2013-0043-PR.

(5) This case was significant to me because it was my first criminal ruling. It came to me as a Rule 32 Petition for Post-Conviction Relief asking for a new trial of a case originally tried before Judge Michael Miller. Typically Rule 32 Petitions are handled by the Judge who tried the case and imposed the sentence. When the Judge who tried the case and imposed the sentence has left the bench, or, in Judge Miller's case, moved to another Court, the Judge who took over that Judge's judicial

division "inherits" the case. I was appointed to take over Judge Miller's Division and so I inherited this case. In such situations, the reviewing Judge is new to the case, and has to treat the case more like an appeal. Rather than reviewing my own work in a case which I knew from having handled the trial, I was instead reviewing the work of another Judge where every piece of the case is new. This was very much like an appeal. (See Tab A: Attachment 3 for excerpts from the Ruling.)

D. See Tab B: Confidential Attachment 1

E. See Tab B: Confidential Attachment 1

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

At my last firm, I had the benefit of working for fifteen years with some of the best trial lawyers and business lawyers in Arizona. Each of my former partners was a resource of immeasurable value throughout my career and an example of how to practice law the right way. I learned professionalism, judgment, negotiating skills, client development, and how a small business is grown, run, and survives in challenging times. For a decade and a half, I watched, and was a part of, the building of a top-notch Arizona law firm. I was mentored by skilled lawyers and was given the opportunity to mentor other lawyers. I saw firsthand how one can operate a law firm as a successful business without sacrificing what makes law a profession.

In my service over the last four years as a Superior Court Judge, I have been able to work closely with a group of dedicated and diligent men and women. In my experience, each of my judicial colleagues is committed to resolving disputes and ensuring that justice is done within the bounds of the law, and to keeping faith with the people to whom we are answerable. It has been a pleasure to be able to collaborate on matters with the talented men and women on the Superior Court, and to use them as resources on some of the most interesting legal issues that exist.

When I applied for the Court of Appeals vacancy in 2015, my experience as a Judge had been limited to the Family Bench. Also, my litigation practice for seventeen years was almost exclusively a civil trial practice. Consequently, I did not have any criminal practice experience. Because about 40% of the 800 or so cases Division 2 resolves per year are criminal cases, I knew I needed to have criminal law experience -- both to be a more credible candidate for the Court of Appeals if I applied again, and also to be a better Court of Appeals Judge if ultimately appointed. To that end, when it came time for judicial rotation and re-assignment, which in our Court happens every three years or so, I asked the Presiding Judge to move me to the Criminal Bench.

I understood the principles of criminal law going in to this assignment. I had kept up on the changes to the law, including criminal law, as part of my job, and I have always been interested in constitutional law in the criminal area. (While in law school I prepared for what I thought would be my future as either a prosecutor or a criminal defense attorney.) By reading opinions and having studied criminal procedure, I had the basics down. What I could not get from study alone, though, was the *feel* for the experience of being a judge during a criminal trial, having often to make decisions with inadequate or no briefing, all while an increasingly impatient jury is waiting for the trial to continue. The decisions we make can, quite literally, have life-or-death consequences, but they always have significant consequences for the people involved. I know the importance of getting the law right. I understand that if a judge in a criminal trial has ruled incorrectly on an issue, even if in isolation it may seem inconsequential, it can have a cascading effect on the fairness of a trial. I also know, though, that some legal errors, even if significant, can be corrected during the trial. If such errors are corrected during the trial, and if necessary instructions are given to the jury, both sides can still receive a fair trial. Now, having been a trial judge in criminal cases, and having had to make split-second decisions on fine points of law that turn an entire case, I believe I will be a better Court of Appeals Judge now than I would have been had I received the appointment two years ago.

BUSINESS AND FINANCIAL INFORMATION

30. Have you ever been engaged in any occupation, business or profession other than the practice of law or holding judicial or other public office, other than as described at question 14? **Yes**. If so, give details, including dates.

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

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

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

31. Are you now an officer, director, majority stockholder, managing member, or otherwise engaged in the management of any business enterprise? **No**. If so, give details, including the name of the enterprise, the nature of the business, the title or other description of your position, the nature of your duties and the term of your service.

Do you intend to resign such positions and withdraw from any participation in the management of any such enterprises if you are nominated and appointed? **Not applicable**. If not, explain your decision.

32. Have you filed your state and federal income tax returns for all years you were legally required to file them? **Yes**. If not, explain.
33. Have you paid all state, federal and local taxes when due? **No**. If not, explain.

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

34. Are there currently any judgments or tax liens outstanding against you? **No**. If so, explain.
35. Have you ever violated a court order addressing your personal conduct, such as orders of protection, or for payment of child or spousal support? **No**. If so, explain.
36. Have you ever been a party to a lawsuit, including an administrative agency matter but excluding divorce? **Yes**. If so, identify the nature of the case, your role, the court, and the ultimate disposition.

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

37. Have you ever filed for bankruptcy protection on your own behalf or for an organization in which you held a majority ownership interest? **No**. If so, explain.
38. Do you have any financial interests including investments, which might conflict with the performance of your judicial duties? **No**. If so, explain.

CONDUCT AND ETHICS

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

40. Have you ever been arrested for, charged with, and/or convicted of any felony, misdemeanor, or Uniform Code of Military Justice violation? **No**.

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

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

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

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

None.

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

None.

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

None.

45. Have you received a notice of formal charges, cautionary letter, private admonition, referral to a diversionary program, or any other conditional sanction from the Commission on Judicial Conduct, the State Bar, or any other disciplinary body in any jurisdiction? **No**. If so, in each case, state in detail the circumstances and the outcome.

46. During the last 10 years, have you unlawfully used controlled substances, narcotic drugs or dangerous drugs as defined by federal or state law? **No**. If your answer is “Yes,” explain in detail.

47. Within the last five years, have you ever been formally reprimanded, demoted, disciplined, cautioned, placed on probation, suspended, terminated or asked to resign by an employer, regulatory or investigative agency? **No**. If so, state the circumstances under which such action was taken, the date(s) such action was taken, the name(s) and contact information of any persons who took such action, and the background and resolution of such action.
48. Have you ever refused to submit to a test to determine whether you had consumed and/or were under the influence of alcohol or drugs? **No**. If so, state the date you were requested to submit to such a test, type of test requested, the name and contact information of the entity requesting that you submit to the test, the outcome of your refusal and the reason why you refused to submit to such a test.
49. Have you ever been a party to litigation alleging that you failed to comply with the substantive requirements of any business or contractual arrangement, including but not limited to bankruptcy proceedings? **No**. If so, explain the circumstances of the litigation, including the background and resolution of the case, and provide the dates litigation was commenced and concluded, and the name(s) and contact information of the parties.

PROFESSIONAL AND PUBLIC SERVICE

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

“Advanced Construction Law in Arizona,” National Business Institute, 1999, contributing co-author

“Everyday Ethics,” The Federal Lawyer, August, 2012, co-authored with Ryan McCabe, Montgomery Barnett, LLP, New Orleans, LA

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

Lecturer, “Fundamentals of Construction Law,” Sterling Educations Services, Inc., 2004

Lecturer, “Construction Law from Contract to Closeout in Arizona,” Lorman Education Services, 2006

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

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

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

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

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

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

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

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

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

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

See below for all legal profession-related organizational activities.

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

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

Member, State Bar of Arizona, 1996-present

Member, Pima County Bar Association, 1996-present

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

Member, Arizona Judges Association, 2013-present

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

Member, Federal Bar Association, 2000-2015

Member, Tucson Defense Bar, 2002-2013

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

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

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

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

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

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

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

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

Member, Supreme Court Historical Society, 2010-2014

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

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

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

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

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

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

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

Member, DM-50, 2013-present

I have been a member of DM-50 since 2013. DM-50 is a group of local businessmen and businesswomen and community leaders who donate their money, time and expertise to support the mission and improve the quality of life of our soldiers, sailors, marines and airmen at Davis Monthan Air Force Base. DM-50 annually hosts events at the Base to benefit the men and women stationed there. When I was stationed at Davis Monthan myself in the late 1980s, my fellow service men and women knew that Tucson supported their mission. Groups like DM-50 make that support tangible. Given the strain on the forces over the last fifteen years, apparent as well as actual support for their mission is even more necessary. Though I have not taken a leadership position in the group so far, and though in my position I cannot participate in fundraising, I volunteer and work at its many events and activities.

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

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

Board Member, Ott Family YMCA, 1999-2004

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

Member, Rotary, 2001-2010

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

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

“AV Preeminent” rating – the highest rating by Martindale-Hubbell Peer Review Ratings; 2012

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

Volunteer of the Year – 2011, Pima County Republican Party

Fellow, Foundation of the Federal Bar Association

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

Certificate of Recognition, Cold War Military Service, awarded 2006

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

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

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

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

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

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

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

Primarily, I am blessed with Mary, my marvelous wife of 30 years, and we are both blessed with three great kids and two grandsons.

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

As far as non-parent and -grandparent efforts, I do woodworking and metalworking in my spare time, tearing down and rebuilding various structures around the house and backyard and staying out of my wife's hair. Together my wife and I enjoy gardening (or, as I prefer to call it, "low-yield farming") and we travel when our work schedules allow.

HEALTH

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

ADDITIONAL INFORMATION

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

My great-great grandfather Stephen emigrated to America from England in the 1860s, and moved to Red Bluff, California, where he began farming. My grandfather Noel was the first to leave the farm when he was conscripted to work in the Oakland shipyards during World War II. There he contracted polio, which wiped out half of his lung power, crippled his left arm and made it difficult for him to eat and drink in later years. But for his polio he might have returned to the farm after the War. Instead, because he could no longer do strenuous manual labor, he became a successful CPA, and, despite his disabilities, he raised a family with my grandmother and lived into his eighties. (He was so stoic that his business partner of twenty years did not know, until after my grandfather's death, that my grandfather had no use of his left arm.) My grandmother Mary was raised in North Dakota and was the first woman in her family to attend college. She earned a home economics degree from the University of California, Berkeley, in the early 1930s.

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

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

Though my story is probably not unlike that of millions of other Americans, I am proud to be a fifth-generation American, an adopted son of Arizona, and a U.S. Military Veteran. My wife and I are proud and happy that, so far anyway, our children have chosen also to remain Arizonans, and we look forward to being a family of Arizonans for generations to come.

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

I have been exceedingly lucky to have led the life I have so far. My personal and professional experiences gained in all of my walks of life have been invaluable. My past professional life outside of the practice of law has allowed me to bring a singular type of experience to my work. I am sure that I am not the only applicant for this position who worked in fields other than the law, and I may not be the only one who served in the military. Both of those experiences do let me bring something other than mere legal training and legal knowledge to my work. My military experience ingrained in me a sense of duty and dedication to a cause other than personal gain or advancement. It taught me of the need for accountability and self-reliance. My specialized training and experience in the particular intelligence field in which I worked gave me a perspective of the wider world. This is a perspective that I would not have obtained had I been a student, and then a lawyer, but nothing else.

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

See Tab A: Attachment 2

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

See Tab B: Confidential Attachment 2

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

See Tab A: Attachment 3 and Tab B: Confidential Attachment 3

65. If you are currently serving as a judicial officer in any court and are subject to a system of judicial performance review, please attach the public data reports and commission vote reports from your last three performance reviews.

See Tab A: Attachment 4

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

TAB A: ATTACHMENT 1

Response to Section I, Question 15:

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



Arizona Superior Court
Pima County
110 West Congress
Tucson, Arizona 85701

BENCH ASSIGNMENTS

Effective February 6, 2017

Presiding Judge: Kyle Bryson

Associate Presiding Judge: Kenneth Lee

CASELOAD REASSIGNMENTS

Family Law cases assigned to Commissioner Jones will be reassigned to Commissioner Abrams
Family Law cases assigned to Commissioner Bibbens will be reassigned to Commissioner Butler
IV-D cases assigned to Commissioner Christoffel will be reassigned to Commissioner Bibbens
IV-D cases assigned to Commissioner Pennington will be reassigned to Commissioner Jones
Probate cases assigned to Commissioner Abrams will be reassigned to Commissioner Connors
Juvenile cases assigned to Commissioner Butler will be reassigned to Commissioner Christoffel
Juvenile cases assigned to Commissioner Connors will be reassigned to Commissioner Pennington

Civil

Jeffrey Bergin, Presiding

Gus Aragon

Richard Gordon

Leslie Miller

Sarah R. Simmons

Catherine Woods

Cynthia Kuhn

Criminal

Richard Fields, Presiding

Danelle Liwski, Mental Health Court

Paul Tang

Michael Butler

Jane L. Eikleberry

Kenneth Lee

Richard D. Nichols

Sean Brearcliffe

Janet C. Bostwick

Howard L. Fell (Pro Tem)

Teresa Godoy (Pro Tem- Drug Court)

Casey F. McGinley (Pro Tem- DTAP)

Juvenile

Kathleen Quigley, Presiding

Javier Chon-Lopez

Peter Hochuli

Brenden Griffin

D. Douglas Metcalf

K.C. Stanford

Joan Wagener

Probate

Charles Harrington, Presiding

Wayne Yehling (Comm)

Julia Connors (Comm)

Family Law

James Marner, Presiding

Deborah Bernini

Christopher Browning

Scott Rash

John Assini (Comm)

Lisa Bibbens (IV-D Comm)

Lisa Abrams (Comm)

Lori Jones (IV-D Comm)

Jane Butler (Comm)

Ken Sanders (Comm)

Geoffrey Ferlan (Comm)

Cathleen Linn (Comm)

Laurie San Angelo (Comm)

Hearing Officer

Lee Ann Roads

Juvenile

Alyce Pennington (Comm)

Dean Christoffel (Comm)

Patricia Green (Comm)

Susan Kettlewell (Comm)

Jennifer Langford (Comm)

Gilbert Rosales (Comm)

Deborah Pratte (Comm)

TAB A: ATTACHMENT 2

Response to Section I, Question 62:

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

I have always been drawn to the work of an appeals court judge -- even if I did not always imagine I would have the chance to be one.

In considering whether to apply for this position, and reflecting on my career as a part of this process, I realized that I have spent a great deal of my free time reading appellate opinions. I do not read them because I have to. I understand that this may expose my sad social life, but I read appellate opinions *recreationally*. A well-written appellate opinion is clear, concise, sometimes sharp, but always a road map that guides the reader to a logical end. Not only is a well-written appellate opinion a joy to read, it is effective in relating to the parties and the lower courts not only what the ruling is but *why* the ruling is what it is. There is nothing better for a law nerd than curling up on a rainy night to read Justice Jackson's steel-seizure case concurring opinion.

Not only do I like the product of the appellate process, I believe I will like the process itself. I do thoroughly enjoy being a trial judge -- it is challenging and personally rewarding. What I have come to like most about the job of a trial judge, though, are those aspects of the work most like the work of an

appeals court judge – that is, handling post-conviction relief petitions and lower-court appeals. (Post-conviction relief petitions are petitions filed by criminal defendants with the trial judge raising non-appealable error. Lower-court appeals from County Justice Courts and Municipal Courts are handled by a Superior Court Judge who serves as a single-judge appellate court.) In these cases, my job is to review the developed record, consider the alleged error, and then, within the limits of the standard of review, determine whether -- as to appeals -- to affirm or overrule the trial judge, or -- as to post-conviction relief petitions -- to grant the defendant a new trial or a new sentencing. When I come across an area of law or a fact that has not been dealt with by a court before, I relish figuring it out for the first time. I enjoy taking the record and evidence given to me, doing the legal research, applying the law to the facts, and creating a thorough, written decision explaining my conclusions to the parties. In doing this kind of work, I spend a great deal of time thinking not just about the practical effect on the parties in front of me, but also of the implications down the road of a consistent application of my reasoning.

Because an appeals court judge must join with at least one of his or her two colleagues on a panel to render any opinion, the job requires collaboration and persuasion. I like persuading others and I do not mind being persuaded by others. If my first position is the wrong one, I want to be shown that is. If my

position is the correct one, I will do whatever I can to persuade my colleagues that it is. Because trial judges work in real time, sometimes without complete guidance on the law from very busy trial lawyers, we often must make decisions without the benefit of lengthy reflection. Reviewing courts have the benefit of time to take a long look at what happened in the trial court, to correct mistakes, and ultimately to ensure that justice under the law is done. Having a court where the judges can spend the time to ensure the fairness of trials is vital. I want to be a part of that process. The work is simply fascinating.

Even so, enjoying and wanting to do an important job is not enough. In the end, I believe that I have the legal skill, background, judgment, temperament, and experience to do the job well. No person, whether already serving as a judge or in practice as a lawyer, has faced, let alone mastered, each of the areas of law he or she will face in the job. The course of my life and the breadth of my civil practice prepared me well for handling the then-unfamiliar areas of the law that I had to handle as a trial judge. That background and my additional experience over the last four years as a trial judge have prepared me for the challenges ahead as a Judge on the Court of Appeals.

TAB A: ATTACHMENT 3

Response to Section I, Question 64:

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

(i) In Chambers Ruling Re: Post Conviction Relief, *State v. Flores*, CR20101123

(ii) In Chambers Ruling Re: Notice of Post-Conviction Relief, *State v. Bramlett*, CR20091858

(iii) See Tab B: Confidential Attachment 3

AUG - 7 2013

FILED
TERRILLION
COURT
8-7-13
13 AUG -7 AM 8:46

ARIZONA SUPERIOR COURT, PIMA COUNTY

HON. SEAN E. BREARCLIFFE

CASE NO. CR20101123 -001
BY: R. ST. GERMAIN, DEPUTY
DATE: August 05, 2013

STATE OF ARIZONA
Plaintiff,
vs.

MICHAEL ANTHONY FLORES (-001)
Defendant.

R U L I N G

IN CHAMBERS RULING RE: POST-CONVICTION RELIEF

Defendant Michael Anthony Flores ("Flores") submitted a Petition for Post-Conviction relief pursuant to Rule 32, Ariz.R.Crim.P., on the basis of ineffective assistance of trial counsel and appellate counsel.

Flores was convicted of aggravated driving under the influence of intoxicating liquor or drugs while his driver's license was suspended or revoked and one count of criminal damage stemming from an April 13, 2009 incident wherein he struck two vehicles in a grocery store parking lot while under the influence of prescription pain and sleep medications. Flores received concurrent sentences: four years incarceration for the criminal damage charge and eight years incarceration for the aggravated DUI charge. The convictions and sentences were not disturbed on appeal.

Flores asserts that his trial counsel's waiver of Flores's presence on the second day of a two-day trial "fell below professional norms" and was "structural error." He also asserts that his appellate counsel's failure to raise an evidentiary issue on appeal fell "below objective standards of reasonableness" and was prejudicial. Neither of the claims is procedurally precluded but neither claim presents a material issue of fact or law that would entitle Flores to relief.

Lynne Booth
Judicial Administrative Assistant

RULING

Error Due to Waiver of Appearance at Trial and Ineffective Assistance of Trial Counsel

On the second day of his two-day trial in Tucson, Flores drove himself to a hospital in Glendale, Arizona, some two hours north, to seek medical attention. Flores's trial counsel, Annamarie Frank, informed the trial judge that Flores was in the hospital receiving treatment. Flores's trial counsel consulted with Flores, discussed with him the advantages and drawbacks of not being present for the second day of trial, told Flores that they had "a good jury," and that his absence for medical reasons may have "sympathetic appeal" with the jury. Flores agreed with his trial counsel's strategic suggestion and consented to a waiver of his appearance. Trial counsel then conveyed that waiver to the trial judge, and, additionally, requested an explanation be given to the jury that Flores's absence was due to "medical reasons." The prosecution agreed to the giving of the explanation, and the explanation was given to the jury. Apparently, however, either the jury was not so good or there was insufficient sympathetic appeal.

Flores asserts that the trial court's permitting the trial to continue in his absence was fundamental, structural error, denying him due process. Flores does not *deny* the consultation with his counsel, but instead asserts that he has "no recollection" of having spoken with his trial counsel the day that the waiver was given. He admits, though, in his Petition that "defense counsel waived Mr. Flores's presence for the second day of trial *after consulting Mr. Flores.*" (emphasis added) Flores argues that error occurred because defense counsel "did not ascertain whether Mr. Flores' medical condition or medication was interfering with his ability to make a knowing and intelligent voluntary waiver." The gravamen of Flores's argument, therefore, is not *whether or not* the waiver was given by his defense counsel following consultation with him, or even that no waiver was given and that trial counsel misrepresented the facts to the trial court. Instead, it is that his medical condition and medication *may or may not* have interfered with his ability to make a knowing, intelligent, and voluntary waiver and the mere fact that his counsel did not inquire as to his condition and medication was reversible error. Flores presents no supporting facts for such argument however. By affidavit, Flores's trial counsel asserts that she *did*

Lynne Booth

Judicial Administrative Assistant

RULING

consult with Mr. Flores and *did* make inquiry to determine his “mental clarity” and that after her “careful conversation with Flores . . . he seemed coherent.” Absent a claim, let alone evidence, that Flores’s medical condition or medication was in fact interfering with his ability to make a knowing, intelligent, and voluntary waiver, or evidence contradicting his trial counsel’s affidavit, this basis for relief is speculative at best. Flores cites principally to two cases he claims control: *State v. Levato*, 186 Ariz. 441, 924 P.2d 445 (1996) and *State v. Garcia-Contreras*, 191 Ariz. 144, 953 P.2d 536 (1998). These cases both state the legal principle on which Flores could justifiably rely. They are not helpful to Flores, however. Indeed, *Levato* supports the denial of relief here. Flores has failed to provide even an allegation that his consent to the waiver by his trial counsel was not knowing, intelligent, and voluntary and/or anything other than that it was a strategic choice made by him with the advice of counsel. Defendant's Rule 32 request for relief on this basis is denied.

Error Due to Ineffective Assistance of Appellate Counsel

Flores asserts that his appellate counsel's, Alex Heveri's, failure to raise an evidentiary issue on appeal that was raised in the trial court was error in that, but for the failure to raise the evidentiary issue on appeal, there is a “reasonable probability” that the result of the appeal would have been different. At the trial level, Flores’s trial counsel made an extensive record by an offer of proof of the disciplinary record of an officer involved in his DUI arrest. Trial counsel presented to the trial court the disciplinary record of the officer and argued that cross-examination of the officer should be permitted on certain elements of that record to allow the jury to determine the officer’s credibility.

The trial court applied Rules 608 and 403, Ariz.R.Evid., to the proffered evidence. Under Rule 608 specific instances of conduct, such as those in the subject disciplinary record of the officer, may only be raised on cross-examination if they are probative for the characteristic of truthfulness or untruthfulness of the witnesses, and they may not be proven by extrinsic evidence. Under Rule 403, the trial court must exercise discretion to determine whether the probative value of the evidence is substantially outweighed by the danger of

Lynne Booth

Judicial Administrative Assistant

R U L I N G

Page 4

Date: August 05, 2013

Case No.: CR20101123 *cl*

unfair prejudice, confusion or waste of time. The trial court read the disciplinary record and took the officer's testimony on the subject (outside of the presence of the jury) as part of proffer and considered argument of counsel. The trial court sustained the objection by the prosecution and barred cross-examination testimony on the disciplinary record under Rules 608 and 403. The trial court determined that the admission of the evidence would cause confusion and would be a waste of time.

Flores claims that his appellate counsel's decision not to raise this evidentiary ruling as error on appeal was ineffective assistance of counsel. For claims of ineffective assistance of counsel, using the *Strickland* test, Arizona courts examine whether or not the conduct of appellate counsel fell below an objective standard of reasonableness and whether that failure caused actual prejudice. *Strickland v. Washington*, 466 U.S. 668 (1984); *State v Ysea*, 191 Ariz. 372, 956 P.2d 499 (1998). Here, appellate counsel's decision not to raise this alleged error on appeal is as likely a product of tactical or strategic decision-making as one of lawyering and therefore there is insufficient basis to find that it fell below any objective measure of competence. A criminal defendant is not entitled to flawless representation, but only to reasonably competent representation. *Ysea*, 191 Ariz. At 376, 956 P.2d at 503. Moreover, it is not likely that the Court of Appeals would have reversed the conviction had the argument been made. The trial court's application of Rules 608 and 403 was not error, and therefore Flores has failed to satisfy the two-pronged *Strickland* test. Defendant's Rule 32 petition on this basis is also denied.

For the foregoing reasons, it is ordered that Defendant's request for post-conviction relief is denied in full.

cc: Attorney General - Criminal - Tucson
Clerk of Court - Appeals Unit
Clerk of Court - Criminal Unit
Office of Court-Appointed Counsel

Lynne Booth

Judicial Administrative Assistant

NOV 04 2013

ARIZONA SUPERIOR COURT, PIMA COUNTY

HON. SEAN E. BREARCLIFFE

CASE NO.

FILED
TONI L. HELLON
CLERK, SUPERIOR COURT
11/4/2013

13 NOV -4 AM 8:39

CR 20091858-001

DATE:

October 31, 2013

BY: R. ST. GERMAINE, DEPUTY

STATE OF ARIZONA

Plaintiff,

vs.

DAVIS HILTON BRAMLETT,

Defendant.

RULING

IN CHAMBERS RULING RE: NOTICE OF POST-CONVICTION RELIEF

After a jury trial, Petitioner was convicted of two counts of: Molestation of a Child, a Class Two, Dangerous Crime Against Children, felony. Petitioner was sentenced to two concurrent terms of seventeen years in prison. Petitioner's conviction and sentence were affirmed by Division Two of the Arizona Court of Appeals in a memorandum decision issued on February 24, 2012.

On July 15, 2013, Petitioner timely filed a petition for post-conviction relief claiming ineffective assistance of trial counsel. A Petitioner is entitled to an evidentiary hearing if the Court determines Petitioner presented at least a "colorable claim" for post-conviction relief. *State v. Schrock*, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986). A colorable claim is one that, taking all of Petitioner's assertions as true, "might have changed the outcome" of his trial. *State v. Runnigeagle*, 176 Ariz. 59, 63, 859 P.2d 173 (1993). In order to establish a colorable claim of ineffective assistance of counsel, a defendant must show counsel's performance was deficient-based on prevailing professional norms-and prejudicial. *See Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). To demonstrate the requisite prejudice, the defendant must show there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A colorable claim entitling the defendant to an evidentiary hearing is one which, if taken as true, "might have changed the outcome." *State v. Schrock*, 149 Ariz. at 441, 719 P.2d, 1057. Like the ultimate decision whether to grant or deny post-conviction relief, whether a claim is colorable and warrants an evidentiary hearing "is, to some extent, a discretionary decision for the trial court." *State v. D'Ambrosio*, 156 Ariz. 71, 73, 750 P.2d 14, 16 (1988).. In his Petition seeking an evidentiary hearing, Petitioner submits five bases to support his claim:

- 1) Trial counsel was constitutionally ineffective by failing to show the jury a video in its entirety during trial, which, if viewed in its entirety during trial versus during deliberations, might

Lynne S. Booth
Judicial Administrative Assistant

RULING

- have changed the outcome of his trial.
- 2) Trial counsel was constitutionally ineffective by stipulating to the showing of the redacted video which, if viewed in its entirety during trial versus during deliberations, might have changed the outcome of his trial.
 - 3) Trial counsel was constitutionally ineffective by failing to object to the State's admission of a written outline of the video which, if objected to, and if precluded by the trial court, would have left the jury with nothing but the full video of the incident from which to draw their conclusions, and such might have changed the outcome of his trial.
 - 4) Trial counsel was constitutionally ineffective by failing to present a live rebuttal character witness at the 404 (c) hearing, and, had the witness been presented, and had the trial court deemed a state's witness insufficiently credible to testify as a result, such might have changed the outcome of his trial.
 - 5) The cumulative effect of trial counsel's other individually insufficiently prejudicial "multiple deficiencies," in addition to the constitutionally ineffective conduct above, prejudiced the Petitioner, which, if they did not occur in the aggregate, might have changed the outcome of his trial.

Rule 32.2 Preclusion

Rule 32.2 limits the grounds on which a defendant may bring a post-conviction claim. In relevant part, Rule 32.2 precludes relief based on grounds "raisable on direct appeal under Rule 31 . . . adjudicated on the merits on appeal . . . [or] that has been waived at trial, on appeal, or in any previous collateral proceeding." Rule 32.2 (b) provides limited exceptions to 32.2 preclusion, none of which are relevant to this action. Arizona case law expressly provides that the sole avenue for addressing claims for ineffective assistance of counsel is during the post-conviction relief process. *State v. Sprietz*, 202 Ariz. 1, 3, ¶9, P.3d 525, 527 (2002) (claims of ineffective assistance of counsel "will not be addressed by appellate courts regardless of merit"). Here, Petitioner seeks post-conviction relief on the ground of ineffective assistance of counsel. The State contends that Petitioner raised at least two of these issues on appeal, and thus Rule 32.2 (a) precludes this Court from considering their merit. *See* Ariz. R. Crim. P. 32.2 (a) (defendant is precluded from post-conviction relief on any ground "raisable on direct appeal"). Though it is arguable that a number of the cited deficiencies were raised on direct appeal and ruled on by the Appellate Court, and are raised here again under the fig-leaf of

Lynne S. Booth
Judicial Administrative Assistant

RULING

ineffective assistance of counsel, for the purposes of this decision, Petitioner's claim will be deemed not precluded by Rule 32.2 and is analyzed in full.

Constitutional Ineffective Assistance of Counsel Principles

Criminal defendants are guaranteed the fundamental right to effective assistance of counsel by the Sixth and Fourteenth Amendments to the U.S. Constitution. *E.g., State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227, cert. denied, 471 U.S. 1143 (1985). When claiming ineffective assistance of counsel in Arizona, the accused has the burden of proving two elements: (1) trial counsel performed below objectively reasonable standards; and (2) that but for the counsel's error, there is a reasonable probability the defendant suffered actual prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Bennett*, 213 Ariz. 562, 567, 146 P.3d 63, 68 (2006).

Considering the first prong, deficient representation exists only if, under the circumstances, counsel's actions "fell below objective standards of reasonable representation measured by prevailing professional norms." *State v. Gerlaugh*, 144 Ariz. 449, 455, 698 P.2d 694, 700 (1985). The defendant must also overcome the "strong" presumption that the challenged action or inaction by trial counsel was part of an appropriate trial strategy. *Nash*, 143 Ariz. at 398, 694 P.2d at 228. The reviewing court will presume that trial counsel was effective unless the petitioner, using the criteria above, establishes that counsel's decisions were a result of "ineptitude, inexperience, or lack of preparation." *State v. Goswick*, 142 Ariz. 582, 586, 691 P.2d 673, 677 (1984). The of presumption of competence allows defense attorneys the necessary freedom to make tactical decisions at trial. Thus, a successful defendant must show the reviewing court that trial counsel's actions were not tactical in nature, but the result of "ineptitude, inexperience, or lack of preparation." *Goswick*, 142 Ariz. at 586, 691 P.2d at 677.

A defendant must also, as the second element, establish a reasonable probability that, but for counsel's deficient performance, the outcome of his or her trial might have been different. *Nash*, 142 Ariz. at 397, 694 P.2d at 227, *State v. Lee*, 142 Ariz. 210, 214, 689 P.2d 153,157 (1984). A reasonable probability means beyond a "mere possibility," it must be "more likely than not" that the outcome would have been different. *Id.*, *Strickland*, 466 U.S. at 693 ("It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding"). If a defendant seeking post-conviction fails to sufficiently establish one element, the reviewing court is not required to consider the sufficiency of the other. *State v. Jackson*, 209 Ariz. 13, 14, 97 P.3d 113, 114 (App. 2004), *Bennett*, 213 Ariz. 562 at ¶ 21, 146 P.3d at 68 ("failure to satisfy either prong of the *Strickland* test is fatal to an ineffective assistance of counsel claim").

Lynne S. Booth
Judicial Administrative Assistant

RULING

With these standards in mind, the Court considers each of Petitioner's bases for his claim of ineffective assistance of counsel.

1. Trial counsel was constitutionally ineffective by failing to show the jury a video in its entirety during trial, which, if viewed in its entirety during trial versus during deliberations, might have changed the outcome of his trial.

Petitioner asserts that, in order for the jury to understand that there was no illegal motivation behind Petitioner's contact with the victim, the jury needed to view the entire nearly two hour video of Petitioner's interactions with the child *during the trial*. Petition, p. 4. Instead, the jury was shown a four minute and forty-four second clip, which allegedly displays Petitioner's interactions with the child "out of context." Petitioner contends that had the jury seen the entire video during trial -- versus only viewing it in deliberations -- they would have known that at least some of Petitioner's interaction with the child was at her request and he was "simply playing along" with a "game" initiated by the victim. Petition, p. 6. Petitioner describes counsel's failure to play the entire video during trial as "inexcusable." Petition, p. 6. The Petitioner necessarily asserts that viewing the video in full in deliberations was *per se* insufficient to convey the full context of the events and that only by watching the full video during the court of the trial could have conveyed the context.

It is undisputed that the entire video was admitted as evidence, that the video was available to the jury to view in deliberations if it chose to do so, that urged *the jury to watch the entire video during deliberations*, and that defense counsel repeatedly mentioned the exculpatory contents of the video during opening and closing statements, as well as his cross-examination of the State's witness. Petitioner, however, fails to allege, cannot allege, that the jury did not view the entire video, or that the jury ignored the urging of defense counsel to watch the entirety of the video as a consequence of defense counsel's "ineptitude, inexperience, or lack of preparation." Counsel diligently admitted this evidence, but is not responsible to guarantee the jury gives Petitioner's desired weight to the evidence. The Court finds that counsel's efforts on this issue are not unreasonable. Thus, the Court finds that trial counsel did not err by failing to show the full video during trial, and, to the extent it was not tactically ideal, because the jury had the entire video to view in deliberations and were urged to do so, any disadvantage visited on the Petitioner by the tactical decision was overcome by the jury's access to the entire video. The Court must presume that the jury considered the admitted evidence and gave it the weight it deemed appropriate; if not, no jury verdict is safe. No colorable claim is raised by this claimed error given the absence of any prejudice. *See Strickland*, 466 U.S. at 689 ("An error by counsel, even if

RULING

professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment”).

2. Trial counsel was constitutionally ineffective by stipulating to the showing of the redacted video which, if viewed in its entirety during trial versus during deliberations, might have changed the outcome of his trial.

In a similar argument, Petitioner asserts counsel wrongfully stipulated to showing the redacted clip of Petitioner's interactions with the victim. Petition, p. 7. Petitioner, again, suggests it was necessary for the jury to see his interactions with the victim in their entirety, specifically the victim's request that Petitioner put a diaper on her, and that counsel's agreement to allow the presentation of such a biased video constitutes a deficient performance. Petition, p. 7. To prevail on this claim, petitioner will both need to show that had trial counsel objected to the redacted video, the court would more than likely have barred the showing of the redacted video, and, had the jury then viewed the entire video, it more likely than not would have changed the outcome of the case. To grant the hearing, this Court would have to accept that the trial court might have excluded the video, and that had the jury viewed the full video, that might have changed the outcome of the case. As stated above, because the jury had the full video, and were urged by defense counsel to view the entire video, any disadvantage visited on the Petitioner by the tactical decision to stipulate to the redacted video was overcome by the jury's access to the entire video. The Court must presume that the jury considered the admitted evidence and gave it the weight it deemed appropriate; if not, no jury verdict is safe. No colorable claim is raised by this claimed error given the absence of any prejudice. *See Strickland*, 466 U.S. at 689 (“An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment”).

Additionally, even if the allegedly exculpatory video clearly demonstrates that playing with a diaper was the victim's idea, that fact is not relevant to a finding of guilt on the charges facing Petitioner. The crime charged and proven was not the placing on of the diaper, but physical contact when the diaper was removed.

3. Trial counsel was constitutionally ineffective by failing to object to the State's admission of a written outline of the video which, if objected to, and if precluded by the trial court, would have left the jury with nothing but the full video of the incident from which to draw their conclusion, and such might have changed the outcome of his trial.

Petitioner also takes issue with the admission of a five page document used as an outline of the full length video, noting the timing of interactions between the Petitioner and the victim. Petition, p. 8. Petitioner

Lynne S. Booth
Judicial Administrative Assistant

RULING

argues that, “[h]ad trial counsel objected to the outline, the Court likely would have precluded its admission into evidence and the jury would have been left with only the video of the incident from which to draw their own conclusions.” *Id.* To grant the hearing, this Court would have to accept that had defense counsel objected to the outline, the trial court might have excluded the outline, leaving the jury only with the full video to watch, and, had the jury viewed the full video, that might have changed the outcome of the case. As stated above, because the jury had the full video, and were urged by defense counsel to view the entire video, any disadvantage visited on the Petitioner by the tactical decision to not object to the outline was overcome by the jury’s access to the entire video. The Court must presume that the jury considered the admitted evidence and gave it the weight it deemed appropriate; if not, no jury verdict is safe. No colorable claim is raised by this claimed error given the absence of any prejudice. *See Strickland*, 466 U.S. at 689 (“An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment”).

4. Trial counsel was constitutionally ineffective by failing to present a live rebuttal character witness at the 404 (c) hearing, which, had the witness been presented, and had the trial court deemed a state’s witness insufficiently credible to testify as a result, such might have changed the outcome of his trial.

Petitioner asserts counsel was further deficient by failing to do “everything possible” to prevent the testimony of the State’s witness from being admitted at trial. Petition, p. 9. Petitioner argues that the State’s witness was permitted to testify at trial only because “counsel did not effectively attack her credibility” at the 404 (c) hearing. Petitioner’s Reply, p. 5. Petitioner goes on to suggest that if the jury had not heard from the State’s witness, “Petitioner would be a free man today.” Petitioner’s Reply p. 5. In order to make a colorable claim based on this error, Petitioner must show both that, had the defense witness been presented at the 404(c) hearing, the trial court might have excluded the state’s competing witness, and then the jury verdict might have been different.

On this issue, Petitioner fails to demonstrate constitutional prejudice. The fact that, on some of the occasions testified to by the state’s witness, the defense witness was present and witnessed no “inappropriate behavior,” would not have precluded a jury from believing that, on other such occasions where the defense witness was *not* present, inappropriate behavior *did* occur. Regardless, judging the credibility of a witness is a quintessential jury matter. *State v. Bustamante*, 229 Ariz. 256, 258, ¶ 5, 274 P.3d 526, 528 (App.2012)(the credibility of witnesses and the weight given to their testimony are issues for the jury, not the court.) Because

Lynne S. Booth
Judicial Administrative Assistant

RULING

evidence bearing on the reliability was presented to the jury, no prejudice can be shown here. *See Strickland*, 466 U.S. at 689 (“An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment”); *see also State v. Towery*, 186 Ariz. 168, 177, 920 P.2d 290, 299 (Ariz. 1996)(as long as the jury hears evidence relevant to a witness’s possible biased motive for testifying, a court can assume the jury could fairly assess the witness’s truthfulness).

5. *The cumulative effect of trial counsel’s other individually insufficiently prejudicial “multiple deficiencies” in addition to the constitutionally ineffective conduct above prejudiced the Petitioner, which, if they did not occur in the aggregate, might have changed the outcome of his trial.*

In addition to the issues stated above, Petitioner urges the Court to consider the cumulative impact of counsel’s deficiencies. Petition, p. 10. Petitioner asserts that, when taken together, the errors of his counsel resulted in “overwhelming” prejudice, leading to the conviction of an innocent man. Petition, p. 10.

In light of the fact that Petitioner failed to establish legitimate bases for his individual challenges on counsel’s assistance above, and fails to make any showing as to why the other claimed errors were deficient as opposed to tactical decisions in the full context of trial in which dozens of tactical decision are made, no “cumulative” prejudice is shown.

CONCLUSION

It is clear that Petitioner is unsatisfied with his representation at trial, but the Sixth Amendment to the Constitution only “entitles a criminal defendant to a fair trial, not a perfect one.” *State v. Dann*, 205 Ariz. 557, ¶ 18, 74 P.3d 231, 239 (2003), *quoting Rose v. Clark*, 478 U.S. 570, 579 (1986). Similarly, “[d]efendants are not guaranteed perfect counsel, only competent counsel.” *State v. Valdez*, 160 Ariz. 9, 15, 770 P.2d 313, 319 (1989); *see also State v. Jenkins*, 148 Ariz. 463, 467, 715 P.2d 716, 720 (1986). The allegations Petitioner makes regarding his representation are, in large part, matters of trial strategy which cannot serve as the basis for a claim of ineffective assistance of counsel. *Beaty*, 158 Ariz. at 250, 763 P.2d at 537. The Court finds that, overall Petitioner makes no colorable claim that Petitioner’s counsel was not competent and failed to meet the minimum requirements guaranteed by the Sixth Amendment.

Lynne S. Booth
Judicial Administrative Assistant

RULING

Page 8

Date: October 31, 2013

Case No.: CR-20091858 -00

For the reasons stated above, the Court finds that Petitioner has failed to establish a colorable claim under both prongs of the *Strickland* test as required for a finding of ineffective assistance of counsel which would entitle him to an evidentiary hearing. Accordingly, the petition for post-conviction relief is DENIED.

DATED this 31st day of October, 2013.



SEAN E. BREARCLIFFE
JUDGE, PIMA COUNTY SUPERIOR COURT

cc: Erin E. Duffy, Esq.
Deputy County Attorney
Clerk of Court - Appeals Unit
Clerk of Court - Criminal Unit
Office of Court-Appointed Counsel

Lynne S. Booth
Judicial Administrative Assistant

TAB A: ATTACHMENT 4

Response to Section I, Question 65:

65. If you are currently serving as a judicial officer in any court and are subject to a system of judicial performance review, please attach the public data reports and commission vote reports from your last three performance reviews.

Pima County Voters Only

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

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

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

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