From:	Brnovich, Mark
To:	Bailey, Michael; Lopez, John
Subject:	FW: Notice of Claim of Unconstitutionality
Date:	Tuesday, December 08, 2015 3:10:44 PM
Attachments:	Notice of Claim of Unconstitutionality.pdf Exhibit 1.pdf Exhibit 2.pdf Exhibit 3.pdf Exhibit 4.pdf Exhibit 5.pdf

From: van Olffen, Marie (Perkins Coie) [mailto:MvanOlffen@perkinscoie.com] **On Behalf Of** Cabou, Jean-Jacques "J" (Perkins Coie)
Sent: Tuesday, December 08, 2015 2:11 PM
To: Brnovich, Mark
Subject: Notice of Claim of Unconstitutionality

Mr. Brnovich:

In November 2015, two special actions were filed in the Arizona Court of Appeals in *Simpson v. Miller* (CA-SA 15-0292), and *Martinez v. Steinle* (CA-SA 15-0295). Both petitions challenge the constitutionality of Arizona Constitution Article 2 § 22(A)(1) and A.R.S. §§ 13-3961(A)(3), (4). On December 8th the Court of Appeals consolidated the cases. The Superior Court's orders and the pending petitions for special action are attached to this email.

Pursuant to the Court of Appeals' December 8th Order, we are hereby providing you with a Notice of Claim of Unconstitutionality (also attached). A process server will deliver physical copies of these documents to your office later today.

Thank you.

Marie van Olffen | Perkins Coie LLP

Legal Secretary

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ARIZONA COURT OF APPEALS

DIVISION ONE

JASON DONALD SIMPSON, a.k.a. JASON DONALD SIMPSON, SR., Petitioner, v. THE HONORABLE PHEMONIA MILLER, Commissioner of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA, Respondent Commissioner, STATE OF ARIZONA, Real Party in Interest.	Court of Appeals No. 1 CA-SA 15-0292 No. 1CA-SA-15-0295 Consolidated Maricopa County Superior Court No. CR2015-134762-001 No. CR 2014-118356-001 **NOTICE OF CLAIM OF UNCONSTITUTIONALITY**
JOE PAUL MARTINEZ, Petitioner, v. THE HONORABLE ROLAND J. STEINLE, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA, Respondent Judge, STATE OF ARIZONA, Real Party in Interest.	

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Attorneys for Petitioner Jason Donald Simpson

December 8, 2015

Pursuant to A.R.S. § 12-1841, Petitioners Jason Donald Simpson ("Simpson") and Joe Paul Martinez ("Martinez") hereby give notice that the Petitions for Special Action in the above-captioned appeals, which are to be consolidated pursuant to the Court's order (Exhibit 1), allege that Arizona Constitution Article 2 § 22(A)(1)[1] and A.R.S. §§ 13-3961(A)(3), (4)[2] (together the "Prop 103 Laws") are facially unconstitutional because they fail to comply with due process.

As required by A.R.S. § 12-1841, Petitioner provides the following information:

1. Petitioners are represented by the following attorneys:

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Sarah R. Gonski (#032567)
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[1] Arizona Constitution Article 2 § 22(A)(1) provides that "[a]ll persons charged with crime shall be bailable by sufficient sureties, except: For capital offenses, sexual assault, sexual conduct with a minor under fifteen years of age or molestation of a child under fifteen years of age when the proof is evident or the presumption great."

[2] A.R.S. §§ 13-3961(A)(3), (4) provide, in relevant part, that "[a] person who is in custody shall not be admitted to bail if the proof is evident or the presumption great that the person is guilty of the offense charged and the offense charged is . . . Sexual Conduct with a minor who is under fifteen years of age…Molestation of a child who is under fifteen years of age . . . ."

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2. The case names, captions, and case numbers are set forth above.

3. The claim of unconstitutionality is set forth more fully in the Petitions for Special Action, attached hereto as Exhibits 2 and 3 and incorporated herein by reference. In sum, Petitioners assert that the Prop 103 Laws violate the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution because (1) they do not "satisfy general substantive due process principles" and (2) they "impose punishment before trial." *Lopez-Valenzuela v. Arpaio*, 770 F.3d. 772 (9th Cir. 2014) (en banc).

4. Petitioner Simpson is charged with offenses enumerated in A.R.S. § 13-1405(A) and Petitioner Martinez is charged with violations of both A.R.S. § 13-1405(A) and A.R.S. § 13-1410. Petitioners sought pre-trial release subject to

appropriate conditions but were declared ineligible for bail pursuant to Arizona Constitution Article 2, § 22 and A.R.S §§ 13-3961(A)(3), (4). Copies of the trial court rulings denying bail are attached hereto as Exhibits 4 and 5. Petitioners are currently incarcerated. Petitioners filed petitions for special action review with the Court of Appeals challenging the legality of their detentions and the constitutionality of Article 2, § 22 of the Arizona Constitution and A.R.S §§ 13-3961(A)(3), (4).

5. Oral argument in the Arizona Court of Appeals has been set for 11:00 a.m. on Wednesday, January 13, 2016 for consideration by Judges Swann, Jones and Gould. The Court has also indicated that any briefing submitted by the interested parties under A.R.S. § 12-1841 must be submitted by January 4, 2015.

Dated: December 8, 2015

Respectfully submitted,

PERKINS COIE LLP

By: /s/ *Jean-Jacques Cabou*

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Respectfully submitted,

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119141-0001/128912308.1

Exhibit 5

ATTACHMENT COVER PAGE	(ENDORSED) **ELECTRONICALLY FILED** **Court of Appeals Division 1** on **Nov 25, 2015 3:05 PM MST** *CLERK OF THE COURT* *Ruth Willingham, Clerk* *By Deputy Clerk:* *JT*
COURT OF APPEALS DIVISION 1 STREET ADDRESS: 1501 West Washington MAILING ADDRESS: CITY AND ZIP CODE: Phoenix, AZ 85007 BRANCH NAME: Court of Appeals Division 1 WEBSITE: www.azcourts.gov/coa1	
ATTACHMENT NAME: **Copy of Order filed in Trial Court: Maricopa County Superior Court Ruling Dated 11/9/2015**	
CASE NAME: **Joe Paul Martinez vs. Hon Roland J. Steinle**	CASE NUMBER: SA-15-0295

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Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
11/13/2015 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2014-118356-001 SE
CR2014-002618-001 DT

11/09/2015

HON. ROLAND J. STEINLE

CLERK OF THE COURT
A. Chee
Deputy

STATE OF ARIZONA

ELIZABETH LOUISE REAMER

v.

JOE PAUL MARTINEZ (001)

BRIAN F RUSSO

JUDGE SAM MYERS

TRIAL CONTINUANCE PAST LAST DAY

9;38 a.m.

Courtroom CCB 1301

State's Attorney:	as stated as above
Defendant's Attorney:	Brian Russo and Jean-Jacques Cabou
Defendant:	Present

Court Reporter, Janell Rose, is present.

A record of the proceeding is also made by audio and/or videotape.

Argument is presented regarding the Defendant’s Motion for Pretrial Release.

IT IS ORDERED taking the matter under advisement.

The Court will rule as a LATER to this minute entry.

The Court is informed that the trial date is unrealistic.

On the Court's own motion,

The Court finds that delay is indispensable to the interests of justice and that the following extraordinary circumstance(s) exist warranting the continuance:

Pursuant to the local guidelines, the trial date having been computer generated, the trial date not being realistic, and based upon the complexity of the case, the review of the report of a forensic expert, as well as ongoing other investigations, the Court will adjust the trial date.

The Defendant waived applicable time limits:

IT IS ORDERED vacating the current trial setting of 12/2/2015 and resetting same to 4/4/2016 at 8:00 a.m. before the Master Calendar Assignment Judge in Courtroom 5B in the South Court Tower. All subpoenaed witnesses are to report to Courtroom 5B in the South Court Tower for trial and will be directed to the trial court from there.

IT IS FURTHER ORDERED that all subpoenas shall remain in full force and effect.

IT IS ORDERED setting Final Trial Management Conference (FTMC) on 3/29/2016 at 8:30 a.m. before this division.

There being no objection,

IT IS ORDERED excluding time. NEW LAST DAY: 5/4/2016.

IT IS FURTHER ORDERED affirming prior custody orders.

9:50 a.m. Matter concludes.

LATER:

RULING

The Court's obligation is to follow the current Law enacted by the Legislature.

IT IS ORDERED denying the Motion for Pretrial Release.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2014-118356-001 SE 11/09/2015
CR2014-002618-001 DT

TRIAL MANAGEMENT ORDERS

IT IS ORDERED that the Joint Pretrial Statement (JPTS) is due in this division by 5:00 p.m., five (5) judicial days before the TMC which was set in the trial setting order or trial, if no TMC is set. The Trial Management Conference shall be heard the morning of trial unless counsel requests an earlier date.

Each Party must disclose the name of the Expert Witnesses no later than 3/4/2016.

If the State and/or Defense wish to offer Expert evidence, the proponent of the evidence shall provide the name and address, the subject matter on which the expert is expected to testify, a summary of the facts and opinions to which the expert is expected to testify.

Request to extend the deadline set this date must be done pursuant to Rule 15.6(d). Failure to request an extension may result in the preclusion of the evidence.

IT IS FURTHER ORDERED that any disclosure and/or discovery shall be completed no later than seven (7) days prior to trial. Any party seeking further disclosure and/or discovery after the discovery deadline shall seek leave of the Court by motion supported by affidavit to extend the time for disclosure and/or discovery. Parties may extend the deadline by written stipulation which waives any objections to the late disclosure and/or discovery.

IT IS FURTHER ORDERED with the JPTS, Counsel shall deliver to this division, copies of the following:

A. A jointly-completed time and witness estimate list. The Court will use the list to predict the length of the trial for the jurors and to direct Counsel to follow the trial time limits established. Any time limitation set will be reasonable presumptive limits subject to modification upon a showing of good cause.

B. A joint set of agreed-upon preliminary and final jury instructions. This does not include Preliminary Criminal RAJI or Standard Criminal RAJI which the Court will give without request.

C. Separate sets of requested instructions that have not been agreed upon. Please read Rosen v. Knaub, 175 Ariz. 329, 857 P.2d 381 (1993). Proposed voir dire questions which the Court will give.

In jury trial cases the parties shall jointly prepare a brief summary of the case which the Court will read to the jury at the commencement of voir dire.

Any juror notebooks. The Court encourages use of juror notebooks in appropriate cases. Stipulating the contents in evidence is necessary. Key exhibits may be included, along with diagrams, photographs, and timelines.

MOTIONS IN LIMINE

Any motions in limine shall be filed thirty (30) days before the TMC is set and such motions must meet the test of State v. Superior Court, 108 Ariz. 396, 397, 499 P.2d 152 (1972): "The primary purpose of a motion in limine is to avoid disclosing to the jury prejudicial matters which may compel a mistrial." See also, Ariz. Rules of Evidence, Rule 103(c). A written response to a motion in limine may be filed no later than ten (10) days thereafter. The Court will rule on the motions in limine without oral argument. If the Court wishes to hear argument, the argument will be heard at the morning of trial if no TMC is set. No replies shall be filed.

PRETRIAL MOTIONS

All pretrial motions must be filed in writing twenty (20) days before TMC. All motions must comply with Rule 35.1 including setting forth a sufficient factual basis for the motion. Failure to file a sufficient motion may result in the motion being denied without evidentiary hearing. See: Rule 16.1[c] Rule 16.2[b]; State v. Londo 215 Ariz. 72 (App.) (2006); State v. Anaya 170 Ariz. 436, 443 (1992); State v. Wilson 164 Ariz. 406, 407 (1990) and State v. Alvarado 121 Ariz. 485 (1979).

MARKING EXHIBITS

The trial lawyers or their knowledgeable assistants shall appear in the division assigned by the Master Calendar Judge to present all exhibits. The exhibits will be marked serially as they are listed in the LIST OF EXHIBITS which will be prepared by counsel and downloaded onto a disk which should be given to the clerk. The parties shall advise the division, referring specifically to the pretrial statement, which exhibits may be marked directly in evidence. All exhibits will be clearly marked to correspond with the list provided. Counsel is directed to meet in person to exchange the exhibits before coming to court. Counsel will make sure that they do not bring to the clerk a set of exhibits that include duplicate exhibits. Written stipulations to admit specified exhibits in evidence are encouraged.

The Court will hear and rule upon objections at the TMC. The rulings will be stated on the record, using exhibit numbers. All objections to known exhibits and witnesses must be made before or during the Trial Management Conference or will be deemed to have been waived.

IT IS FURTHER ORDERED that counsel, at the TMC, shall be prepared to discuss:

A. Time limits in voir dire, opening statements, examination of witnesses and closing arguments.

B. Stipulations for the foundation and authenticity of exhibits.

C. Jury instructions (preliminary and final), juror notebooks (Counsel shall bring any proposed jury notebooks to the conference), mini-opening statements and voir dire.

D. Any special scheduling or equipment issues.

Status of settlement of the case.

EXPEDIATED DISCOVERY

If there are any issues as to the disclosure required under Rule 15, the parties shall attempt to resolve the issue under Rule 15.7 (b). After personal consultation the party seeking relief shall fax or e-mail a one page letter seeking forth the issue and counsel requested relief. The Court will convene a conference to resolve the issue.

LAST DAY CALCULATION

Counsel shall notify the Court within ten (10) days after the minute entry is posted that there are errors in the last day calculation.

Failure to object will be deemed a waiver, see Rule 8.1(c) and rule 8.1(d).

Exhibit 4

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
11/06/2015 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2015-134762-001 DT 11/05/2015

COMMISSIONER PHEMONIA L. MILLER

CLERK OF THE COURT
Y. King
Deputy

STATE OF ARIZONA

v.

JASON DONALD SIMPSON (001)

BRADLEY LEWIS MILLER

HECTOR J DIAZ

UNDER ADVISEMENT RULING

After an Evidentiary Hearing, the Court took the Defendant's Motion For Immediate Release under advisement. Prior to the Court issuing its ruling, the Defendant filed his Request to file Notice of Filing Forensic Interview Transcripts Under Seal. The Court has considered the initial motions and associated pleadings, the testimony and exhibits introduced at the evidentiary hearing, the interview transcripts and the arguments of counsel. The Court has observed the demeanor of the witness while testifying and the following findings are based on the evidence as well as the Court's assessment of credibility:

Brief background is instructive:

The Maricopa County Grand Jury returned an Indictment charging Defendant a number of crimes including two counts of Sexual Conduct With A Minor, Class 2 Felonies.

At the Defendant's Initial Appearance Hearing, he was held non-bondable pursuant to A.R.S. 13-3961 (A)(3) on all of the above referenced counts. Defense counsel requested a hearing pursuant to *Simpson v. Owens,* 207 Ariz. 261, 85 P.3d 478 (App. 2004) on the issue of the defendant being held non-bondable. A.R.S. §13-3961 (A)(3) reads as follows:

"A person who is in custody shall not be admitted to bail if the proof is evident or the presumption great that the person is guilty of the offense charged and the offense charged is one of the following:…..**3**. Sexual conduct with a minor who is under fifteen years of age.

At the Evidentiary Hearing, the State's evidence included, but is not limited to, the following:

On July 25, 2015, Victims 1 and 2 (hereinafter V1 and V2), both 13 years of age, were interviewed by the police. V1 stated that on one occasion Defendant had her and V2 take off their clothes and digitally penetrate each other with a dildo while Defendant watched. Defendant ejaculated after seeing victims digitally penetrate each other. V1 told the SANE exam nurse that Defendant forced them to put the dildo in each other and he played with himself and ejaculated by their faces.

V2 stated that while at Defendant's home, Defendant showed them a silver and black dildo and offered each of them $100 to use the dildo on each other. V2 said they inserted the dildo into each other while the defendant masturbated. V2 made the same statements to the SANE exam nurse.

The Defendant's evidence included, but is not limited to, the following:

When V1 was interviewed by Officer Babcock, she was specifically asked about digital penetration with a sex toy and stated that she refused to allow V2 to insert it in her vagina. Victim's father was interviewed by Officer Babcock and stated that V1 had limited to no memories of what had happened and that her memory was vague. V1 never mentioned penetration.

V2 said that she can't really say if she did it or not with the dildo and said that she didn't remember what was going on. V2 was interviewed by Officer Babcock as well and made no reference to vaginal penetration. Additionally, V2's family members said that V2 had limited to no memory of what happened because of the edible marijuana that was given to her.

Simpson hearings are not for the Court to decide the guilt or innocence of a Defendant. *Simpson* hearings are for this Court to decide whether, based upon the evidence presented, defendant should be held non-bondable or be allowed to post a bond. Additionally, the Court must decide whether all of the evidence, fully considered by the Court, makes it plain and clear to the understanding, and satisfactory and apparent to the well-guarded, dispassionate judgment of the court that the accused committed one of the offenses enumerated in the statute; proof must be substantial, but it need not rise to proof beyond a reasonable doubt. *Simpson v. Owens,* 207 Ariz. 261, 85 P.3d 478 (App. 2004).

In this case, even though V1 never mentioned penetration to one of the officers, the Court finds V1 statements credible. Additionally, even though V2 initially reported that she had little to no memory of the event, the court finds V2 statements credible. The victims' statements

are consistent with the evidence found in defendant's home. The victims' statements are consistent with Exhibits 2-20. The Court further finds that all of the evidence considered by this Court makes it plain and clear that defendant committed Counts 23 and 24 of the indictment. Hence, based upon the evidence presented, the Court finds that the proof is evident or the presumption great that Defendant committed the offenses. Therefore, the Defendant is non-bondable.

For the foregoing reasons,

IT IS ORDERED denying Defendant's Motion For Immediate Release.

IT IS ORDERED affirming the Comprehensive Pretrial Conference date of **October 26, 2015 at 8:30 a.m.** in Judge Steinle's division.

IT IS ORDERED signing this minute entry as a formal written order of the Court.

/s/ JUDGE PRO TEM PHEMONIA L. MILLER

JUDICIAL OFFICER OF THE SUPERIOR COURT

Exhibit 3

ATTACHMENT COVER PAGE	(ENDORSED) **ELECTRONICALLY FILED** **Court of Appeals Division 1** on **Nov 25, 2015 3:05 PM MST** *CLERK OF THE COURT* *Ruth Willingham, Clerk* *By Deputy Clerk:* *JT*
COURT OF APPEALS DIVISION 1 STREET ADDRESS: 1501 West Washington MAILING ADDRESS: CITY AND ZIP CODE: Phoenix, AZ 85007 BRANCH NAME: Court of Appeals Division 1 WEBSITE: www.azcourts.gov/coa1	
ATTACHMENT NAME: **Petition for Special Action: Petition for Special Action**	
CASE NAME: **Joe Paul Martinez vs. Hon Roland J. Steinle**	CASE NUMBER: SA-15-0295
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ARIZONA COURT OF APPEALS

DIVISION ONE

JOE PAUL MARTINEZ, Petitioner, v. THE HONORABLE ROLAND J. STEINLE, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA, Respondent Judge, STATE OF ARIZONA, Real Party in Interest	No. Maricopa County Superior Court No. CR 2014-118356-001 **PETITION FOR SPECIAL ACTION**

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Attorneys for Petitioner Joe Paul Martinez

November 25, 2015

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OTHER AUTHORITIES

Introduction

Joe Martinez has been held without bail for nearly nineteen months on non-capital charges for which he has neither been tried nor convicted. The Superior Court of Maricopa County ("Superior Court") has repeatedly denied Mr. Martinez pretrial release, applying the unconstitutional, categorical prohibition of bail set forth in Arizona Constitution Article 2, § 22(A)(1)[1] and Arizona Revised Statute ("A.R.S.") § 13-3961(A)(4)[2] (together, the "Prop 103 Laws").

Under the Prop 103 Laws, the Superior Court must deny bail when an arrestee is charged with certain enumerated offenses, irrespective of whether the arrestee poses a flight risk or a danger to the community, "if the court finds [] that the proof is evident or the presumption great that the person committed a serious offense." *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 775 (9th Cir. 2014) (en banc). Were it not for the Prop 103 Laws, Mr. Martinez would be "bailable as a matter of right" and the Superior Court would release him subject to "the least

[1] Arizona Constitution Article 2, § 22(A)(1) provides that "[a]ll persons charged with a crime shall be bailable by sufficient sureties, except: [] For capital offenses, sexual assault, sexual conduct with a minor under fifteen years of age or molestation of a child under fifteen years of age when the proof is evident or the presumption great."

[2] A.R.S. § 13-3961(A)(3) provides, in relevant part, that "[a] person who is in custody shall not be admitted to bail if the proof is evident or the presumption great that the person is guilty of the offense charged and the offense charged is . . . [s]exual conduct with a minor who is under fifteen years of age."

onerous condition or conditions contained in Rule 7.3(b) which will reasonably assure [his] appearance." Ariz. R. Crim. P. 7.2(a).

Mr. Martinez, like every other person arrested, is presumed innocent until proven guilty, is entitled to assist in his own defense, and has a substantive due process right to his liberty unless that liberty is taken away through a constitutionally adequate procedure. The Prop 103 Laws violate the substantive Due Process rights of Mr. Martinez because they deprive him of his liberty and impermissibly impose punishment before trial. In infringing these rights, the Prop 103 Laws additionally impede both Mr. Martinez's right to the presumption of innocence and his right to participate in his own defense.

Both the Supreme Court in *United States v. Salerno*, 481 U.S. 739, 749-50, 755 (1987), and the en banc Ninth Circuit in *Lopez-Valenzuela*, 770 F.3d at 772, have defined the constitutional limits of pretrial detention. Each court has specifically made clear that categorical denials of bail based on an arrestee's status—including the categorical denial of bail contained in the Prop 103 Laws—fail to provide constitutionally adequate process to arrestees. Accordingly, the Court should accept special action jurisdiction and grant relief in the form of an order directing the Superior Court to: (1) immediately hold a hearing on appropriate conditions of pretrial release, and (2) thereafter admit Martinez to bail on the least restrictive conditions necessary to (a) guarantee his appearance at

future court proceedings and (b) mitigate any risk to the public posed by his release. *See* A.R.S. §§ 13-4132,-4135.

Issue Presented

Where the U.S. Supreme Court has made clear that laws that categorically deny bail to non-capital offenders are unconstitutional, violating substantive due process, and where, applying the Prop 103 Laws which categorically deny bail to certain offenders, the Superior Court denied bail to Mr. Martinez, did the Superior Court violate his substantive due process rights?

Jurisdictional Statement

The Court should accept special action jurisdiction when the issue raised is (1) one of first impression, (2) presents a pure question of law, (3) is of statewide importance, and (4) is likely to arise again. *See, e.g.*, *Blake v. Schwartz*, 202 Ariz. 120, 122 ¶ 7, 42 P.3d 6, 8 (App. 2002). Special Action jurisdiction is also appropriate where, as here, the Petitioner lacks an "equally plain, speedy, [or] adequate remedy by appeal." Ariz. R. P. Spec. Act. 1(a); *State ex rel. Romley v. Rayes*, 206 Ariz. 58, 60 ¶ 5, 75 P.3d 148, 150 (App. 2003).

Mr. Martinez's case satisfies each of these criteria. Whether the Prop 103 Laws are consistent with substantive due process is an issue of first impression in

Arizona appellate courts.[3] Additionally, the constitutionality of the Prop 103 Laws presents a pure question of statutory and constitutional interpretation. The third and fourth factors are also met because criminal defendants across Arizona are routinely denied their Due Process rights when Superior Courts hold an accused defendant non-bailable as a matter of right under the Prop 103 Laws. Finally, if the Court declines to accept jurisdiction, the State's decision to hold Mr. Martinez without bail is unreviewable. He and other similarly situated defendants depend on this Court's immediate intervention to remedy the profound Constitutional inadequacies in the Prop 103 Laws.

The Court's exercise of jurisdiction in this case, although discretionary, *State ex rel. Thomas v. Blakey*, 211 Ariz. 124, 126 ¶ 8, 118 P.3d 639, 641 (App. 2005) (citation omitted), is both warranted and necessary. Only with this Court's exercise of jurisdiction will Superior Courts throughout the State have the guidance necessary to properly balance the State's need to ensure criminal defendants' availability for trial with the Due Process rights of the accused. This Court has not hesitated to accept special action jurisdiction to interpret no-bail provisions. *See Simpson v. Owens*, 207 Ariz. 261, 265 ¶ 13, 85 P.3d 478, 482 (App. 2004) (accepting special action jurisdiction to interpret whether no-bail provision

[3] Petitioner has been advised this week that another special action pending before this Court presents very similar issues to the issue raised here. *See Simpson v. Miller*, 1CA-SA-15-0292, filed Nov. 20, 2015. A Notice of Related Case has been filed contemporaneously with the filing of this Petition.

deprived due process to criminal defendants); *see also* *Romley*, 206 Ariz. at 60 ¶ 5, 75 P.3d at 150 (same).

Categorical no-bail provisions implicate the fundamental right to liberty guaranteed under the Constitution of the United States, and thus the Court should accept special action jurisdiction in order to ensure the protection of Mr. Martinez's rights as well as the rights of similarly-charged defendants across Arizona.

Statement of Material Facts

In November 2002, Arizona voters approved Proposition 103, which amended the Prop 103 Laws to categorically deny bail to defendants charged with certain offenses if the proof is evident or the presumption great that he is guilty of the offense. Under the Prop 103 Laws, a wide variety of offenses are non-bailable as a matter of right, including certain sexual offenses and both non-capital and capital charges.

In April 2014, a grand jury returned an indictment against Joe Paul Martinez, alleging, among other charges, two counts of sexual conduct with a minor. Following the return of the indictment, the Superior Court relied on the Prop 103 Laws to find that Mr. Martinez was non-bailable as a matter of right due to the nature of his charged offenses. Mr. Martinez nonetheless petitioned the Superior Court to set a reasonable bail and any other conditions of release that the

Superior Court deemed necessary to "reasonably assure [his] appearance" for trial. *See* Ariz. R. Crim. P. 7.2(a).

In response to Mr. Martinez's petition, the Superior Court conducted a *Simpson* hearing. *See Simpson*, 207 Ariz. at 274 ¶ 41, 85 P.3d at 491 (outlining procedures for bail hearing). At a *Simpson* hearing, the arrestee can dispute whether there is proof that he or she actually committed the charged offenses, but may not refute Prop 103's irrebuttable presumption that he or she poses an unmanageable flight risk. At Mr. Martinez's *Simpson* hearing, the court determined that the proof was evident or the presumption great of his potential guilt. The Superior Court did not consider whether Mr. Martinez was either an unmanageable flight risk or whether he posed a danger to the community. Even if it had, the Prop 103 Laws deprive the court of discretion to release Mr. Martinez under any circumstances, even if the court would have found—*and even if the State were to concede*—that he did not pose a flight risk or danger to the community. Pursuant to the Prop 103 Laws, the Superior Court denied the Motion for Release and held Mr. Martinez non-bailable as a matter of right under the Prop 103 Laws.

After over a year and a half in custody, Mr. Martinez again moved for release. He challenged the Prop 103 Laws, arguing that they deprive him of his substantive Due Process rights by categorically denying bail without first

determining that he is "neither a flight risk nor a danger to the community."[4] In response, the State made two main arguments: (1) that "all of the evidence, fully considered by the court" . . . "ma[de] it plain and clear to the understanding, and satisfactory and apparent to the well-guarded, dispassionate judgment of the court" that the accused actually committed the charged offense (citation omitted); and (2) that because the Ninth Circuit in *Lopez-Valenzuela* did not invalidate the Prop 103 Laws themselves, the fact that it invalidated a nearly identical provision is immaterial.[5] The Superior Court granted oral argument on the Mr. Martinez's Motion to Release but ultimately denied the motion, not because the Court did not agree that the Prop 103 Laws are constitutionally flawed, but because "[t]he Court's obligation is to follow the current Law enacted by the Legislature."[6]

Mr. Martinez continues to remain in custody pending trial.

Argument

I. THE PROP 103 LAWS, THE SOLE BASIS FOR MR. MARTINEZ'S LONG PRETRIAL DETENTION, VIOLATE THE U.S. CONSTITUTION'S GUARANTEE OF SUBSTANTIVE DUE PROCESS AND CANNOT BE ENFORCED.

The Prop 103 Laws and Mr. Martinez's detention without bail pursuant to them, violate the substantive Due Process protections of the U.S. Constitution in at

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[4] [APP 011 (10/15/2015 Mot. for Pretrial Release at 2)]

[5] [*See* APP 025 - 029 (11/4/2015 State's Resp. to the Defense Mot. for Pretrial Release ("State's Resp.") at 4, 5-8)]

[6] [APP 002 (11/9/2015 Minute Entry at 2)]

least two ways: (1) because they deprive arrestees of their fundamental liberty interest without being narrowly tailored to serve a compelling governmental interest; and (2) because the Prop 103 Laws impermissibly "impos[e] punishment before trial." *See Lopez-Valenzuela*, 770 F.3d at 780 (outlining substantive due process framework). "[R]estrictions on pretrial release of adult arrestees must be carefully limited to serve a compelling governmental interest." *Lopez-Valenzuela*, 770 F.3d at 777 (citing *Salerno*, 481 U.S. at 748-51). Issues of statutory and constitutional construction are reviewed *de novo*. *See, e.g.*, *Herman v. City of Tucson*, 197 Ariz. 430, 432 ¶ 5, 4 P.3d 973, 975 (App. 1999) (issues of statutory interpretation and constitutionality are reviewed *de novo*).

A. The Prop 103 Laws Cannot Withstand Constitutional Scrutiny Because They Are Profoundly Overbroad Rather Than Narrowly Tailored.

"Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects." Lopez-Valenzuela, 770 F.3d at 781 (alteration in original) (citation omitted) (noting that while bail itself is not a fundamental right, bail restrictions merit heightened scrutiny because they are inextricable with the fundamental right to liberty). The Fourteenth Amendment's guarantee of substantive Due Process prohibits the government from "'infring[ing] certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the

infringement is narrowly tailored to serve a compelling state interest.'" *Lopez-Valenzuela*, 770 F.3d at 780 (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)). A no-bail provision is sufficiently tailored to withstand strict scrutiny as long as (1) the challenged provision addresses "a particularly acute problem"; (2) "[t]he [a]ct operates only on individuals who have been arrested for a specific category of extremely serious offenses"; and (3) there is a "full-blown adversary hearing" at which the government is required to "convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person." *Salerno*, 481 U.S. at 750. A law must satisfy all three *Salerno* factors to be sufficiently narrowly tailored that it may survive heightened scrutiny. *See id.* (explaining that the U.S. Supreme Court upheld the Federal Bail Reform Act only after finding each of *Salerno*'s three factors present).

Even conceding that the crimes with which Mr. Martinez is charged are "extremely serious," as required by the second *Salerno* factor, the Prop 103 Laws do not satisfy *Salerno* factors one and three. Because they do not satisfy all three *Salerno* factors, the Prop 103 Laws are unconstitutional and cannot be enforced.

1. The Prop 103 Laws Do Not Require a Full-Blown Adversary Hearing at Which the State is Required to Prove That an Individual Arrestee Presents an Unmanageable Flight Risk or Danger to the Community.

The third *Salerno* factor requires that a defendant denied pretrial release must have a "full-blown adversary hearing" at which the government is required to "convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person." *Salerno*, 481 U.S. at 750. In contrast, the Prop 103 Laws do not provide—or even permit—such a hearing. Mr. Martinez had no opportunity to provide evidence that he could be safely released under appropriate conditions. Instead, the Prop 103 Laws "employs an overbroad, irrebuttable presumption . . . to determine whether a particular arrestee poses an unmanageable flight risk" or danger to the community. *Lopez-Valenzuela*, 770 F.3d at 784.

The only individualized hearing available to arrestees under the Prop 103 Laws is a *Simpson* hearing. *See Simpson*, 207 Ariz. at 274 ¶ 41, 85 P.3d at 491 (outlining procedures for bail hearing). At a *Simpson* hearing the Superior Court does not attempt to determine whether a particular arrestee is an unmanageable flight risk or community danger; instead, the trial judge considers only whether the "proof is evident or the presumption great" that the defendant actually committed the charged offense. *See id.* at 804. Put differently, the *Simpson* inquiry asks the Superior Court to make a constitutionally irrelevant, preliminary determination of

guilt while enjoining the constitutionally required inquiry into flight risk and dangerousness. *See Salerno*, 481 U.S. at 750 (setting forth constitutionally proper, required findings for pretrial detention), *cf. Coffin v. United States*, 156 U.S. 432, 453 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.").

Even if Mr. Martinez had been able to present evidence at an individualized hearing that he was eligible for release, the Prop 103 Laws strip the Superior Court of discretion to grant release to an individual based on the outcome of such a hearing. Instead, the Prop 103 Laws broadly and categorically preclude a court from granting bail to a defendant based *only* on the nature of his charged offense and in utter disregard for whether the accused is actually a flight risk or a danger to the community. The Prop 103 Laws are wholly antithetical to the "'general rule' of substantive due process that the government may not detain a person prior to a judgment of guilt in a criminal trial" except pursuant to a "'*narrowly focuse[d]*,' '*carefully limited* exception' to [that rule]." Lopez-Valenzuela, 770 F.3d at 782 (1st alteration in original) (quoting *Salerno*, 481 U.S. at 749-50).

Assuming that "a categorical denial of bail for noncapital offenses could *ever* withstand heightened scrutiny," *id.* at 785 (emphasis added), alleged sexual conduct with a child who is under fifteen years of age is not such an offense.

There is no evidence, and certainly none was presented or considered by the Superior Court here, that one who allegedly commits one of the non-bailable offenses in the Prop 103 laws is an unmanageable flight risk, or that any danger posed by such a person to the community could not be mitigated by other conditions of release. *See id.* at 786 (no evidence that status as undocumented immigrant was constitutionally sufficient to "serve as a convincing proxy for unmanageable flight risk or dangerousness"). Because the Prop 103 Laws do not permit such a finding, they fail the third *Salerno* factor. This alone compels the conclusion that the Prop 103 Laws are not sufficiently narrowly tailored to withstand heightened scrutiny.

2. The Prop 103 Laws Do Not Address a Particularly Acute Problem.

Even if the Prop 103 Laws satisfied the *Salerno* requirement of an individualized hearing, they would still be unconstitutional because they do not address "a particularly acute problem." *Salerno*, 481 U.S. at 750. In formulating this requirement, the Supreme Court acknowledged that the liberties and privileges infringed by the pretrial detention of a defendant, who is presumed innocent, are particularly profound. *See Lopez-Valenzuela*, 770 F.3d at 781 (quoting *Gerstein v. Pugh*, 420 U.S. 103, 114, 123 (1975)) ("'Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships' . . . [a]nd it may affect 'the defendant's ability to assist in preparation of his

defense.'"). Accordingly, the Supreme Court in recognized that pretrial confinement is an extreme measure only justified to address "a particularly acute problem." *Salerno*, 481 U.S. at 750.

Here, in contrast to *Salerno*, there is no evidence that the Prop 103 Laws were adopted to address "a particularly acute problem." *Id.* There are no findings, studies, statistics or other evidence in the legislative record showing that individuals made non-bailable under the Prop 103 Laws pose an unmanageable flight risk or are a danger to the community that cannot be managed through less restrictive means.[7] *See Lopez-Valenzuela*, 770 F.3d at 783.

The lone piece of evidence cited by the State is both unpersuasive and troubling. The State cites the Ballot Proposition Materials for Prop 103, which references "[a] behavioral analysis done by a 27-year veteran FBI Special Agent, who dealt with sexual predators" as purportedly revealing "that 33% of sexual predators who are released on bail will commit a new sex offense, commit another crime or otherwise violate their terms of release."[8] The statement was made by Ms. Julie Lind, a semi-prominent political operative and layperson with no obvious law enforcement or scientific training. And her statement contains no citations to

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[7] We note that, for example, with the exception of capital offenses, the Bail Reform Act governing pretrial release in federal cases contains no similar categorical judgments about denial of bail based on the nature of the offense. *See* 18 U.S.C. § 3142, *et seq.*

[8] [APP 029 (State's Resp. at 8); APP 041 (State's Resp., Exhibit 3 (Proposition 103, 2002 Ballot Proposition Materials))]

actual authority. Plainly, this "evidence" is not sufficient justification for the State to categorically deny bail to every defendant charged with particular crimes.[9]

Because there is no evidence to suggest that denial of pretrial release to arrestees charged with Prop 103 offenses addresses "a particularly acute problem," the Prop 103 Laws cannot satisfy the first *Salerno* factor. Having failed two of the three *Salerno* factors, the Prop 103 Laws are not carefully limited or narrowly tailored, as they must be, to survive heightened scrutiny. *See Salerno*, 481 U.S. at 755 ("In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.").

B. The Prop 103 Laws "Impose Punishment Before Trial" in Violation of Due Process Protections.

The Prop 103 Laws also violate substantive due process by impermissibly imposing punishment before trial. The U.S. Supreme Court has emphasized that "under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt." *Bell v. Wolfish*, 441 U.S. 520, 535 (1979). Accordingly, the Due Process Clause prohibits the imposition of "conditions and restrictions of pretrial detainment" that "amount to punishment of the detainee." *Id.* at 533, 535.

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[9] Even taken at face value, Ms. Lind's "evidence" does not render the Prop 103 Laws constitutionally adequate. First, 33% is a minority of arrestees, and therefore denying bail to everyone charged with the enumerated offenses because a minority of people violated some condition of release fails constitutional scrutiny. Second, the statement assumes that all arrestees for sexual offenses are "sexual predators," which again obliterates the Constitution's presumption of innocence.

"To determine whether a restriction on liberty constitutes impermissible punishment or permissible regulation, [it is necessary to] first look to legislative intent." *Salerno*, 481 U.S. at 747. "[I]f a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees." *Bell*, 441 U.S. at 539.

There is strong evidence in the legislative history that the Prop 103 Laws are punitive. The election materials circulated with the proposition, contain statements unambiguously confirming that the Prop 103 Laws were designed to punish. Senator Dean Martin, who sponsored the legislation, asserted that "[w]ith Proposition 103, we will treat sexual predators who destroy lives the same way we treat those who take them away."[10] Furthermore, the legislative history starkly confirms that proponents of Prop 103 acknowledged its repudiation of the presumption of innocence, for example asking voters to: "Please vote YES on Proposition 103 to help keep dangerous sexual predators off our streets."[11]

Assuming even that the legislature did not expressly intend to impose punitive restrictions, and assuming that the Prop 103 Laws were adopted for the permissive regulatory purposes of either managing flight risk or dangerousness to the community, a categorical denial of pretrial release "appears excessive in

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[10] [*See* APP 041 (State's Resp., Exhibit 3)]

[11] [*Id.*]

relation to the alternative purpose assigned [to it]." Salerno, 481 U.S. at 747 (alteration in original) (citation omitted). Even if these problems exist, the Prop 103 Laws "employ[] a profoundly overbroad irrebuttable presumption, rather than an individualized evaluation, to determine whether an arrestee is an unmanageable flight risk" or danger to society. *Lopez-Valenzuela*, 770 F.3d at 791. As a result, individuals charged with non-bailable offenses under the Prop 103 Laws are categorically denied the opportunity for bail even if they are not flight risks and do not pose an unmanageable risk to the community. "Given this *severe* lack of fit between the asserted nonpunitive purpose[s] and the actual operation of the law," *id.*, the Prop 103 Laws violate substantive Due Process, imposing punishment before trial.

Conclusion

By categorically denying to certain arrestees the substantive Due Process to which all defendants are entitled, the Prop 103 Laws are invalid. *See Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint" is "at the core of the liberty protected by the Due Process Clause . . . ."). Mr. Martinez respectfully requests that this Court accept jurisdiction of this Petition and grant relief in the form of an order directing the Superior Court to: (1) immediately hold a hearing on appropriate conditions of pretrial release, and (2) thereafter admit Mr. Martinez to bail on the least restrictive conditions necessary to (a) guarantee

his appearance at future court proceedings and (b) mitigate any risk to the public posed by his release. *See* A.R.S. §§ 13-4132, -4135.

Dated: November 25, 2015

Respectfully submitted,

PERKINS COIE LLP

By: /s/ *Jean-Jacques Cabou*

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119141-0001/128740369.4

ARIZONA COURT OF APPEALS

DIVISION ONE

JOE PAUL MARTINEZ, Petitioner, v. THE HONORABLE ROLAND J. STEINLE, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA, Respondent Judge, STATE OF ARIZONA, Real Party in Interest	No. Maricopa County Superior Court No. CR 2014-118356-001 **APPENDIX TO PETITION FOR SPECIAL ACTION**

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November 25, 2015

Index to Appendix to Petition for Special Action

App. No.

119141-0001/LEGAL128760420.1

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
11/13/2015 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2014-118356-001 SE
CR2014-002618-001 DT

11/09/2015

HON. ROLAND J. STEINLE

CLERK OF THE COURT
A. Chee
Deputy

STATE OF ARIZONA

ELIZABETH LOUISE REAMER

v.

JOE PAUL MARTINEZ (001)

BRIAN F RUSSO

JUDGE SAM MYERS

TRIAL CONTINUANCE PAST LAST DAY

9;38 a.m.

Courtroom CCB 1301

State's Attorney:	as stated as above
Defendant's Attorney:	Brian Russo and Jean-Jacques Cabou
Defendant:	Present

Court Reporter, Janell Rose, is present.

A record of the proceeding is also made by audio and/or videotape.

Argument is presented regarding the Defendant's Motion for Pretrial Release.

IT IS ORDERED taking the matter under advisement.

The Court will rule as a LATER to this minute entry.

The Court is informed that the trial date is unrealistic.

On the Court's own motion,

The Court finds that delay is indispensable to the interests of justice and that the following extraordinary circumstance(s) exist warranting the continuance:

Pursuant to the local guidelines, the trial date having been computer generated, the trial date not being realistic, and based upon the complexity of the case, the review of the report of a forensic expert, as well as ongoing other investigations, the Court will adjust the trial date.

The Defendant waived applicable time limits:

IT IS ORDERED vacating the current trial setting of 12/2/2015 and resetting same to 4/4/2016 at 8:00 a.m. before the Master Calendar Assignment Judge in Courtroom 5B in the South Court Tower. All subpoenaed witnesses are to report to Courtroom 5B in the South Court Tower for trial and will be directed to the trial court from there.

IT IS FURTHER ORDERED that all subpoenas shall remain in full force and effect.

IT IS ORDERED setting Final Trial Management Conference (FTMC) on 3/29/2016 at 8:30 a.m. before this division.

There being no objection,

IT IS ORDERED excluding time. NEW LAST DAY: 5/4/2016.

IT IS FURTHER ORDERED affirming prior custody orders.

9:50 a.m. Matter concludes.

LATER:

RULING

The Court's obligation is to follow the current Law enacted by the Legislature.

IT IS ORDERED denying the Motion for Pretrial Release.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2014-118356-001 SE 11/09/2015
CR2014-002618-001 DT

TRIAL MANAGEMENT ORDERS

IT IS ORDERED that the Joint Pretrial Statement (JPTS) is due in this division by 5:00 p.m., five (5) judicial days before the TMC which was set in the trial setting order or trial, if no TMC is set. The Trial Management Conference shall be heard the morning of trial unless counsel requests an earlier date.

Each Party must disclose the name of the Expert Witnesses no later than 3/4/2016.

If the State and/or Defense wish to offer Expert evidence, the proponent of the evidence shall provide the name and address, the subject matter on which the expert is expected to testify, a summary of the facts and opinions to which the expert is expected to testify.

Request to extend the deadline set this date must be done pursuant to Rule 15.6(d). Failure to request an extension may result in the preclusion of the evidence.

IT IS FURTHER ORDERED that any disclosure and/or discovery shall be completed no later than seven (7) days prior to trial. Any party seeking further disclosure and/or discovery after the discovery deadline shall seek leave of the Court by motion supported by affidavit to extend the time for disclosure and/or discovery. Parties may extend the deadline by written stipulation which waives any objections to the late disclosure and/or discovery.

IT IS FURTHER ORDERED with the JPTS, Counsel shall deliver to this division, copies of the following:

A. A jointly-completed time and witness estimate list. The Court will use the list to predict the length of the trial for the jurors and to direct Counsel to follow the trial time limits established. Any time limitation set will be reasonable presumptive limits subject to modification upon a showing of good cause.

B. A joint set of agreed-upon preliminary and final jury instructions. This does not include Preliminary Criminal RAJI or Standard Criminal RAJI which the Court will give without request.

C. Separate sets of requested instructions that have not been agreed upon. Please read Rosen v. Knaub, 175 Ariz. 329, 857 P.2d 381 (1993). Proposed voir dire questions which the Court will give.

In jury trial cases the parties shall jointly prepare a brief summary of the case which the Court will read to the jury at the commencement of voir dire.

Any juror notebooks. The Court encourages use of juror notebooks in appropriate cases. Stipulating the contents in evidence is necessary. Key exhibits may be included, along with diagrams, photographs, and timelines.

MOTIONS IN LIMINE

Any motions in limine shall be filed thirty (30) days before the TMC is set and such motions must meet the test of State v. Superior Court, 108 Ariz. 396, 397, 499 P.2d 152 (1972): "The primary purpose of a motion in limine is to avoid disclosing to the jury prejudicial matters which may compel a mistrial." See also, Ariz. Rules of Evidence, Rule 103(c). A written response to a motion in limine may be filed no later than ten (10) days thereafter. The Court will rule on the motions in limine without oral argument. If the Court wishes to hear argument, the argument will be heard at the morning of trial if no TMC is set. No replies shall be filed.

PRETRIAL MOTIONS

All pretrial motions must be filed in writing twenty (20) days before TMC. All motions must comply with Rule 35.1 including setting forth a sufficient factual basis for the motion. Failure to file a sufficient motion may result in the motion being denied without evidentiary hearing. See: Rule 16.1[c] Rule 16.2[b]; State v. Londo 215 Ariz. 72 (App.) (2006); State v. Anaya 170 Ariz. 436, 443 (1992); State v. Wilson 164 Ariz. 406, 407 (1990) and State v. Alvarado 121 Ariz. 485 (1979).

MARKING EXHIBITS

The trial lawyers or their knowledgeable assistants shall appear in the division assigned by the Master Calendar Judge to present all exhibits. The exhibits will be marked serially as they are listed in the LIST OF EXHIBITS which will be prepared by counsel and downloaded onto a disk which should be given to the clerk. The parties shall advise the division, referring specifically to the pretrial statement, which exhibits may be marked directly in evidence. All exhibits will be clearly marked to correspond with the list provided. Counsel is directed to meet in person to exchange the exhibits before coming to court. Counsel will make sure that they do not bring to the clerk a set of exhibits that include duplicate exhibits. Written stipulations to admit specified exhibits in evidence are encouraged.

The Court will hear and rule upon objections at the TMC. The rulings will be stated on the record, using exhibit numbers. All objections to known exhibits and witnesses must be made before or during the Trial Management Conference or will be deemed to have been waived.

IT IS FURTHER ORDERED that counsel, at the TMC, shall be prepared to discuss:

A. Time limits in voir dire, opening statements, examination of witnesses and closing arguments.

B. Stipulations for the foundation and authenticity of exhibits.

C. Jury instructions (preliminary and final), juror notebooks (Counsel shall bring any proposed jury notebooks to the conference), mini-opening statements and voir dire.

D. Any special scheduling or equipment issues.

Status of settlement of the case.

EXPEDIATED DISCOVERY

If there are any issues as to the disclosure required under Rule 15, the parties shall attempt to resolve the issue under Rule 15.7 (b). After personal consultation the party seeking relief shall fax or e-mail a one page letter seeking forth the issue and counsel requested relief. The Court will convene a conference to resolve the issue.

LAST DAY CALCULATION

Counsel shall notify the Court within ten (10) days after the minute entry is posted that there are errors in the last day calculation.

Failure to object will be deemed a waiver, see Rule 8.1(c) and rule 8.1(d).

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ARIZONA SUPERIOR COURT

MARICOPA COUNTY

THE STATE OF ARIZONA, Plaintiff, v. JOE PAUL MARTINEZ, Defendant.	No. CR 2014-118356-001 **MOTION FOR PRETRIAL RELEASE** (**Expedited Oral Argument Requested Pursuant to Rule 7.4(b))** (Assigned to the Honorable Roland Steinle)

CASES

STATUTES

OTHER AUTHORITIES

Defendant Joe Paul Martinez, by and through his undersigned counsel, hereby moves, pursuant to Ariz. R. Crim. P. 7.4(b), for his pretrial release, subject to electronic monitoring and such other conditions as the Court may deem necessary to "reasonably assure [his] appearance" for trial in this matter. *See* Ariz. R. Crim. P. 7.2(a). This Motion is supported by the following Memorandum of Points and Authorities, which is incorporated herein by reference.

MEMORANDUM OF POINTS AND AUTHORITIES

Joe Martinez ("Martinez") is presumed innocent and yet he has been incarcerated for nearly eighteen months on non-capital charges for which he has neither been tried nor convicted. He does not present a danger to the community, has extensive family ties in Phoenix, and is not a flight risk. Certainly, among the options for supervising defendants on pretrial release there is an option short of incarceration that would protect the community from any alleged danger that Martinez might pose and that would ensure his appearance at trial.

I. MARTINEZ IS ENTITLED TO AN EXPEDITED HEARING AND TO RELEASE.

Martinez has been held without bail since April 2014. Where, as here, a motion for release "involves whether the person shall be held without bail, the motion need not allege new material facts and a hearing on the motion shall be held on the record as soon as practicable but not later than seven days after filing of the motion." Ariz. R. Crim. P. 7.4(b).

The basis for his pretrial detention is merely this: a checked box on his Release Order marked "No Bond: The defendant is held without bond pursuant to Arizona Constitution Article 2, Section 22." [*State v. Martinez*, Release Order No. CR2014-118 356-001, dated May 7, 2014] By merely checking this box on a prefabricated form, the government was able to detain the defendant, who is presumed innocent. The court conducted no hearing, made no findings of fact, nor inquired into the specific circumstances of Martinez's case. The Detention Order applies the unconstitutional prohibition of bail set forth in Arizona Constitution Article 2, § 22(A)(1)[1] and

[1] Arizona Constitution Article 2, § 22(A)(1) provides that "[a]ll persons charged with a crime shall be bailable by sufficient sureties, except: [] For capital offenses, sexual assault,

A.R.S. § 13-3961(A)(4)[2] (together the "Prop 103 Laws"). But for the Prop 103 Laws, Martinez would be "bailable as a matter of right" and this Court would release him subject to "the least onerous condition or conditions contained in Rule 7.3 (b) which will reasonably assure [his] appearance." Ariz. R. Crim. P. 7.2(a).

But in the year-and-a-half he has been held in custody, the Superior Court has never considered any of the facts or circumstances demonstrating that he is neither a flight risk nor a danger to the community. Rather, Martinez has been held without bail simply because he is charged with "non-bailable" offenses, specifically sexual conduct with a minor under fifteen years of age, A.R.S. § 13-1405, and molestation of a child under fifteen years of age, A.R.S. § 13-1410. Pursuant to the Prop 103 Laws, the Superior Court was previously precluded from considering any other factors in its decision.

But, as the en banc Ninth Circuit has since made clear, the Prop 103 Laws and Martinez's absolute denial of bail or pretrial release pursuant to these laws violate the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution. *See Lopez-Valenzuela v. Arpaio*, 770 F.3d. 772 (9th Cir. 2014) (en banc). The Superior Court's categorical denial of bail impermissibly infringes on Martinez's "[f]reedom from bodily restraint," which is "at the core of the liberty protected by the Due Process Clause." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). Martinez respectfully asks that this Court apply the Constitutionally-required holding of *Lopez-Valenzuela*, hold a hearing on appropriate conditions of pretrial release, and thereafter admit Martinez to bail on the least restrictive conditions necessary to (a) guarantee his appearance at future court proceedings and (b) mitigate any risk to the public posed by his release. *See* A.R.S. §§ 13-4132, -4135.

sexual conduct with a minor under fifteen years of age or molestation of a child under fifteen years of age when the proof is evident or the presumption great . . . ."

[2] A.R.S. § 13-3961(A)(3) provides, in relevant part, that "[a] person who is in custody shall not be admitted to bail if the proof is evident or the presumption great that the person is guilty of the offense charged and the offense charged is . . . [s]exual conduct with a minor who is under fifteen years of age."

II. THE PROP 103 LAWS, THE SOLE BASIS FOR HIS LONG PRETRIAL DETENTION, VIOLATE THE U.S. CONSTITUTION'S GUARANTEE OF SUBSTANTIVE DUE PROCESS AND CANNOT BE ENFORCED.

The Prop 103 Laws, and Martinez's detention without bail pursuant to them, violate the substantive Due Process protections of the U.S. Constitution in at least two ways: (1) the Prop 103 Laws do not "satisfy general substantive due process principles" and (2) the Prop 103 Laws "impos[e] punishment before trial." *Lopez-Valenzuela*, 770 F.3d at 780 (outlining substantive due process framework). The Prop 103 Laws are unconstitutional in all applications, and are thus facially unconstitutional. *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008); *see also id.* ("[A] facial challenge must fail where the statute has a 'plainly legitimate sweep.'") (citation omitted).

A. The Prop 103 Laws Do Not Satisfy "General Substantive Due Process Principles."

The Fourteenth Amendment's guarantee of substantive Due Process prohibits the government from "'infring[ing] certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.'" *Lopez-Valenzuela*, 770 F.3d at 780 (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)). In evaluating both the state interest served by the Prop 103 Laws and the narrowness of the means used to achieve that interest, this Court must apply heightened scrutiny to the Prop 103 Laws because, in providing for non-bailable offenses, they infringe a "fundamental right," the right to liberty. *See id.*; *see also Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) ("Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects.").

The liberties and privileges infringed by the pretrial detention of a defendant, who is presumed innocent, are particularly profound. *Lopez-Valenzuela*, 770 F.3d at 781; *see id.* ("'Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships' . . . [a]nd it may affect 'the defendant's ability to assist in preparation of

his defense.'" (quoting *Gerstein v. Pugh*, 420 U.S. 103, 114, 123 (1975)). And even assuming that the Prop 103 Laws serve compelling interests, for example ensuring that individuals accused of serious crimes are available for trial, 770 F.3d at 782, the Prop 103 Laws are not sufficiently narrowly tailored to satisfy the heightened scrutiny to which they are constitutionally subject. Rather, these Laws broadly and categorically preclude a court from granting bail to a defendant based **only** on the nature of his charged offense and of evidence of that offense as judged in a rump procedure known colloquially as a *Simpson* hearing. *See Simpson v. Owens*, 207 Ariz. 261, 85 P.3d 478 (App. 2004) (outlining procedures for bail hearing). Put differently, the Prop 103 Laws flaunt the "'general rule' of substantive due process that the government may not detain a person prior to a judgment of guilt in a criminal trial" except pursuant to a "'*narrowly focuse[d]*,' '*carefully limited* exception' to [that rule]." *Lopez-Valenzuela*, 770 F.3d at 782 (1st alteration in original) (quoting *United States v. Salerno*, 481 U.S. 739, 749-50, 755 (1987)).

To confirm this conclusion, this Court must analyze the Prop 103 Laws in light of three considerations identified by the U.S. Supreme Court in *United States v. Salerno*, 481 U.S. at 749, in its due process analysis of the federal pretrial release statute. Specifically, *Salerno* considered whether (1) the challenged provision addresses "'a particularly acute problem'"; (2) "'[t]he [a]ct operates only on individuals who have been arrested for a specific category of extremely serious offenses,'"; and (3) there is a "'full-blown adversary hearing' at which the government [is] required to 'convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person.'" *Lopez-Valenzuela*, 770 F.3d at 782 (1st alteration in original) (quoting *Salerno*, 481 U.S. at 750).

To provide the substantive Due Process to which arrestees are entitled, a law restricting admission to bail must satisfy all three of the *Salerno* factors. *See id.* (explaining that the U.S. Supreme Court upheld the Federal Bail Reform Act only after finding each of *Salerno*'s three factors present). Here, even assuming factor two, that the Prop 103 Laws are limited to the specific category of extremely serious offenses of sexual conduct with young children, a review

of factors one and three compels the conclusion that the Prop 103 Laws are not "carefully limited" and are invalid under the Due Process Clause.

1. The Prop 103 Laws Do Not Require a Full-Blown Adversary Hearing at Which the State is Required to Prove that an Individual Arrestee Presents an Unmanageable Flight Risk or Danger to the Community.

Taking the third consideration first, the Prop 103 Laws are "plainly . . . not carefully limited" because, in denying bail to all persons arrested for sexual conduct with a minor they "employ[] an overbroad, irrebuttable presumption rather than an individualized hearing to determine whether a particular arrestee poses an unmanageable flight risk" or danger to the community. *Id.* at 784.

Specifically, the Prop 103 Laws are not narrowly focused on those arrestees that present flight risk or danger to the community. Instead, they categorically exclude *all* arrestees, regardless of the risk actually posed by each individual. Assuming that "a categorical denial of bail for noncapital offenses could *ever* withstand heightened scrutiny," *id.* at 785 (emphasis added), sexual conduct with a child who is under fifteen years of age is not that offense. Unlike a capital offense, where most defendants face the death penalty, the non-bailable offenses in the Prop 103 Laws do not "serve as a convincing proxy for unmanageable flight risk or dangerousness." *Id.* at 786. There is no evidence, and certainly none was presented or considered by the Court here, that one who allegedly commits one of the non-bailable offenses in the Prop 103 laws is an unmanageable flight risk, or that any danger posed by such a person to the community could not be mitigated by other conditions of release.

2. The Prop 103 Laws Do Not Address a Particularly Acute Problem.

Also, A.R.S. § 13-3961(A)(3) does not address "a particularly acute problem." *Salerno*, 481 U.S. at 750. Here, there is no evidence that the Prop 103 Laws were adopted to address a particularly acute problem. We are unaware of any "findings, studies, statistics or other

evidence"[3] in the legislative record showing that individuals charged under A.R.S. § 13-1405 or § 13-1410, and thus made non-bailable under the Prop 103 Laws, pose an unmanageable flight risk or are a danger to the community that cannot be managed through less restrictive means.[4] *See Lopez-Valenzuela*, 770 F.3d at 783. The absence of this evidence supports the conclusion that A.R.S. § 13-3961(A)(3) is not carefully limited, as it must be, to survive heightened scrutiny. *See id.*

B. The Prop 103 Laws "Impose Punishment Before Trial" in Violation of Due Process Protections.

The Prop 103 Laws also violate substantive due process by imposing punishment before trial. "'To determine whether a restriction on liberty constitutes impermissible punishment or permissible regulation, [it is necessary to] first look to legislative intent.'" *Id.* at 789 (quoting *Salerno*, 481 U.S. at 747). "'Unless [the legislature] expressly intended to impose punitive restrictions, the punitive/regulatory distinction turns on whether an alternative purpose to which the restriction may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned to it.'" *Id.* (alteration in original) (quoting *id.*).

There is strong evidence in the legislative history that the Prop 103 Laws are punitive. The election materials circulated with the proposition, contain statements unambiguously confirming that the Prop 103 Laws were designed to punish. Senator Dean Martin, who sponsored the legislation, asserted that "[w]ith Proposition 103, we will treat sexual predators

[3] The Ballot Proposition Materials for Prop 103 do reference "[a] behavioral analysis done by a 27-year veteran FBI Special Agent, who dealt with sexual predators" as purportedly revealing "that 33% of sexual predators who are released on bail will commit a new sex offense, commit another crime or otherwise violate their terms of release." [Proposition 103, 2002 Ballot Proposition Materials (attached hereto as Exhibit 1)] Even taken at face value, though, this uncited reference unconstitutionally assumes that all arrestees for sexual offenses are "sexual predators."

[4] We note that, for example, with the exception of capital offenses, the Bail Reform Act governing pretrial release in federal cases contains no similar categorical judgments about denial of bail based on the nature of the offense. *See* 18 U.S.C. § 3142, *et seq.*

who destroy lives the same way we treat those who take them away."[5] Furthermore, the legislative history starkly confirms that proponents of Prop 103 acknowledged its repudiation of the presumption of innocence, for example asking voters to: "Please vote YES on Proposition 103 to help keep dangerous sexual predators off our streets."[6]

Assuming even that the legislature did not expressly intend to impose punitive restrictions, and assuming that the Prop 103 Laws were adopted for the permissive regulatory purposes of either managing flight risk or dangerousness to the community, "it appears excessive in relation to the alternative purpose assigned [to it]." *Salerno*, 481 U.S. at 747 (alteration in original). Even if these problems exist, the Prop 103 Laws "employ[] a profoundly overbroad irrebuttable presumption, rather than an individualized evaluation, to determine whether an arrestee is an unmanageable flight risk" or danger to society. *Lopez-Valenzuela*, 770 F.3d at 791. As a result, individuals charged with non-bailable offenses under the Prop 103 Laws are categorically denied the opportunity for bail even if they are not flight risks and do not pose an unmanageable risk to the community. "Given this *severe* lack of fit between the asserted nonpunitive purpose[s] and the actual operation of the law," *id.*, the Prop 103 Laws are punitive, and thus violate substantive due process as they impose punishment before trial.

Conclusion

The Prop 103 Laws categorically deny bail or other pretrial release and thus require pretrial detention for every person for which it is determined the "proof [was] evident" or the "presumption great" that they committed the charged, non-bailable offense, regardless of the "individual circumstances of the arrestee, including the arrestee's strong ties to and deep roots in the community." *Lopez-Valenzuela*, 770 F.3d at 791. In contrast to permissible pretrial release provisions, the Prop 103 Laws do not address an established "particularly acute problem" and do not include an individualized determination of flight risk or dangerousness. *Salerno*, 481 U.S.

[5] *See* Exhibit 1.
[6] *Id.*

at 750. By failing to provide the substantive Due Process to which all arrestees are entitled, the Prop 103 Laws are invalid, and Martinez must be admitted to bail pursuant to the least restrictive conditions necessary to guarantee his appearance at future proceedings and to mitigate any risk to the community posed by his pretrial release.

Dated: October 15, 2015

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Copy of the foregoing electronically filed with the Clerk of Superior Court for Maricopa County on October 15, 2015.

Copy of the foregoing sent via U.S. Mail on October 15, 2015, to:

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119141-0001/128195306.1

EXHIBIT 1

PROPOSITION 103

OFFICIAL TITLE

SENATE CONCURRENT RESOLUTION 1011

PROPOSING AN AMENDMENT TO THE CONSTITUTION OF ARIZONA; AMENDING ARTICLE II, SECTION 22, CONSTITUTION OF ARIZONA; RELATING TO BAILABLE OFFENSES.

TEXT OF THE PROPOSED AMENDMENT

Be it resolved by the Senate of the State of Arizona, the House of Representatives concurring:

1. Article II, section 22, Constitution of Arizona, is proposed to be amended as follows if approved by the voters and on proclamation of the Governor:

22. Bailable offenses

Section 22. A. All persons charged with crime shall be bailable by sufficient sureties, except for:

1. Capital offenses, SEXUAL ASSAULT, SEXUAL CONDUCT WITH A MINOR UNDER FIFTEEN YEARS OF AGE OR MOLESTATION OF A CHILD UNDER FIFTEEN YEARS OF AGE when the proof is evident or the presumption great.

2. Felony offenses~~,~~ committed when the person charged is already admitted to bail on a separate felony charge and where the proof is evident or the presumption great as to the present charge.

3. Felony offenses if the person charged poses a substantial danger to any other person or the community, if no conditions of release which may be imposed will reasonably assure the safety of the other person or the community and if the proof is evident or the presumption great as to the present charge.

B. THE PURPOSES OF BAIL AND ANY CONDITIONS OF RELEASE THAT ARE SET BY A JUDICIAL OFFICER INCLUDE:

1. ASSURING THE APPEARANCE OF THE ACCUSED.

2. PROTECTING AGAINST THE INTIMIDATION OF WITNESSES.

3. PROTECTING THE SAFETY OF THE VICTIM, ANY OTHER PERSON OR THE COMMUNITY.

2. The Secretary of State shall submit this proposition to the voters at the next general election as provided by article XXI, Constitution of Arizona.

ANALYSIS BY LEGISLATIVE COUNCIL

The Arizona Constitution provides that all persons who are charged with a crime are eligible for bail, subject to certain exceptions. Bail is not allowed for any person who is charged with a crime if the court finds proof that the person committed the crime is evident or the presumption that the person committed the crime is great and the charged crime is: (1) a capital offense (an offense punishable by death), (2) a felony offense committed when the person charged is already admitted to bail on a separate felony charge or (3) a felony offense if the person charged poses a substantial danger to any other person or the community and no condition of release will reasonably assure the safety of the other person or community.

Proposition 103 would amend the Arizona Constitution to additionally prohibit bail for any person who is charged with a crime if the court finds proof that the person committed the crime is evident or the presumption that the person committed the crime is great and the charged crime is: (1) sexual assault, (2) sexual conduct with a minor under fifteen years of age or (3) molestation of a child under fifteen years of age.

Proposition 103 would also amend the Constitution to specify that the purposes of bail and any conditions of release that are set by a judicial officer include assuring the appearance of the accused, protecting against the intimidation of witnesses and protecting the safety of the victim, any other person or the community.

ARGUMENTS "FOR" PROPOSITION 103

Last year, the US Supreme Court ruled that sexual predators can be held even after their criminal sentence if they still pose a danger to the community. Now, when sexual predators are caught, they know they could be facing lifetime incarceration.

Slick defense lawyers have been able to reduce million dollar bonds, allowing predators back on the street for just a few hundred dollars. A sexual predator who knows he is guilty, facing life behind bars, has no incentive to ever return. It has happened time and again.

The Constitution currently allows judges to hold murderers without bond "when the proof is evident or the presumption is great." Using this high standard, false accusations or circumstantial evidence cannot be used to deny bail. With Proposition 103, we will treat sexual predators who destroy lives the same way we treat those who take them away.

Here's how it would work if Proposition 103 passes: When a sexual predator is arrested, a special hearing may be requested by prosecutors to present evidence (i.e. DNA is found where it should not be found, photographic or video evidence). If the judge decides that "the proof is evident or the presumption is great", persons charged with the following crimes would be ineligible for bail: sexual assault (rape), sexual conduct (intercourse) with a minor under 15 years old, or molestation of a child under 15.

Proposition 103 also gives better tools to judges to set bail conditions beyond just money. Judges will be able to set any conditions of release to protect the community, the victim or their family, or protect against the intimidation of witnesses.

Visit www.YesOnBailReform.org for more information.

Please vote YES on Proposition 103 to help keep dangerous sexual predators off our streets.

Senator Dean Martin, Sponsor of Legislation, Phoenix

Arizona has an opportunity with Proposition 103 to enhance its laws and be a greater protector of the innocent. Proposition 103 will give the proper weight to the crime of rape and child molestation.

There is a tremendous problem in our country with sexual assault on children and adults and our state is no exception. Southern Arizona Center Against Sexual Assault reports that one in every three girls and one in every six boys will be sexually abused before the age of eighteen.

We have learned a great deal in recent years about these types of offenders and we need to begin to have our laws reflect what we now know. A behavioral analysis done by a 27-year veteran FBI Special Agent, who dealt with sexual predators, reveals that 33% of sexual predators who are released on bail will commit a new sex offense, commit another crime or otherwise violate their terms of release.

Many studies now tell us that these types of offenders have a long-term persistent pattern of behavior. They make ritual or need-driven decisions that often overwhelm their sense of community restraint and certainly their willingness to adhere to bail requirements. Proposition 103 will help seal the crack in the justice system and can prevent the worst sexual predators from jumping bail or even simply walking our neighborhoods while they await trial.

Spelling, grammar, and punctuation were reproduced as submitted in the "for" and "against" arguments.

Proposition 103 also saves money in our criminal justice system. It only costs $45 per day to incarcerate a prisoner. Proposition 103 accelerates the trial schedule, saving money on attorneys, judges and court costs. This monetary savings is above and beyond the untold savings of mental anguish to victims and their families and provides peace of mind that we will ALL be safer.

Please Vote Yes on Proposition 103.

Julie Lind, Tempe

Vote Yes on Proposition 103, Bailable Offenses

Nothing undermines public confidence in our criminal justice system more severely than reports about violent crimes committed by offenders who have been arrested for an earlier crime and then released back into the community. When this happens, it is an inexcusable failure of the justice system. The studies confirm the high recidivism rates among rapists and child molesters. This amendment is therefore a critically needed reform if we are to protect the rights and safety of crime victims. The United States Supreme Court has provided that the United States Constitution does not prohibit courts from considering the safety of victims in making pretrial detention decisions. The time has long passed for Arizona to conform its constitution in this way. On behalf of crime victims and law-abiding citizens throughout Arizona, I urge you to vote yes on this important proposition.

Mr. Steve Twist, Victim's Advocate, Phoenix

My name is Chris Cottrell, I am 13 years old, and I am the "Chris" of "Chris' Law," now Proposition 103. This issue has touched my family, and I want to do whatever I can to prevent others from going through the same suffering.

Last year I wrote a bill in a student legislature regarding bail reform for sexual predators. As part of the student legislature, I met with Senator Dean Martin. Senator Martin agreed that this was a very important issue and we spent last summer working with legal experts, prosecutors, and victims' organizations drafting a version which Senator Martin introduced during the 2002 Legislative Session.

We worked very hard on the bill, which became known as Chris' Law. We met with individual legislators, and told them how innocent people were being hurt because of loopholes in our bail system. We testified before committees in the Senate and the House of Representatives, which both passed Chris' Law.

Because "Chris' Law" is a constitutional amendment, it must also be approved by the voters.

Proposition 103 amends the Arizona Constitution to treat bail for rapists and child molesters the same way we treat bail for accused murderers.

Many people have asked me what they can do to help stop sexual predators in our neighborhoods.

I tell them to vote YES on Prop 103.

It's one thing that you can do to help prevent more families from being hurt by sexual predators.

Chris Cottrell, Phoenix

Paid for by Susan Cottrell

Former Congressman and gubernatorial candidate Matt Salmon strongly supports Prop. 103. As a Congressman, Matt Salmon wrote "Aimee's Law" which helps keep convicted murderers, rapists, and child predators behind bars and out of our neighborhoods. Matt believes that the system is too focused on the rights of the criminal to the detriment of safe streets and the rights of victims. Judges often set low bail that allows potentially dangerous suspects to go free pending trial. It is long past time that we amend the Arizona Constitution so that bail for rapists and child molesters can be treated like bail for murderers. Recent history proves the need for Prop. 103:

- Last January, bail was set at $26,000 for a person charged with Indecent Exposure, Sexual Conduct with a Minor, and Child Molestation. Reports by those present at the Madison Street Jail Courtroom said "bail was low because the Judge was in a good mood that night."
- In December, a Maricopa County Superior Court Judge lowered a suspect's bail from $2.5 million to $100,000. The suspect, who had allegedly raped an 11 year-old boy, did not show up for trial.
- That same month, the director of a church-based teen group was charged with having illicit sex with at least three minors. The suspect was charged with 15 counts of sexual conduct with a minor and one count of furnishing obscene materials to a minor. He was freed on a $21,240 bond.
- In November, after a 19-month search by Tucson police to locate a suspect charged with breaking into the apartment of an 11 year-old girl and raping her, Pima County Justice Pro Tem Walter Weber set bail at just $5,500.

I hope that you will join former Congressman Matt Salmon in voting yes on this important Proposition.

James B. Morse Jr., Policy Director for Salmon for Governor, Tempe

Paid for by Andrew E. Chasin

ARGUMENTS "AGAINST" PROPOSITION 103

The Secretary of State did not receive any arguments "against" Proposition 103.

BALLOT FORMAT

PROPOSITION 103

PROPOSED AMENDMENT TO THE CONSTITUTION BY THE LEGISLATURE

OFFICIAL TITLE

SENATE CONCURRENT RESOLUTION 1011

PROPOSING AN AMENDMENT TO THE CONSTITUTION OF ARIZONA; AMENDING ARTICLE II, SECTION 22, CONSTITUTION OF ARIZONA; RELATING TO BAILABLE OFFENSES.

DESCRIPTIVE TITLE

ADDS SEXUAL ASSAULT, SEXUAL CONDUCT WITH MINOR UNDER AGE 15 AND MOLESTATION OF CHILD UNDER AGE 15 TO LIST OF NON-BAILABLE OFFENSES; STATES PURPOSE OF BAIL RELEASE CONDITIONS IS TO ASSURE APPEARANCE OF ACCUSED, PROTECT AGAINST WITNESS INTIMIDATION AND PROTECT SAFETY OF VICTIM AND OTHERS IN COMMUNITY.

PROPOSITION 103

A "yes" vote shall have the effect of providing that sexual assault, sexual conduct with a minor under age 15 and molestation of a child under age 15 are non-bailable offenses.	**YES** ☐
A "no" vote shall have the effect that these offenses will not be added to the list of offenses for which bail is not available.	**NO** ☐

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

THE STATE OF ARIZONA, Plaintiff, vs. JOE PAUL MARTINEZ, Defendant.	CR 2014-118356-001 STATE'S RESPONSE TO THE DEFENSE MOTION FOR PRETRIAL RELEASE (Assigned to the Roland Steinle)

The State of Arizona, through undersigned counsel, hereby requests that the Court deny the defense Motion for Pretrial Release. The attached Memorandum of Points and Authorities supports this response.

Submitted November ___, 2015.

WILLIAM MONTGOMERY
MARICOPA COUNTY ATTORNEY

BY: /s/
/s/ Elizabeth Reamer
Deputy County Attorney

MEMORANDUM OF POINTS AND AUTHORITIES

FACTS

The defendant was charged with 17 counts, including two counts of Sexual Conduct with a Minor, a class 2 felony and a dangerous crime against children (Counts 9 and 10). On April 19, 2014, the defendant was held non-bondable as a matter of right due to the charges of sexual conduct with a minor against him.

On October 30, 2014, this Court held a Simpson hearing and found, for Counts 9 and 10, that there was "proof [ ] evidence and the presumption great" that "if believed by the jury, [ ] the Defendant committed the crime charged." *See* Ex. 1, Minute Entry, Oct. 30, 2014, 2. As a result, this Court ordered the defendant to be held non-bondable on Counts 9 and 10. The defendant is currently incarcerated.

LAW AND ARGUMENT

The defendant's Motion for Pretrial Release should be denied because pursuant to the Arizona Constitution and Arizona Revised Statutes, the defendant may be lawfully held not bailable. The defendant argues that Ariz. Const. art. II, § 22(A)(1) ("(A)(1)") is unconstitutional because the provision holding a defendant non-bondable is a violation of the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution. The defendant heavily, and incorrectly, relies on *Lopez-Valenzuela v. Arpaio*, which found a different section, Ariz. Const. art. II, § 22 (A)(4) ("(A)(4)") unconstitutional. 770 F.3d 772, 788-89 (9th Cir. 2014). First, the defendant does not have a constitutional right to bail. Though there are limitations in determining bail for the defendant, the State has satisfied the requirements under Arizona law, by demonstrating there was "proof evident or the presumption great that the [defendant]is guilty of the offense charged." Second, the defendant's constitutional argument fails under *Lopez-Valenzuela* since the case is not applicable in determining the constitutionality of (A)(1), and the defendant uses the incorrect

level of scrutiny when assessing the constitutionality of (A)(1). As a result, the defendant is left without authority of his constitutional argument.

Under the Arizona Constitution, Article II, § 22, all persons charged with "capital offenses, sexual assault, sexual conduct with a minor under fifteen years of age or molestation of a child under fifteen years of age when the proof is evident or the presumption great" are not entitled to bail. Ariz. Const. art. II, § 22(A)(1). A.R.S. § 13-3961(A) was amended to provide the same:

> A person who is in custody shall not be admitted to bail if the proof is evident or the presumption great that the person is guilty of the offense charged and the offense charged is one of the following:
>
> 1. A capital offense.
> 2. Sexual assault.
> 3. Sexual conduct with a minor who is under fifteen years of age.
> 4. Molestation of a child who is under fifteen years of age.
> 5. A serious felony offense if there is probable cause to believe that the person has entered or remained in the United States illegally.

The purpose of bail includes: "1) Assuring the appearance of the accused; 2) Protecting against the intimidation of witnesses; [and] 3) Protecting the safety of the victim, any other person or the community." Ariz. Const. art. II, § 22(B).

a. **Defendant does not have a constitutional right to bail.**

"[T]here is no absolute right to bail." *State ex rel. Romley v. Rayes*, 206 Ariz. 58, 62, ¶ 9, 75 P.3d 148, 152 (App. 2003). The Arizona Supreme Court has never held that "the eighth amendment to the United States Constitution creates an absolute right to bail." *Id.* However, a trial court is limited in setting bail because "excessive bail" is unconstitutional under the Arizona Constitution. *Costa v. Mackey*, 227 Ariz. 565, 569-70, ¶ 8, 261 P.3d 449, 453-54 (App. 2011) (citing Ariz. Const. art. II, § 15; *Fragoso v. Fell*, 210 Ariz. 427, 434, ¶ 22, 111 P.3d 1027, 1034 (App. 2005)). "Because bail is designed, among other things, to assure the defendant's appearance at court proceedings, protect against intimidation of witnesses, and protect any victim

or others, any bail set at an amount greater than necessary to achieve these purposes is excessive within the meaning of our constitution and is therefore prohibited." *Id.*

Here, the defendant is requesting pretrial release pursuant to Ariz. R. Crim. P. 7.4(b), arguing but for (A)(1) and § 13-3961(A), the defendant would be "bailable as a matter of right." *See* Defense Motion, 2. Under Arizona case law, the defendant does not have an absolute right to bail. It is within the trial court's discretion in setting bail, so long as it is constitutional under the Arizona Constitution. Thus, the defendant would not be automatically "bailable" due to an "automatic right." In regards to bail, the defendant is still subject to the provisions set forth in the Arizona Constitution and Arizona Revised Statutes.

b. **Under § 13-3961(A)(3), the defendant was lawfully held without bail because the State demonstrated the "proof is evident or the presumption great" that the defendant is guilty of sexual conduct with a minor under 15 years of age.**

In order for the State to hold the defendant without bail, the State must prove that the "proof is evident or the presumption great." *State ex rel. Romley v. Rayes*, 206 Ariz. 58, 61, 75 P.3d 148, 151 (App. 2003). *See also* § 13-3961(A)(3)(a person is not entitled to bail if "the proof is evident or the presumption great that the person is guilty of the offense charged" and "the offense charged is. . . 3) Sexual conduct with a minor who is under fifteen years of age"). This requires "all of the evidence, fully considered by the court, mak[ing] it plain and clear to the understanding, and satisfactory and apparent to the well-guarded, dispassionate judgment of the court that the accused committed one of the offenses enumerated in A.R.S. § 13–3961(A)." *Simpson v. Owens*, 207 Ariz. 261, 274, ¶ 40, 85 P.3d 478, 491 (App. 2004). If the State makes this showing, the defendant must be held without bail. *Rayes*, 206 Ariz. at 61, ¶ 11, 75 P.3d at 151. *See* A.R.S. § 13-3961. Only when the State fails to prove that "the proof is evident or the presumption great" is the defendant entitled to be considered for bail. *Id.*; *See* A.R.S. § 13-3962.

Here, this Court found, based upon the evidence presented, that "the proof is evident or the presumption great" that the defendant committed sexual conduct with a minor under 15 years

of age. *See* Ex. 1, Minute Entry, Oct. 30, 2014, 2. As a result, this Court held the defendant without bail pursuant to § 13-3961. Thus, pursuant to *Rayes*, the defendant is lawfully held without bail pursuant to Arizona law.

c. The defendant's reliance on *Lopez-Valenzuela* is improper and does not invalidate subsection (A)(1) of Article II, section 22 of the Arizona Constitution.

The majority, if not all, of the defendant's Motion attempted to invalidate (A)(1) by heavily relying on the 9th Circuit opinion, *Lopez-Valenzuela*, 770 F.3d 772 (9th Cir. 2014) – which invalidated (A)(4), relating to illegal immigrants who commit a serious felony offense.

Art. II, § 22(A)(4) of the Arizona Constitution provides:

> All persons charged with crime shall be bailable by sufficient sureties, except:
>
> 4. For serious offenses as prescribed by the legislature if the person charged has entered or remained in the United States illegally and if the proof is evident or the presumption great as to the present charge.

This subsection was passed by the Arizona legislature in 2005 and was voter approved in proposition 100 in 2006. *Lopez-Valenzuela*, 770 F.3d at 775. The intent was to prevent illegal persons from fleeing to another country and thus "assuring the appearance of the accused." *See* Ex. 2, Proposition 100 Ballot Proposition; Ariz. Const. art. II, § 22(B).

In *Lopez-Valenzuela*, the 9th Circuit Court held (A)(4) violated the Lopez-Valenzuela's Due Process rights and thus was unconstitutional. 770 F.3d at 782, 788, 791. Lopez-Valenzuela and other plaintiffs filed a class-action complaint, arguing proposition 100, enacted as (A)(4), violated their substantive due process rights under the Fourteenth Amendment by failing to be narrowly tailored to serve a compelling governmental interest and by "impermissibly impos[ing] punishment before trial." *Id.* at 776. First, the court agreed with the plaintiffs that (A)(4) was not narrowly tailored. *Id.* The court opined that the Due Process Clause "forbid[s] the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Id.* at 780 (quoting *Reno v. Flores,* 507 U.S. 292, 302 (1993)). The court applied this "heightened scrutiny" because

"freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause" and institutionalizing an adult is a "fundamental" right that triggers the heightened scrutiny. *Id.* at 780-81. In determining whether (A)(4) was narrowly tailored, the court used three considerations from *Salerno*:

> First, that the challenged provisions addressed "a particularly acute problem." *Id.* at 750, 107 S.Ct. 2095. Second, that "[t]he Act operates only on individuals who have been arrested for a specific category of extremely serious offenses," where Congress had "specifically found that these individuals are far more likely to be responsible for dangerous acts in the community after arrest." *Id.* Third, that the Act required "a full-blown adversary hearing" at which the government was required to "convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person." *Id.*

Id. at 782 (citing *Salerno*, 481 U.S. at 750).

The court in *Lopez-Valenzuela* held that none of the considerations existed. *Id.* In regards to the first consideration, there was no evidence, such as studies or statistics, showing "that undocumented immigrants as a group pose" a flight risk and that adoption of prop 100 would address any acute problem. *Id.* at 783. "The absence of evidence. . .supports the conclusion that prop 100 laws are not carefully limited, as they must be to survive the heightened scrutiny under *Salerno.*" *Id.* at 783. In regards to the second factor, the court did not find prop 100 limited to a "specific category of extremely serious offenses" and was thus extremely broad. *Id.* at 784 (citing *Salerno*, 481 U.S. at 750). Lastly, as to the third factor, prop 100 "employs an overbroad, irrebuttable presumption rather than an individualized hearing" in determining whether the person is an unmanageable flight risk. *Id.* at 784. The court found many illegal immigrants to not be unmanageable flight risks, because contrary to common assumption, they have strong ties to their community. *Id.* at 785 (quoting *Arizona v. United States*, __ U.S. __, 132 S.Ct. 2492, 2499 (2012) ("Many have 'children in the United States' and 'long ties to the community'")). Therefore, prop 100 does not satisfy the due process scrutiny under *Salerno* because "[a]lthough the state has a compelling interest in assuring that arrestees, including

undocumented immigrants, appear for trial, Proposition 100 is not carefully limited to serve that interest." *Id.* at 788.

Second, the court found that (A)(4) served as a punitive tool and thus was unconstitutional. *Id.* at 791-92. ". . .[T]he challenged laws are excessive in relation to the state's legitimate interest in assuring arrestees' presence for trial. They therefore impermissibly impose punishment before an adjudication of guilt." *Id.* The court first looked to legislative intent in determining whether (A)(4) was impermissibly restrictive. *Id.* After analyzing voter materials, the court held that "the voter materials contained some official statements reflecting a punitive purpose, but ultimately the message was mixed." *Id.* at 790. "Unless [the legislature] expressly intended to impose punitive restrictions, the punitive/regulatory distinction turns on whether an alternative purpose. . .may be rationally connected. . .and whether it appears excessive in relation to the alternative purpose assigned to it." *Id.* at 789-90. The court found the provision "excessive in relation to its stated legitimate purpose" because the flight risk of illegal immigrants has not been shown. *Id.* at 791. Thus, the court found proposition 100 to be "motivated by an improper punitive purpose." *Id.*

Here, *Lopez-Valenzuela* does not invalidate proposition 103 because *Lopez-Valenzuela* specifically invalidated proposition 100 for reasons relating to **illegal immigrants** – not felonious sex offenses. Applying the *Salerno* factors set forth in *Lopez-Valenzuela* demonstrates proposition 103, or now enacted as art. II, § 22(A)(1), that the proposition does not violate the defendant's due process rights. First, proposition 103 addresses a "particularly acute problem." Sex offenders, faced with several years in prison, have no incentive to return to court. *See* Ex. 3, Proposition 103, 2002 Ballot Propositions. 33 percent of sex offenders violate their terms of release. *Id.* Thus, statistics demonstrate that sex offenders are a flight risk. Second, unlike (A)(4), proposition 103 specifically targets sex conduct with a minor who is under fifteen years of age. As indicated in *Lopez-Valenzuela*, (A)(1) was broad because it entailed "serious offenses."

(A)(4) is far more specific than (A)(1), applying to the specific offense of sex conduct with a minor who is under fifteen years of age. Third, no conditions of release could assure the safety of the community or victims. The State has a high interest in protecting victims, particularly minors under fifteen years of age, from their sexual offenders, especially due to the highly sensitive nature of the crime. Specific studies and findings support a purpose in assuring the appearance of the accused and protecting the victims and society, different from the purpose of holding illegal immigrants non-bondable. *Id.* According to the 2002 ballot for Proposition 103, 33 percent of sexual predators who are released on bail will commit a new sexual offense. *Id.* Several studies demonstrate sex offenders "have a long-term persistent pattern of behavior." *Id.* Therefore, under the *Salerno* factors, art. II, § 22(A)(1) is narrowly tailored and meets the constitutional standard that the Due Process Clause requires.

Additionally, looking at the legislative intent behind proposition 103, the legislation was not intended to be a punitive tool. The legislation was not excessive, as (A)(1) addresses the legislature's concern about the safety of the victims of sex crimes due to sexual predators' likelihood of reoffending while on release. *See* Ex. 3, Proposition 103, 2002 Ballot Propositions. "The US Supreme Court ruled that sexual predators can be held even after their criminal sentence if they still pose a danger to the community." *Id.* Additionally, 33 percent of sexual predators who are released on bail commit new crimes or violate their release terms. *Id.* Analyzed as a whole, the concern was more of the safety of the community and victims, rather than punishing sexual offenders. Thus, (A)(4) is not a punitive tool.

As a result, *Lopez* does not invalidate art. II, § 22(A)(1).

CONCLUSION

For the aforementioned reasons, the State requests that this court deny the defendant's motion for pretrial release. The law does not require the finding defense suggests it does and a

Simpson Hearing was already conducted. Based on the Court's findings at the Simpson Hearing, the defendant remained non-bondable.

Submitted November ___, 2015.

WILLIAM MONTGOMERY
MARICOPA COUNTY ATTORNEY

BY: /s/_____
/s/ Elizabeth Reamer
Deputy County Attorney

Copy mailed\delivered
November ___, 2015,
to:

Honorable Roland Steinle
Judge of the Superior Court

Brian Russo
Attorney For Defendant

BY: /s/_____
/s/Elizabeth Reamer
Deputy County Attorney

EXHIBIT 1

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
11/05/2014 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2014-118356-001 SE
CR2014-002618-001 DT

10/30/2014

HON. ROLAND J. STEINLE

CLERK OF THE COURT
A. Chee
Deputy

STATE OF ARIZONA

ELIZABETH LOUISE REAMER

v.

JOE PAUL MARTINEZ (001)

DAVID M CANTOR

MINUTE ENTRY

1:58 p.m.

Courtroom CCB 1301

State's Attorney: as stated as above
Defendant's Attorney: Michael Albert and Joey Hanby
Defendant: Present

Court Reporter, Janell Rose, is present.

A record of the proceeding is also made by audio and/or videotape.

This is the time set for Initial Pretrial Conference in CR2014-002618-001 and Evidentiary Hearing in CR2014-118356-001.

Regarding CR2014-118356-001:

The Court precedes as to Counts 9, 10, and 12 of the Indictment.

Detective Bradley Breckon is sworn and testifies.

The witness is excused.

Argument is presented.

For reasons stated on the record,

THE COURT FINDS that the standard is met as to Counts 9 and 10.

THE COURT FINDS that under Rule 13-3961, the proof is evident and the presumption great based upon the evidence if believed by the jury that the Defendant committed the crime charged and therefore the Defendant shall be held non-bondable on Counts 9 and 10 only.

As to Count 12, the Court does not make the same findings.

IT IS ORDERED affirming the Comprehensive Pretrial Conference on 12/15/2014 at 8:30 a.m. before this division.

IT IS ORDERED affirming the trial set for 1/5/2015 at 8:00 a.m. before the Master Calendar Assignment Judge.

LAST DAY REMAINS: 2/20/2015

Regarding CR2014-002618-001:

The parties discuss discovery issues.

Based on the statements of counsel, the Court will defer ruling on setting a Simpson Hearing.

Defense waives time pursuant to Rule 7 and 3961.

IT IS ORDERED affirming the Status Conference set for 12/18/2014 at 8:30 a.m. before this division.

IT IS ORDERED setting Comprehensive Pretrial Conference on 12/18/2014 at 8:30 a.m. before this division.

CR2014-118356-001 SE
CR2014-002618-001 DT

10/30/2014

IT IS ORDERED affirming prior custody orders.

LAST DAY REMAINS: 2/20/2015

2:32 p.m. Matter concludes.

This case is eFiling eligible: http://www.clerkofcourt.maricopa.gov/efiling/default.asp. Attorneys are encouraged to review Supreme Court Administrative Order 2011-140 to determine their mandatory participation in eFiling through AZTurboCourt.

EXHIBIT 2

2006 Ballot Proposition Guide
Issued by the Arizona Secretary of State's Office

PROPOSITION 100
OFFICIAL TITLE
HOUSE CONCURRENT RESOLUTION 2028
PROPOSING AN AMENDMENT TO THE CONSTITUTION OF ARIZONA; AMENDING ARTICLE II, SECTION 22, CONSTITUTION OF ARIZONA; RELATING TO BAILABLE OFFENSES.
TEXT OF PROPOSED AMENDMENT
Be it resolved by the House of Representatives of the State of Arizona, the Senate concurring:
1. Article II, section 22, Constitution of Arizona, is proposed to be amended as follows if approved by the voters and on proclamation of the Governor:
22. Bailable offenses
Section 22. A. All persons charged with crime shall be bailable by sufficient sureties, except for:
1. FOR capital offenses, sexual assault, sexual conduct with a minor under fifteen years of age or molestation of a child under fifteen years of age when the proof is evident or the presumption great.
2. FOR felony offenses committed when the person charged is already admitted to bail on a separate felony charge and where the proof is evident or the presumption great as to the present charge.
3. FOR felony offenses if the person charged poses a substantial danger to any other person or the community, if no conditions of release which may be imposed will reasonably assure the safety of the other person or the community and if the proof is evident or the presumption great as to the present charge.
4. FOR SERIOUS FELONY OFFENSES AS PRESCRIBED BY THE LEGISLATURE IF THE PERSON CHARGED HAS ENTERED OR REMAINED IN THE UNITED STATES ILLEGALLY AND IF THE PROOF IS EVIDENT OR THE PRESUMPTION GREAT AS TO THE PRESENT CHARGE.
B. The purposes of bail and any conditions of release that are set by a judicial officer include:
1. Assuring the appearance of the accused.
2. Protecting against the intimidation of witnesses.
3. Protecting the safety of the victim, any other person or the community.
2. The Secretary of State shall submit this proposition
to the voters at the next general election as provided by article XXI, Constitution of Arizona.
Analysis by Legislative Council
The Arizona Constitution provides that all persons who are charged with a crime are eligible for bail, subject to certain exceptions. Bail is not allowed for any person who is charged with a crime if the court finds proof that the person committed the crime is evident or the presumption that the person committed the crime is great and the charged crime is one of the following:
1. A capital offense (an offense punishable by death), sexual assault, sexual conduct with a minor under fifteen years of age or molestation of a child under fifteen years of age.
2. A felony offense committed when the person charged is already admitted to bail on a separate felony charge.
3. A felony offense if the person charged poses a substantial danger to any other person or the community and no condition of release will reasonably assure the safety of the other person or community.
Proposition 100 would amend the Arizona Constitution to additionally prohibit bail for any person who is charged with a serious felony offense (as determined by the Legislature) if the person charged entered or remained in the United States illegally and the court finds proof that the person committed the crime is evident or the presumption that the person committed the crime is great.

In 2006, the Legislature enacted legislation to specify that class 1, 2, 3 and 4 felony offenses would constitute the "serious felony" offenses for which a person who has entered or remained in the United States illegally shall be denied bail. That legislation does not become effective unless Proposition 100 is enacted.

ARGUMENTS "FOR" PROPOSITION 100

Ballot argument FOR Proposition 100 (Bailable offenses) Illegal aliens that commit a crime are an extremely difficult challenge for law enforcement and growing threat to our citizens. Large, well-organized gangs of illegal aliens have flooded many neighborhoods with violence to the point where Arizona now has the highest crime rate in the nation. With few real ties to the community and often completely undocumented by state agencies, many illegal aliens can easily escape prosecution for law breaking simply because they are so difficult to locate. HCR 2028 would deny bail to illegal aliens when there is convincing evidence that they've committed a serious felony, keeping dangerous thugs in jail rather than releasing them onto the streets. Allowing an illegal immigrant to post bail simply gives them time to slip across the border and evade punishment for their crimes. By voting yes for this initiative, we keep more violent criminals in jail, make our homes and communities safer, and send a powerful message to illegal aliens that their crimes will not go unpunished.
The Honorable Russell Pearce, Arizona House of Representatives, Mesa
Paid for by "Russell Pearce 2004"

Illegal immigrants accused of committing serious felonies in Arizona should not be allowed to make bail and flee the country before standing trial for their crimes. That's why I helped draft and strongly support this proposition, which would amend our state constitution to prohibit bail for such offenders. Far too many illegal immigrants accused of serious crimes have jumped bail and slipped across the border in order to avoid justice in an Arizona courtroom. When and if they do come back to the United States, too often it's not to appear in court, but to commit more crimes. One example is Oscar Martinez-Garcia. Indicted in 1998 on drug and weapons charges, he posted bail and was released to federal authorities, who then deported him before he could be tried. He returned to Phoenix illegally and was driving a vehicle when Phoenix Police Officer Marc Atkinson pulled him over. One of the passengers in the vehicle shot and killed Officer Atkinson. Martinez-Garcia was convicted of first-degree murder for his participation in this cold-blooded killing, but that won't bring back this fallen officer. Other examples of illegal immigrants who made bail and avoided prosecution for serious crimes include accused child predators, armed robbers, drug dealers and other accused criminals. The victims of these crimes deserve justice. Thanks to an amendment approved overwhelmingly by voters in 2002, the Arizona Constitution now denies bail to defendants accused of rape and child molestation. This proposition similarly would deny bail to illegal immigrants who pose a clear danger to society and who too often use our border as an escape route. Our state constitution was not intended to "bail out" illegal immigration. I urge you to vote yes to end this abuse of our criminal justice system.
Andrew Thomas, Maricopa County Attorney, Phoenix

The Arizona Farm Bureau supports proposition 100. Bail is a judgment that the party is neither a danger to society nor a risk of flight from prosecution. We ask you: When is an undocumented person, who is accused of a serious crime, not a flight risk? If a person has no legal right to be in this country and commits a serious crime for which they must answer, we do not think bail is a prudent choice. Comprehensive immigration reform would reduce the criminal element coming into this country. Securing the border coupled with a temporary worker program and identifying the millions of those illegally in this country, would do much to stem the tide of criminal activity.
Kevin Rogers, President, Arizona Farm Bureau, Mesa
Jim W. Klinker, Chief Administrative Officer, Arizona Farm Bureau, Mesa
Paid for by "Arizona Farm Bureau"

I fully support the actions of the State Legislature that placed this measure on the ballot. The citizens of Arizona must be assured that all persons who commit violent criminal acts against society face our system of justice. It is a matter of undeniable fact that a large number of these wanted fugitives from justice are illegal aliens who have fled to their native country as a means of avoiding prosecution and conviction for their crimes. In many of these cases the prosecuting attorneys have asked the court to retain custody of these fugitives because of the flight risk only to have judges ignore that risk and set bail. This must not be allowed to continue. I commit to you that, as your Governor, I will apply all legal measures to protect and defend Arizonans from the illegal invasion. This Ballot Measure addresses one area that needs to be resolved in this fight to secure our borders and reduce the level of crime in our neighborhoods. It is embarrassing to have our state lead the nation in crime. Unfortunately, the current governor has vetoed ten separate bills sent to her desk by the legislature that were written to protect you from illegal immigration. We can do better and I ask you to vote YES on this Ballot Proposition so the citizens of Arizona can have confidence that our criminal justice system works as intended. **Paid for by Goldwater for Governor Committee.**
Don Goldwater, Goldwater for Governor, Laveen

Arguments "AGAINST" Proposition 100
Proposition 100 would deny the constitutional right to post bail to people accused of most felony offenses based on nothing more than their inability to prove current immigration status, and not the actual danger they pose to the community. It is wrong. VOTE NO on Prop 100 because: 1. This proposition will cost taxpayers an extra $2,100 per month for each person who is held and denied bail. 2. Our jails are already overcrowded and cost taxpayers millions every year. Arizona cannot afford to hold low-risk persons simply due to their national origin. 3. Bail is a cherished constitutional right. People accused of crimes have not necessarily committed the crimes they are accused of and have the right to post bail. 4. This proposition puts people who overstay a tourist visa or cross the border in the same category as serial murderers. 5. People who pose an actual danger to society are already held without bail under the current law. 6. Prop 100 will do nothing to increase public safety. More reasons to VOTE NO on Prop 100: Under current law, judges set bail to assure appearance at court proceedings and protect public safety. The more serious the crime, the higher the bail that is set. Certain offenses, such as capital murder, are not eligible for bail because they are considered very serious. In contrast, Prop 100 penalizes individuals who are not a danger and who have families and close community ties. Prop 100 would also create a sub-class of people within the justice system based solely on race or national origin, and unnecessarily penalize people who pose little or no risk to the community. This proposition would do nothing more than institutionalize bias and discrimination in the justice system, at taxpayer expense. VOTE NO on Prop 100.
Jim Fullin, Tucson
Matt Green, Tucson
Margot Veranes, Tucson
Paid for by "Margot I. Veranes"

BALLOT FORMAT
PROPOSED AMENDMENT TO THE CONSTITUTION BY THE LEGISLATURE
OFFICIAL TITLE
HOUSE CONCURRENT RESOLUTION 2028
PROPOSING AN AMENDMENT TO THE CONSTITUTION OF ARIZONA; AMENDING ARTICLE II, SECTION 22, CONSTITUTION OF ARIZONA; RELATING TO BAILABLE OFFENSES.
DESCRIPTIVE TITLE
ADDS TO THE LIST OF NON-BAILABLE OFFENSES SERIOUS FELONY OFFENSES PRESCRIBED BY THE LEGISLATURE IF THE PERSON CHARGED HAS ENTERED OR

REMAINED IN THE UNITED STATES ILLEGALLY AND IF THE PROOF IS EVIDENT OR THE PRESUMPTION GREAT AS TO THE PRESENT CHARGE.
A "yes" vote shall have the effect of denying bail to persons charged with serious felonies as defined by law if the person has entered or remained in the United States illegally. YES
A "no" vote shall have the effect of continuing to allow bail to persons charged with serious felony offenses who enter or remain in the United States illegally, unless the person is charged with an offense for which bail is not permitted under current law. NO

The Ballot Format displayed in HTML reflects only the text of the Ballot Proposition and does not reflect how it will appear on the General Election Ballot. Spelling, grammar, and punctuation were reproduced as submitted in the "for" and "against" arguments. This text only version of the proposition guide may not include striking, underlining, emphasis and bolding of words in the proposition language, or in "for" or "against" arguments.

Next Proposition

Back to Table of Contents

JANICE K. BREWER
Arizona Secretary of State

Disclaimer

EXHIBIT 3

PROPOSITION 103
OFFICIAL TITLE

SENATE CONCURRENT RESOLUTION 1011

PROPOSING AN AMENDMENT TO THE CONSTITUTION OF ARIZONA; AMENDING ARTICLE II, SECTION 22, CONSTITUTION OF ARIZONA; RELATING TO BAILABLE OFFENSES.

TEXT OF THE PROPOSED AMENDMENT

Be it resolved by the Senate of the State of Arizona, the House of Representatives concurring:

1. Article II, section 22, Constitution of Arizona, is proposed to be amended as follows if approved by the voters and on proclamation of the Governor:

22. Bailable offenses

Section 22. A. All persons charged with crime shall be bailable by sufficient sureties, except for:

1. Capital offenses, SEXUAL ASSAULT, SEXUAL CONDUCT WITH A MINOR UNDER FIFTEEN YEARS OF AGE OR MOLESTATION OF A CHILD UNDER FIFTEEN YEARS OF AGE when the proof is evident or the presumption great.

2. Felony offenses~~,~~ committed when the person charged is already admitted to bail on a separate felony charge and where the proof is evident or the presumption great as to the present charge.

3. Felony offenses if the person charged poses a substantial danger to any other person or the community, if no conditions of release which may be imposed will reasonably assure the safety of the other person or the community and if the proof is evident or the presumption great as to the present charge.

B. THE PURPOSES OF BAIL AND ANY CONDITIONS OF RELEASE THAT ARE SET BY A JUDICIAL OFFICER INCLUDE:

1. ASSURING THE APPEARANCE OF THE ACCUSED.

2. PROTECTING AGAINST THE INTIMIDATION OF WITNESSES.

3. PROTECTING THE SAFETY OF THE VICTIM, ANY OTHER PERSON OR THE COMMUNITY.

2. The Secretary of State shall submit this proposition to the voters at the next general election as provided by article XXI, Constitution of Arizona.

ANALYSIS BY LEGISLATIVE COUNCIL

The Arizona Constitution provides that all persons who are charged with a crime are eligible for bail, subject to certain exceptions. Bail is not allowed for any person who is charged with a crime if the court finds proof that the person committed the crime is evident or the presumption that the person committed the crime is great and the charged crime is: (1) a capital offense (an offense punishable by death), (2) a felony offense committed when the person charged is already admitted to bail on a separate felony charge or (3) a felony offense if the person charged poses a substantial danger to any other person or the community and no condition of release will reasonably assure the safety of the other person or community.

Proposition 103 would amend the Arizona Constitution to additionally prohibit bail for any person who is charged with a crime if the court finds proof that the person committed the crime is evident or the presumption that the person committed the crime is great and the charged crime is: (1) sexual assault, (2) sexual conduct with a minor under fifteen years of age or (3) molestation of a child under fifteen years of age.

Proposition 103 would also amend the Constitution to specify that the purposes of bail and any conditions of release that are set by a judicial officer include assuring the appearance of the accused, protecting against the intimidation of witnesses and protecting the safety of the victim, any other person or the community.

ARGUMENTS "FOR" PROPOSITION 103

Last year, the US Supreme Court ruled that sexual predators can be held even after their criminal sentence if they still pose a danger to the community. Now, when sexual predators are caught, they know they could be facing lifetime incarceration.

Slick defense lawyers have been able to reduce million dollar bonds, allowing predators back on the street for just a few hundred dollars. A sexual predator who knows he is guilty, facing life behind bars, has no incentive to ever return. It has happened time and again.

The Constitution currently allows judges to hold murderers without bond "when the proof is evident or the presumption is great." Using this high standard, false accusations or circumstantial evidence cannot be used to deny bail. With Proposition 103, we will treat sexual predators who destroy lives the same way we treat those who take them away.

Here's how it would work if Proposition 103 passes: When a sexual predator is arrested, a special hearing may be requested by prosecutors to present evidence (i.e. DNA is found where it should not be found, photographic or video evidence). If the judge decides that "the proof is evident or the presumption is great", persons charged with the following crimes would be ineligible for bail: sexual assault (rape), sexual conduct (intercourse) with a minor under 15 years old, or molestation of a child under 15.

Proposition 103 also gives better tools to judges to set bail conditions beyond just money. Judges will be able to set any conditions of release to protect the community, the victim or their family, or protect against the intimidation of witnesses.

Visit www.YesOnBailReform.org for more information.

Please vote YES on Proposition 103 to help keep dangerous sexual predators off our streets.

Senator Dean Martin, Sponsor of Legislation, Phoenix

Arizona has an opportunity with Proposition 103 to enhance its laws and be a greater protector of the innocent. Proposition 103 will give the proper weight to the crime of rape and child molestation.

There is a tremendous problem in our country with sexual assault on children and adults and our state is no exception. Southern Arizona Center Against Sexual Assault reports that one in every three girls and one in every six boys will be sexually abused before the age of eighteen.

We have learned a great deal in recent years about these types of offenders and we need to begin to have our laws reflect what we now know. A behavioral analysis done by a 27-year veteran FBI Special Agent, who dealt with sexual predators, reveals that 33% of sexual predators who are released on bail will commit a new sex offense, commit another crime or otherwise violate their terms of release.

Many studies now tell us that these types of offenders have a long-term persistent pattern of behavior. They make ritual or need-driven decisions that often overwhelm their sense of community restraint and certainly their willingness to adhere to bail requirements. Proposition 103 will help seal the crack in the justice system and can prevent the worst sexual predators from jumping bail or even simply walking our neighborhoods while they await trial.

Spelling, grammar, and punctuation were reproduced as submitted in the "for" and "against" arguments.

Proposition 103 also saves money in our criminal justice system. It only costs $45 per day to incarcerate a prisoner. Proposition 103 accelerates the trial schedule, saving money on attorneys, judges and court costs. This monetary savings is above and beyond the untold savings of mental anguish to victims and their families and provides peace of mind that we will ALL be safer.

Please Vote Yes on Proposition 103.

Julie Lind, Tempe

Vote Yes on Proposition 103, Bailable Offenses

Nothing undermines public confidence in our criminal justice system more severely than reports about violent crimes committed by offenders who have been arrested for an earlier crime and then released back into the community. When this happens, it is an inexcusable failure of the justice system. The studies confirm the high recidivism rates among rapists and child molesters. This amendment is therefore a critically needed reform if we are to protect the rights and safety of crime victims. The United States Supreme Court has provided that the United States Constitution does not prohibit courts from considering the safety of victims in making pretrial detention decisions. The time has long passed for Arizona to conform its constitution in this way. On behalf of crime victims and law-abiding citizens throughout Arizona, I urge you to vote yes on this important proposition.

Mr. Steve Twist, Victim's Advocate, Phoenix

My name is Chris Cottrell, I am 13 years old, and I am the "Chris" of "Chris' Law," now Proposition 103. This issue has touched my family, and I want to do whatever I can to prevent others from going through the same suffering.

Last year I wrote a bill in a student legislature regarding bail reform for sexual predators. As part of the student legislature, I met with Senator Dean Martin. Senator Martin agreed that this was a very important issue and we spent last summer working with legal experts, prosecutors, and victims' organizations drafting a version which Senator Martin introduced during the 2002 Legislative Session.

We worked very hard on the bill, which became known as Chris' Law. We met with individual legislators, and told them how innocent people were being hurt because of loopholes in our bail system. We testified before committees in the Senate and the House of Representatives, which both passed Chris' Law.

Because "Chris' Law" is a constitutional amendment, it must also be approved by the voters.

Proposition 103 amends the Arizona Constitution to treat bail for rapists and child molesters the same way we treat bail for accused murderers.

Many people have asked me what they can do to help stop sexual predators in our neighborhoods.

I tell them to vote YES on Prop 103.

It's one thing that you can do to help prevent more families from being hurt by sexual predators.

Chris Cottrell, Phoenix

Paid for by Susan Cottrell

Former Congressman and gubernatorial candidate Matt Salmon strongly supports Prop. 103. As a Congressman, Matt Salmon wrote "Aimee's Law" which helps keep convicted murderers, rapists, and child predators behind bars and out of our neighborhoods. Matt believes that the system is too focused on the rights of the criminal to the detriment of safe streets and the rights of victims. Judges often set low bail that allows potentially dangerous suspects to go free pending trial. It is long past time that we amend the Arizona Constitution so that bail for rapists and child molesters can be treated like bail for murderers. Recent history proves the need for Prop. 103:

- Last January, bail was set at $26,000 for a person charged with Indecent Exposure, Sexual Conduct with a Minor, and Child Molestation. Reports by those present at the Madison Street Jail Courtroom said "bail was low because the Judge was in a good mood that night."
- In December, a Maricopa County Superior Court Judge lowered a suspect's bail from $2.5 million to $100,000. The suspect, who had allegedly raped an 11 year-old boy, did not show up for trial.
- That same month, the director of a church-based teen group was charged with having illicit sex with at least three minors. The suspect was charged with 15 counts of sexual conduct with a minor and one count of furnishing obscene materials to a minor. He was freed on a $21,240 bond.
- In November, after a 19-month search by Tucson police to locate a suspect charged with breaking into the apartment of an 11 year-old girl and raping her, Pima County Justice Pro Tem Walter Weber set bail at just $5,500.

I hope that you will join former Congressman Matt Salmon in voting yes on this important Proposition.

James B. Morse Jr., Policy Director for Salmon for Governor, Tempe

Paid for by Andrew E. Chasin

ARGUMENTS "AGAINST" PROPOSITION 103

The Secretary of State did not receive any arguments "against" Proposition 103.

BALLOT FORMAT

PROPOSITION 103

PROPOSED AMENDMENT TO THE CONSTITUTION BY THE LEGISLATURE

OFFICIAL TITLE SENATE CONCURRENT RESOLUTION 1011 PROPOSING AN AMENDMENT TO THE CONSTITUTION OF ARIZONA; AMENDING ARTICLE II, SECTION 22, CONSTITUTION OF ARIZONA; RELATING TO BAILABLE OFFENSES.
DESCRIPTIVE TITLE ADDS SEXUAL ASSAULT, SEXUAL CONDUCT WITH MINOR UNDER AGE 15 AND MOLESTATION OF CHILD UNDER AGE 15 TO LIST OF NON-BAILABLE OFFENSES; STATES PURPOSE OF BAIL RELEASE CONDITIONS IS TO ASSURE APPEARANCE OF ACCUSED, PROTECT AGAINST WITNESS INTIMIDATION AND PROTECT SAFETY OF VICTIM AND OTHERS IN COMMUNITY.

PROPOSITION 103

A "yes" vote shall have the effect of providing that sexual assault, sexual conduct with a minor under age 15 and molestation of a child under age 15 are non-bailable offenses.	**YES** ☐
A "no" vote shall have the effect that these offenses will not be added to the list of offenses for which bail is not available.	**NO** ☐

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CASE NAME: **Joe Paul Martinez vs. Hon Roland J. Steinle**	CASE NUMBER: SA-15-0295
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ARIZONA COURT OF APPEALS

DIVISION ONE

JOE PAUL MARTINEZ, Petitioner, v. THE HONORABLE ROLAND J. STEINLE, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA, Respondent Judge, STATE OF ARIZONA, Real Party in Interest	No. Maricopa County Superior Court No. CR 2014-118356-001 **CERTIFICATE OF COMPLIANCE**

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November 25, 2015

Pursuant to Arizona Rule of Procedure for Special Actions 7(e), I certify that the attached Petition for Special Action uses proportionately spaced type of 14 points or more, is double-spaced using a Roman font and contains 3,873 words.

Dated: November 25, 2015

Respectfully submitted,

PERKINS COIE LLP

By: /s/ *Jean-Jacques Cabou*

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November 25, 2015

I hereby certify that on November 25, 2015, I electronically filed:

PETITION FOR SPECIAL ACTION

APPENDIX TO PETITION FOR SPECIAL ACTION

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CERTIFICATE OF COMPLIANCE

CONTACT INFORMATION SHEET

REQUEST FOR ORAL ARGUMENT

with the Clerk of the Court of Appeals, Division One, by using the Arizona TurboCourt e-filing system.

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Maricopa County Superior Court
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Exhibit 2

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By Deputy Clerk: *JT*

CASE NAME: **Jason Donald Simpson aka Jason Donald Simpson, Sr. vs. Phemonia Miller**

CASE NUMBER: SA-15-0292

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Ruth Willingham, Clerk

By Deputy Clerk: *JT*

ATTACHMENT NAME: **AFFIDAVIT Other: Certificate of Service**

CASE NAME: **Jason Donald Simpson aka Jason Donald Simpson, Sr. vs. Phemonia Miller**

CASE NUMBER: SA-15-0292

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COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

JASON DONALD SIMPSON, aka JASON DONALD SIMPSON, SR., Petitioner, v. HON. PHEMONIA MILLER, JUDGE OF THE SUPERIOR COURT OF THE STATE OF ARIZONA, IN AND FOR THE COUNTY OF MARICOPA, Respondent, and THE STATE OF ARIZONA, Real Party in Interest.	Case No.

PETITION FOR SPECIAL ACTION

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INTRODUCTION

Just over a year ago, the Ninth Circuit held that Arizona's bond deprivation scheme did not satisfy the heightened scrutiny required under the U.S. Constitution because it "employs an overbroad, irrebuttable presumption rather than an individualized hearing to determine whether a particular arrestee poses an unmanageable flight risk." *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 784 (9th Cir. 2014). Nevertheless, Arizona courts continue to deny bail based solely on whether the proof is evident or presumption great that a defendant has committed a certain crime without considering if alternative release conditions could neutralize any risk of flight or protect community safety.

This case is but one example. Here, the Defendant, Jason Donald Simpson ("Mr. Simpson"), was arrested on July 27, 2015. Yet he was held in custody without bond for almost two full months before receiving a hearing as to his bail conditions. Before and during the hearing, Mr. Simpson repeatedly argued, based on *Lopez-Valenzuela*, that due process requires an individualized determination where the burden is on the State to prove that no other release conditions adequately protect public safety or guard against Mr. Simpson's risk of flight. But the court rejected the Ninth Circuit's holding and refused to conduct an individualized determination.

Then, despite this Court's call for timeliness, the superior court took the matter under advisement and waited another six weeks (three-and-a-half months after Mr. Simpson's arrest) before determining that the proof was evident or presumption great that Mr. Simpson violated A.R.S. § 13-3961(A)(3).

The court's refusal to examine alternative release conditions violated due process. The Ninth Circuit's mandate was clear; defendants cannot be denied bail based solely on the sufficiency of the evidence. Due process requires a "full-blown adversary hearing, at which the government [is] required to prove by clear and convincing evidence that the individual presented a demonstrable danger to the community and that no conditions of release could reasonably assure the safety of the community." *Lopez-Valenzuela*, 770 F.3d at 784-85 (internal quotation omitted). In exceptionally limited circumstances, the categorical rule "requiring pretrial detention in all cases" without an individual determination can survive heightened scrutiny. *Id.* at 786. However, in such cases, the chosen classification would have to "serve as a convincing proxy for unmanageable flight risk or dangerousness." *Id.* A.R.S. § 13-3961(A)(3) does not meet this extremely rare criteria. *See id.* (suggesting that only capital offenses would satisfy this standard).

This is an issue of statewide importance. This issue is not limited to Mr. Simpson's case. The due process rights of defendants throughout the state are

being denied because of the failure of courts to conduct an individualized assessment. It is the duty of this Court to remedy this constitutional violation.

Accordingly, Mr. Simpson respectfully requests that this Court accept special action jurisdiction and order his immediate release. In the alternative, Mr. Simpson requests that the matter be remanded for a full individualized determination as to whether alternative release conditions adequately protect public safety or guard against Mr. Simpson's risk of flight.

THIS COURT SHOULD EXERCISE JURISDICTION

The court's ruling implicates all of the traditional bases for special action review.

First, there is an unresolved conflict between the Ninth Circuit's decision in *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772 (9th Cir. 2014) and this Court's holding in *Simpson v. Owens*, 207 Ariz. 261, 277 ¶ 49, 85 P.3d 478, 494 (App. 2004). *See Bourne v. McClennen ex rel. Cty. of Maricopa*, 235 Ariz. 423, 425 ¶ 7, 333 P.3d 750, 752 (App. 2014) (accepting special action jurisdiction because of conflicting rulings). In *Simpson*, 207 Ariz. at 277 ¶ 49, 85 P.3d at 494, this Court explicitly rejected a contention that at the bail hearing the State must present "compelling evidence that the accused is a flight risk or a risk to recidivate." The Court held: "Arizona law does not require that a risk of flight or a risk of recidivism be

considered before bail is denied. . . . We neither can nor will rewrite those provisions." *Id.*

There is no way to reconcile the holding in *Simpson* with the decision in *Lopez-Valenzuela*. In *Lopez-Valenzuela*, the Ninth Circuit found that A.R.S. § 13-3961(A)(5) was unconstitutional on its face because it did not allow for an individualized determination as to whether alternative release conditions can adequately protect public safety and guard against a defendant's flight risk. As discussed further below, A.R.S. § 13-3961(A)(3) possesses the same constitutional infirmities. A decision from this Court is necessary to guide lower courts as to the due process requirements for a bond hearing. This issue will surely come up again, indeed it can arise anytime an individual is indicted for a non-bondable offense under A.R.S. § 13-3961.

Second, Mr. Simpson has no adequate remedy by appeal. *See* Ariz. R.P. Spec. Act. 1(a) (special action review proper when there is no "equally plain, speedy, and adequate remedy by appeal"). The injury suffered by Mr. Simpson cannot be remedied after trial. Mr. Simpson is currently being deprived of his right to liberty without due process. Every day that Mr. Simpson is detained pre-trial constitutes an irreparable injury. Moreover, as noted by the U.S. Supreme Court in *Gerstein v. Pugh*, 420 U.S. 103, 114, 123 (1975), pretrial custody has deleterious effects on a defendant's job and source of income, his relationships with family,

and his "ability to assist in preparation of his defense." The only way to remedy this situation is to make this determination now**.**

Third, the central issue raised – whether A.R.S. § 13-3961(A)(3) fails to comply with due process because it does not provide for an individualized determination as to a defendant's flight risk– is one of statewide importance. *See O'Brien v. Escher*, 204 Ariz. 459, 460 ¶ 3, 65 P.3d 107, 108 (App. 2003). Surely, the importance of a defendant's right to liberty, and the attendant due process rights to any deprivation of that right, cannot be understated. *See Oviatt By & Through Waugh v. Pearce*, 954 F.2d 1470, 1474 (9th Cir. 1992) ("[T]he paradigmatic liberty interest under the due process clause is freedom from incarceration."). Furthermore, this is a constitutional issue that will be presented time and again. Whether a defendant is entitled to an individualized determination is not an issue unique to Mr. Simpson. It arises any time that an individual is indicted for a crime listed in A.R.S. § 13-3961. This Court has a duty to step in and provide trial courts the guidance they need.

Fourth, the real issues here are ones of law. *Sw. Gas Corp. v. Irwin ex rel. Cnty. of Cochise*, 229 Ariz. 198, 201 ¶ 7, 273 P.3d 650, 653 (App. 2012). Whether the Due Process Clauses of the U.S. and Arizona Constitutions require an individualized hearing where the State bears the burden of proving that no other condition of release could reasonably protect community safety or guard against

the defendant's flight risk is a question of law whose resolution does not depend on any fact. Similarly, the court's failure to issue a ruling as to Mr. Simpson's bond eligibility in a reasonably timely manner presents a question of law, not a question of fact.

For these reasons, the case is one the Court should consider. This case is an opportunity not only to correct errors with serious implications for Mr. Simpson's right to liberty which are otherwise effectively unreviewable but it could potentially affect innumerable other defendants charged with a non-bondable offense under A.R.S. § 13-3961.

ISSUES PRESENTED

1. In light of *Lopez-Valenzuela* and pursuant to the Due Process clauses of the U.S. and Arizona Constitutions, must the State prove by clear and convincing evidence at a bail hearing that no alternative conditions of release can adequately protect public safety or guard against a defendant's flight risk before a defendant can be held non-bondable?

2. Whether A.R.S. § 13-3961 and Article II, section 22(1) of the Arizona Constitution constitute unconstitutional punishment?

3. Whether the trial court's ruling as to the availability of bond must be issued in a reasonably timely manner after the bail hearing to comply with this Court's decision in *Simpson v. Owens*, 207 Ariz. 261, 85 P.3d 478 (App. 2004)?

STATEMENT OF MATERIAL FACTS

I. THE STATE'S EXTREMELY BRIEF INVESTIGATION BEFORE MR. SIMPSON'S ARREST IGNORED CONTRADICTORY EVIDENCE.

On July 27, 2015, Jason Donald Simpson was arrested by the Phoenix Police Department ("PPD") following a traffic stop.

The arrest was the culmination of a short and limited investigation into conflicting allegations offered against Mr. Simpson by his girlfriend's daughter and her friend. The investigation was launched less than 24 hours before Mr. Simpson's arrest. It began when the alleged victims claimed that Mr. Simpson allowed them to consume edible marijuana and that he masturbated while watching them engage in inappropriate sexual conduct with each other. The alleged victims have never claimed that he ever touched them inappropriately.

Upon further questioning, the alleged victims' stories diverged and rampant inconsistencies emerged. While one alleged victim claimed that the two vaginally penetrated one another with a sex toy, the other alleged victim completely denied that any penetration occurred and never described a sex toy like one described by the other alleged victim.

Despite these and other inconsistencies, PPD detectives chose to quickly arrest Mr. Simpson without further investigation or the identification of any evidence that would corroborate the allegations.

While none of the allegations lent themselves to charging Mr. Simpson with a "non-bondable" offense as enumerated in A.R.S. § 13-3961, the State seemed determined to prevent Mr. Simpson's release. Ignoring the contradictory testimony regarding the nature of the alleged sexual conduct, and relying on the unusual theory that Mr. Simpson was an accomplice to the alleged sexual activities of the two juveniles, the State secured an indictment of Mr. Simpson on two counts of Sexual Conduct with a Minor, in violation of A.R.S. §§ 13-1405(A) and 13-303, in addition to other counts.[1] *See* Appendix 1. As a result of the indictment for Sexual Conduct with a Minor, Mr. Simpson was held without bond pursuant to § 13-3961(A)(3).

II. THE TRIAL COURT FAILED TO GIVE MR. SIMPSON THE CONSTITUTIONALLY-MANDATED INDIVIDUALIZED DETERMINATION.

A. Mr. Simpson Timely Requested an Individualized Determination.

On September 4, 2015, Mr. Simpson filed his *Motion for Immediate Release, Or, in the Alternative, Defendant's Motion for Bail Hearing with an Individualized Evaluation as Mandated by the U.S. and Arizona Constitutions* (the "Motion"). *See* Appendix 2. In the Motion, Mr. Simpson argued that A.R.S. § 13-3961(A)(3) is unconstitutional because it does not provide for a constitutionally-mandated individualized hearing to determine whether a particular arrestee poses a

[1] None of these other counts implicate the provisions of A.R.S. § 13-3961.

unmanageable flight risk or risk to community safety, which is necessary to protect a defendant's right to due process. Because A.R.S. § 13-3961(A)(3) does not allow for such a hearing, Mr. Simpson argued that he should be released immediately. In the alternative, Mr. Simpson requested a full hearing to determine the appropriate release conditions where the State bears the burden of showing that Mr. Simpson poses an unmanageable flight risk and that no conditions of release can protect the public or adequately ensure Mr. Simpson's appearance.

B. The State Failed to Respond to the Motion.

The State entirely failed to respond to the Motion. Accordingly, Mr. Simpson filed a Motion for Relief Based upon the State's Failure to Timely Respond to Defendant's Motion to Dismiss (the "Motion for Relief") on September 22, 2015. *See* Appendix 3. In the Motion for Relief, Mr. Simpson argued that pursuant to Arizona Rule of Criminal Procedure 35.1, the Motion was deemed submitted on the record and the State waived its right to present evidence, testimony or argument on the Motion.

C. The Court Denied the Motion at the Hearing.

The court held an evidentiary hearing as to Mr. Simpson's release conditions on September 24, 2015. At this point, Mr. Simpson had been in custody for almost a full two months without any determination as to whether he was eligible for bail.

As the court began the evidentiary hearing, counsel for Mr. Simpson asserted, once again, that due process required an individualized evaluation of whether an alternative release condition could adequately protect community safety or his risk of flight, pointing the court to the arguments made in the Motion. 9/24/2015 A.M. Transcript, Appendix 4, at 5:5-6:7, 7:21-8:7, 8:21-10:10. In response, the State argued that once the court found proof evident of a non-bondable crime, that was the end of the matter and Mr. Simpson should be held without bond. *Id.* at 6:13-21, 10:14-19.[2]

Commissioner Miller initially declined to take a position on the question of the need to conduct an individual determination. Without committing to actually considering any evidence, she did, however, offer to allow defense counsel to make a brief presentation as to Mr. Simpson's flight risk. *Id.* at 11:2-10. Despite providing an opportunity to make a cursory presentation, this aspect of the hearing was a farce. There was no meaningful inquiry as to whether Mr. Simpson posed an unmanageable flight risk or the suitability of alternate release conditions. Moreover, the burden was placed on Mr. Simpson.

Demonstrating the meaningless nature of the presentation, at the end of the hearing the court explicitly rejected Mr. Simpson's request for an individualized determination, citing A.R.S. § 13-3961, Article II, section 22 of the Arizona

[2] The court denied any relief based on the State's failure to respond to the Motion. Appendix 4 at 7:8-10, 10:20-24.

Constitution and Arizona Rule of Criminal Procedure 7.4(B). 9/24/2015 P.M. Transcript, Appendix 5, at 40:18-23. The court took under advisement the question of whether the proof was evident or presumption great that Mr. Simpson committed an offense under A.R.S. § 13-3961.

D. After Six Weeks, the Court Determined that Mr. Simpson Should Be Held Without Bond.

Commissioner Miller ultimately found Mr. Simpson to be non-bondable on November 6, 2015, a full six weeks after the hearing and more than three months after Mr. Simpson's arrest. Reaffirming her earlier denial of the Motion, the court's minute entry made no mention of an individualized determination as to Mr. Simpson's flight risk or *Lopez-Valenzuela*. *See* November 6, 2015 Minute Entry, Appendix 6. The court's only findings concerned whether the proof was evident or presumption great that Defendant committed the alleged offenses under A.R.S. § 13-3961(A)(3). *Id.*

ARGUMENT

I. DUE PROCESS REQUIRES AN INDIVIDUALIZED EVALUATION.

A. Pretrial Detention Triggers Heightened Constitutional Scrutiny.

The United States Supreme Court has long found that the Due Process clause and the Excessive Bail provisions of the United States Constitution restrict the State's ability to detain an individual prior to trial. *See Stack v. Boyle,* 342 U.S. 1, 4-5 (1951); *Gerstein v. Pugh,* 420 U.S. 103, 114 (1975); *United States v.*

Salerno, 481 U.S. 739, 748-51 (1987); *Schall v. Martin*, 467 U.S. 253, 269-74 (1984). It is a "general rule of substantive due process that the government may not detain a person prior to a judgment of guilt in a criminal trial." *Salerno*, 481 U.S. at 749. This rule is a basic part of the American criminal trial system. "Unless [the] right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." *Stack*, 342 U.S. at 4.

Recognizing that pre-trial detention "may imperil the suspect's job, interrupt his source of income," and affect his "ability to assist in the preparation of his defense," heightened scrutiny is warranted when evaluating the constitutionality of pretrial detention because it infringes a "fundamental" right. *Gerstein*, 420 U.S. at 114; *see also Reno v. Flores*, 507 U.S. 292, 316 (1993) (O'Connor, J., concurring) ("The institutionalization of an adult by the government triggers heightened, substantive due process scrutiny."). To meet this heightened scrutiny, the restriction on liberty must be narrowly tailored and "carefully limited to serve a compelling governmental interest." *Lopez-Valenzuela*, 770 F.3d at 777. As the Supreme Court has held, "liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *Salerno*, 481 U.S. at 755.

B. *Lopez-Valenzuela* Found A.R.S. § 13-3961(A)(5) Unconstitutional.

Lopez-Valenzuela concerned the constitutionality of A.R.S. § 13-3961, but it dealt specifically with § 13-3961(A)(5), which provides for categorical denial of bond for undocumented immigrants charged with certain crimes. While the Ninth Circuit recognized that the State has a legitimate interest in ensuring the appearance of a defendant (and in protecting public safety), it ultimately held that A.R.S. § 13-3961(A)(5) was unconstitutional and failed to meet the Due Process requirement that pretrial detention be carefully limited. *Lopez-Valenzuela,* 770 F.3d at 783.

The Ninth Circuit's decision relied largely upon the Supreme Court's evaluation of the constitutionality of the federal Bail Reform Act ("Act") in *United States v. Salerno*, 481 U.S. 739 (1987). *Id.* at 784. In finding that the Act was sufficiently tailored to pass constitutional muster, the court in *Salerno* relied upon the Act's requirement that there be a "full-blown adversary hearing" where the government is required to "convince a neutral decision maker by clear and convincing evidence that ***no conditions of release can reasonably assure the safety of the community or any person***." *Salerno,* 420 U.S. at 755 (emphasis added). Emphasizing that this individualized assessment and heightened standard ensured that the Act's scope was carefully limited to those who actually posed a threat to the community, the Court found that "under these narrow circumstances"

the state's interest outweighed the "individual's strong interest in liberty." *Id.* at 750.

Relying on *Salerno*, the Ninth Circuit determined that § 13-3961(A)(5) was not carefully limited "because it employs an overbroad, irrebuttable presumption rather than an individualized hearing to determine whether a particular arrestee poses an unmanageable flight risk." 770 F.3d at 784. The court found that the State utilized an overbroad approach by categorically assuming that all undocumented immigrants presented a flight risk that could not be mitigated through alternative release conditions. *Id.* at 785. Indeed, the *Lopez-Valenzuela* court strongly suggested that such a categorical approach to pre-trial detention is never appropriate for a noncapital offense. *Id.* at 786-87. At the very least, any categorical rule would have to be "carefully limited" and the classification "would have to serve as a convincing proxy for unmanageable flight risk or dangerousness." *Id.* at 786.

Because undocumented status did not correlate closely with ***unmanageable*** flight risk, assumptions that unlawful residents supposedly lack strong ties to the community and could easily flee to another country did not suffice. *Id.* at 786. Moreover, § 13-3961(A)(5) failed to allow for a consideration of other methods to manage flight risk, such as bond requirements, monitoring or reporting requirements. *Id.* In failing to take a more "narrowly focused" and "carefully

limited" approach to preventing flight, the Ninth Circuit held that the non-bondable scheme was unconstitutionally overbroad because it resulted in the detention of those who posed no flight risk. *Id.* at 782.

C. Pursuant to the Principles in *Lopez-Valenzuela,* A.R.S. § 13-3961(A)(3) Fails to Comply with Due Process Absent an Individualized Determination.

A.R.S. § 13-3961(A)(3)'s requirement that all individuals charged with Sexual Conduct with a Minor be held non-bondable without an individualized assessment suffers from the same constitutional infirmities as § 13-3961(A)(5). It is neither narrowly tailored nor carefully limited.

Under A.R.S. § 13-3961, "[a] person who is in custody shall not be admitted to bail if the proof is evident or the presumption great" that the person is guilty of one of five charged offenses, including, as relevant here, sexual conduct with a minor who is under fifteen years of age. Thus, under the current interpretation by Arizona courts, when a person is charged with sexual conduct with a minor pursuant to A.R.S. § 13-1405, that person can be held without bond so long as the State satisfies the "proof is evident or the presumption great" standard. Although defendants are afforded an adversarial hearing that includes various rights, detention decisions for these offenses are based solely on a determination as to whether the defendant committed the underlying offense. There is no

"individualized hearing to determine whether a particular arrestee poses an unmanageable flight risk." *Lopez-Valenzuela*, 770 F.3d at 784.

In enacting § 13-3961(A)(3), Arizona adopted a categorical requirement that all individuals charged with Sexual Conduct with a Minor be held without bond (provided the proof is evident or presumption great). There is no evidence, however, to support § 13-3961(A)(3)'s categorical assumption that no conditions of release can protect the public from individuals charged with sexual conduct with a minor.[3] In fact, the contrary is true. Study after study monitoring recidivism rates for individuals convicted of sexual conduct with a minor (or its statutory equivalent) demonstrate that only a small percentage of offenders are later convicted of new crimes.

For example, a 2003 Department of Justice study that tracked sex offenders released from prison in 1994 revealed that only 20.4% of child sex offenders were convicted of a new crime within three years of their release and only 9.1% of all child sex offenders were sentenced to prison for the commission of a new offense. *See* Langan, Patrick et al., *Recidivism of Sex Offenders Released from Prison in 1994*, Bureau of Justice Statistics (November 2003), available at http://www.bjs.gov/content/pub/pdf/rsorp94.pdf. Comparatively, a 2010

[3] Neither the legislative history of § 13-3961 nor the publicity pamphlets promoting the amendments to Article II, section 22 of the Arizona Constitution, provide any data that suggests individuals charged with sexual conduct with a minor pose an unmanageable public safety risk. Ariz. Sec'y of State, 2002 Ballot Propositions, at 16-17 (2002).

Department of Justice study that tracked all prisoners released in 2005 found that over 67% of all offenders recidivated within 3 years of their release. *See* Durose, Matthew, *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010*, Bureau of Justice Statistics (April 2014), available at http://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf. As such, convicted offenders for this type of offense are over three (3) times ***less*** likely to commit a new offense than the general population of criminal offenders.

A 2009 Arizona Criminal Justice Commission study of released sex offenders provided similar results. Monitoring the recidivism rates of 290 sex offenders released from prison in 2001, this study found that less than 1% of the released "child molesters" were convicted of a new sex crime within three years of their release and no released "statutory rapists" were convicted of a new sex crime against a child or an adult. *See* Rodriguez, Nancy, *Recidivism of Sex Offenders Released from the Arizona Department of Corrections in 2001*, Arizona Criminal Justice Commission (2009), available at https://cvpcs.asu.edu/sites/default/files/content/projects/Rodriquez%20stevenson.pdf.

It defies common sense to suggest that categorical pretrial detention is necessary for a population that is statistically less likely to offend than the general population. It is also impossible to claim that a system that results in the pretrial

detention of so many individuals who are unlikely to commit new crimes is a "narrowly focused" and "carefully limited exception." *Salerno*, 481 U.S. at 749-50. Any scheme that categorically calls for the pretrial detention of everyone charged with a particular offense - when more than 75% of the individuals ***convicted*** of that offense do not commit new offenses within three years of their release from prison - is unquestionably unconstitutionally overbroad as it requires the pretrial detention of those who pose no threat to public safety and no risk of flight.[4]

Even if the category of individuals accused of Sexual Conduct with a Minor posed a heightened risk (an assumption undermined by all available evidence), such a heightened risk would be insufficient to justify the categorical impingement of a fundamental right. As the *Lopez-Valenzuela* court emphasized, the proper inquiry is not whether a category of pretrial defendants pose any risk, but whether the category of defendants pose an **"unmanageable" risk**. 770 F.3d at 786 (emphasis added).

Recent advances in technology provide the State with a number of highly effective tools to monitor the whereabouts of a defendant. Electronic monitoring that relies upon GPS satellite technology provides pretrial services officers with the

[4] Critically, the above-noted studies all measure the recidivism rates of ***convicted*** sex offenders whose crimes were serious enough to merit a sentence of imprisonment, not those merely charged with criminal conduct.

precise location of the defendant in real-time. Paired with other traditional release conditions, electronic monitoring can mitigate the risk that the defendant fails to appear or commits a new offense. In light of the technological advances in electronic monitoring and the effectiveness of other forms of supervision, there is no lawful justification for a categorical rule of pretrial detention for individuals charged with Sexual Conduct with a Minor.

Admittedly, this Court has previously stated that Arizona law does not require "that a risk of flight or a risk of recidivism be considered before bail is denied." *Simpson*, 207 Ariz. at 277 ¶ 49, 85 P.3d at 494. Unfortunately, and in light of *Lopez-Valenzuela*, this acknowledgment only confirms the unconstitutionality of § 13-3961. As the Ninth Circuit has made clear, the Due Process clause of the U.S. Constitution requires an individualized evaluation of an accused's public safety and flight risks prior to the denial of bail. *Lopez-Valenzuela*, 770 F.3d at 782.

As shown above, the irrebuttable presumption codified in A.R.S. § 13-3961 that individuals who commit certain crimes always present an unmanageable flight risk or risk to the community cannot constitutionally stand. Due process requires more than just a finding that the proof is evident or presumption great that the defendant committed a certain crime. Rather, the court must make an

individualized determination as to whether other release conditions adequately protect public safety or guard against the defendant's flight risk.

D. The Trial Court Rejected *Lopez-Valenzuela*.

As set forth above, the State was required to prove by clear and convincing evidence that no other release conditions could adequately protect public safety and guard against Mr. Simpson's risk of flight. However, the court denied Mr. Simpson's request for an individualized determination. 9/24/2015 P.M. Transcript, Appendix 5, at 40:18-23. Although the court did allow defense counsel to make a superficial presentation about Mr. Simpson's flight risk,[5] the court ultimately made it clear that it would give this evidence no weight, determining that the only material issue is whether the proof is evident or presumption great that the defendant committed the alleged crime. *See* Appendix 6.

The court's refusal to make an individualized determination deprived Mr. Simpson of due process. Had the court considered the evidence presented by defense counsel at the hearing, it is clear that release conditions are available that would guard against any of the State's concerns. This is especially true given that there are no allegations that Mr. Simpson actually engaged in any sexual contact

[5] The court also improperly placed the burden on Mr. Simpson rather than the State in contravention of the *Salerno* decision. *See* 481 U.S. at 750 (On top of showing that it was more likely than not that the arrestee committed the crime, the Government also had to "convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person" in a "full-blown adversary hearing.").

with any minors. Rather, he has been charged under a theory of accomplice liability for allegedly encouraging two minors to engage in sexual activities.

To be sure, Mr. Simpson also poses no flight risk. As was presented to the judge, his ties to the community are significant. His family is here, his small business is here, his church is here. Moreover, at the hearing, Mr. Simpson offered to stipulate to a multitude of release conditions, which would have sufficiently mitigated any risk of safety to the community or the alleged victims. 9/24/2015 P.M. Transcript, Appendix 5, at 28:25-29:9, 41:10-13, 41:13-15. As noted above, recent advances in technology ensure that Mr. Simpson would remain compliant with these release conditions.

Accordingly, the court's actions violated Mr. Simpson's right to due process.

E. Other Jurisdictions Support *Lopez-Valenzuela*.

The Ninth Circuit is not alone. Courts across the country have required individualized determinations to hold a defendant without bond.

In *Hunt v. Roth*, the Eighth Circuit examined the constitutionality of a Nebraska bail provision that denied bail when the "proof is evident or the presumption great" that the defendant committed sexual offenses involving "penetration by force or against the will of the victim." 648 F.2d 1148, 1165 (8th Cir. 1981), *vacated on other grounds sub nom. Murphy v. Hunt*, 455 U.S. 478

(1982). Similar to § 13-3961, the Nebraska bail provision did not require an individualized evaluation of the defendant's flight risk. *Id.* at 1162.

In finding the Nebraska bail provision unconstitutional, the Eighth Circuit focused on the failure of the provision to require the individual evaluation of the defendant's flight risk. *Id.* The "irrebuttable presumption that every individual charged with this particular offense is incapable of assuring his appearance by conditioning it upon reasonable bail or is too dangerous to be granted release" was a "fatal flaw." *Id.* at 1165. As noted by the court, "[t]he constitutional protections involved in the grant of pretrial release by bail are too fundamental to foreclose by arbitrary state decree." *Id.*

Numerous other state and federal courts have recognized the constitutional requirement of an individualized evaluation. *See Clark v. Hall*, 53 P.3d 416, 417 (Okla. 2002) ("We find the statute is unconstitutional because it violates the due process rights of citizens of this State to an individualized determination to bail."); *Witt v. Moran*, 572 A.2d 261, 267 (R.I. 1990) (procedural requirements of Federal Bail Reform Act, including allowing trial judge to consider alternative to bail and prompt detention hearing, "were necessary in order to make the statute conform with due process"); *Huihui v. Shimoda*, 644 P.2d 968, 978 (Haw. 1982) (state statute "exceed[ed] the bounds of reasonableness and due process by conclusively presuming a defendant's dangerousness from the fact that he had been charged

previously with a serious crime and presently with a felony, and by leaving no discretion in the trial judge to allow bail based on other factors"); *Steiner v. State*, 763 N.E.2d 1024, 1027-28 (Ind. Ct. App. 2002) ("we find that the trial court must make an individualized determination that the accused is likely to use drugs while on bail before it is reasonable to place restrictions on the individual based on that contingency"); *Escandar v. Ferguson*, 441 F. Supp. 53, 59 (S.D. Fla. 1977) (holding that it is "forbidden by the Due Process Clause to blanketly deny bail to the Petitioners on the basis of a permanent and irrebuttable presumption that they will not appear in court at all times their presence is required"; the defendant must be afforded a hearing on the issue); *Aime v. Com.*, 611 N.E.2d 204, 214 (Mass. 1993) (finding that statute did not "pass constitutional muster under the due process clause" because it did not provide for full hearing procedures); *United States v. Moore*, 607 F. Supp. 489, 494 (N.D. Cal. 1985) (holding that statute designating certain offenses as nonbailable "will not pass constitutional muster unless its provisions are construed in such a way that defendant can make a showing based on the particular facts of the case in order to overcome the presumption"); *Augustus v. Roemer*, 771 F. Supp. 1458, 1466 (E.D. La. 1991) ("a statute that creates a class for the purpose of limiting bail eligibility must also provide for a method of individualized determination citing a compelling reason or reasons when denying bail"); *State v. Wilcenski*, 827 N.W.2d 642, 650 (Wis. 2013)

(finding bail conditions justified because court made an individualized determination but cautioning that "a mandatory condition of release based solely on the nature of a charged crime without considering a defendant's individual circumstances constitutes an erroneous exercise of discretion in setting bail conditions").

II. SECTION 13-3961(A)(3) IS UNCONSTITUTIONALLY PUNITIVE.

In addition, § 13-3961(A)(3) constitutes unconstitutional punishment before trial. To determine whether a restriction on liberty, such as pretrial detention, "constitutes impermissible punishment or permissible regulation," courts first examine whether the restriction is based on an express intent to inflict punishment. *Salerno*, 481 U.S. at 747. If no express legislative intent is present, courts will infer a punitive purpose if the restriction appears excessive in relation to a nonpunitive purpose. *Id.*; *see also Lopez-Valenzuela*, 770 F.3d at 790.

Even assuming that § 13-3961(A)(3) was adopted for a permissible purpose, it is excessive to any nonpunitive purpose, such as managing flight risks, because it prevents any individual consideration as to the necessity of the arrestee's pretrial detention. *Lopez-Valenzuela*, 770 F.3d at 790. The statute necessarily sweeps in individuals who may not pose any danger to the community or flight risk. Indeed, there is no mechanism to ensure that pretrial detention is limited to cases where it

would serve the nonpunitive purpose. This "*severe* lack of fit" between objective and restriction shows that § 13-3961(A)(3) is punitive rather than regulatory. *Id.*

III. THE COURT SHOULD DETERMINE THAT A.R.S. § 13-3961(A)(3) IS UNCONSTITUTIONAL OR, IN THE ALTERNATIVE, PROVIDE A FULL INDIVIDUALIZED DETERMINATION.

"Where differing constructions of a statute are possible," the court has a duty "to construe it in such a manner that it will be constitutional." *Schecter v. Killingsworth*, 93 Ariz. 273, 282, 380 P.2d 136, 142 (1963); *see also State v. McDonald*, 191 Ariz. 118, 120, 952 P.2d 1188, 1190 (App. 1998) ("This court has a duty to construe a statute so that it will be constitutional if possible."). This is not a blank check to effectively rewrite the statute. The court "cannot interpret a statute in such a way as to do violence to the words or the legislature's intent." *Readenour v. Marion Power Shovel, a Div. of Dresser Indus., Inc.*, 149 Ariz. 442, 445, 719 P.2d 1058, 1061 (1986). Accordingly, if no plausible reading of the statute would comply with the constitution, the statute must be struck down as void. For example, in *State v. Seyrafi*, 201 Ariz. 147, 151 ¶ 19, 32 P.3d 430, 434 (App. 2001), the court of appeals found that a city ordinance creating a mandatory evidentiary presumption could not be interpreted to be constitutional and hence was facially invalid and void as unconstitutional.

In light of the Ninth Circuit's decision in *Lopez-Valenzuela*, it is clear that § 13-3961(A)(3) cannot be interpreted in a constitutional manner. The plain

language of the statute clearly states that bond eligibility hinges solely on whether the "proof is evident or presumption great" that the defendant committed the offense. A.R.S. § 13-3961(A). This language cannot be construed in a manner consistent with the constitutional requirement that bond eligibility hinges on an individual evaluation of the defendant.

To the extent, however, that this Court believes the statutory language may be interpreted in a manner that allows for the constitutionally mandated individualized evaluation, than it must immediately set a hearing regarding Mr. Simpson's eligibility for bond. Following this hearing, Mr. Simpson must be released unless the State is able to "convince a neutral decision maker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person." *Salerno,* 420 U.S. at 755.

IV. THE TRIAL COURT FAILED TO TIMELY RULE AS REQUIRED BY *SIMPSON*.

The court's failure to comply with due process was not limited solely to its failure to provide an individualized determination. The court also failed to rule in a timely manner.

As previously detailed, Mr. Simpson filed his Motion on September 4, 2015. A hearing on the Motion was initially scheduled for September 17, 2015 in the afternoon. *See* 9/17/2015 Transcript, Appendix 7. Just hours before the hearing

was to start, the State disclosed numerous items to the defense, including interviews with the alleged victims.[6] *Id.* at 5:17-6:4, 13:12-22.

In order to allow the defense time to review this belated disclosure, the court continued the hearing for a week. The court conducted the evidentiary hearing on September 24, 2014. *See* Appendices 4, 5. But the court did not rule on Mr. Simpson's Motion until November 6, 2015 – forty-three days after the conclusion of the evidentiary hearing. *See* Appendix 6. Absent from the court's minute entry was any explanation as to reason for the lengthy delay in ruling on the Motion.

A. Timeliness is Meaningful in Bail Determination.

Pursuant to Arizona Rule of Criminal Procedure 7.4(b), if the defendant's motion "involves whether the person shall be held without bail . . . a hearing on the motion shall be held on the record as soon as practicable but not later than seven days after the filing of the motion." *Id.* Arizona law is clear that "while the accused may be held in custody as he awaits a bail hearing, the hearing should take place as soon as is practicable to ensure that the accused is afforded due process and to maintain the presumption of innocence." *See Simpson*, 207 Ariz. at 277 ¶ 55, 85 P.3d at 494.

While Arizona law is silent regarding the time frame in which a court must rule on a motion for bail hearing, Rule 7.4(b) and *Simpson* make it clear that the

[6] The State was in possession of this evidence from the earliest stages of the investigation.

decision must also issue as soon as practicable. Due process cannot be suspended pending a decision on the issue given a defendant remains in custody during this determination. *See, e.g.*, U.S. Const., Amend. 5, 14; *Simpson*, 207 Ariz. at 277 ¶ 55, 85 P.3d at 494. Moreover, other jurisdictions have explicitly recognized that in order to adequately comply with the Fourteenth Amendment, a court must speedily determine a defendant's release conditions. *See Mello v. Superior Court*, 370 A.2d 1262, 1266-67 (R.I. 1977) (holding that a defendant awaiting a bail revocation hearing has a right to a speedy determination of his status); *Marshall v. Casey*, 324 S.E.2d 346, 351-52 (W.Va. 1984) (holding that in a bail revocation hearing "a speedy and thorough determination of the revocation issue" must be facilitated).

It would be absurd to conclude that a bail hearing must occur no later than seven days, but that the bail hearing court can issue its ruling forty-three days after the hearing. This forty-three day delay prejudiced Mr. Simpson in that he continued to remain in custody, while also further delaying the filing of this Petition for Special Action.

In order to ensure that all defendants are afforded due process, Arizona must clarify the law – that a defendant awaiting a ruling on a bail hearing has a due process right throughout the bail review process. *See Simpson*, 207 Ariz. at 277, 85 P.3d at 494.

Here, Mr. Simpson was denied a due process right to a speedy determination of his release conditions. This unexplained delay denied Mr. Simpson his fundamental due process right to liberty.

CONCLUSION

The mandate set forth by the Ninth Circuit was clear. Due Process requires an individualized assessment where the burden is on the State to prove that no other release conditions can assure the safety of the public and a defendant's appearance in future proceedings. The categorical assumption that any individual charged with Sexual Conduct with a Minor presents an unmanageable risk is unsupported by evidence and unconstitutionally overbroad. Accordingly, A.R.S. § 13-3961(A)(3) fails to comply with due process.

Here, in contravention of the principles announced in *Salerno* and *Lopez-Valenzuela*, the court refused to make an individualized determination as to Mr. Simpson's flight risk or the adequacy of other release conditions. Furthermore, it took over three months from Mr. Simpson's arrest for him to receive a ruling from the trial court concerning his bond eligibility. During those three months, Mr. Simpson was held without bond. This by itself is a violation of Mr. Simpson's right to due process.

Intervention by this Court is necessary to correct this violation of a fundamental right, to resolve the conflict between this Court's rulings and *Lopez-*

Valenzuela, and to ensure that future defendants charged with non-bondable crimes under A.R.S. § 13-3961(A)(3) receive the due process afforded to them under the U.S. and Arizona Constitutions.

RESPECTFULLY SUBMITTED this 20th day of November, 2015.

GALLAGHER & KENNEDY P.A.

By /s/ Woodrow C. Thompson
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COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

JASON DONALD SIMPSON, aka JASON DONALD SIMPSON, SR., Petitioner, v. HON. PHEMONIA MILLER, JUDGE OF THE SUPERIOR COURT OF THE STATE OF ARIZONA, IN AND FOR THE COUNTY OF MARICOPA, Respondent, and THE STATE OF ARIZONA, Real Party in Interest.	Case No. **CERTIFICATE OF COMPLIANCE**

Under Ariz. R. Civ. P. 14(b), the undersigned certifies that the Petition for Special Action, including headings, footnotes and block quotes, is double-spaced, uses proportionately-spaced typeface of Times New Roman 14-point, and contains 6,439 words according to Microsoft Word.

DATED this 20th day of November, 2015.

/s/ Woodrow C. Thompson
Woodrow C. Thompson

COURT OF APPEALS

STATE OF ARIZONA

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STATE OF ARIZONA)
) ss.
County of Maricopa)

I, Woodrow C. Thompson, being first duly sworn, certify that on the 20th day of November, 2015, the Petition for Special Action and Appendix to the Petition for Special Action were electronically filed with the Clerk of the Court of Appeals, Division One.

I further certify that on this same date I caused to be mailed two (2) copies of the foregoing via U.S. Mail to:

Brad Miller
Maricopa County Attorney's Office
301 W. Jefferson, 5th Floor
Phoenix, AZ 85003

/s/ Woodrow C. Thompson
Woodrow C. Thompson

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CASE NAME: **Jason Donald Simpson aka Jason Donald Simpson, Sr. vs. Phemonia Miller**	CASE NUMBER: **SA-15-0292**

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COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

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APPENDIX TO PETITION FOR SPECIAL ACTION

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

THE STATE OF ARIZONA,

Plaintiff,

vs.

JASON DONALD SIMPSON,
aka JASON DONALD SIMPSON, SR

Defendant.

CR2015-134762-001

INDICTMENT
645 GJ 436

COUNT 1: PUBLIC SEXUAL INDECENCY TO A MINOR, A CLASS 5 FELONY (JASON DONALD SIMPSON)
COUNT 2: PUBLIC SEXUAL INDECENCY TO A MINOR, A CLASS 5 FELONY (JASON DONALD SIMPSON)
COUNT 3: PUBLIC SEXUAL INDECENCY TO A MINOR, A CLASS 5 FELONY (JASON DONALD SIMPSON)
COUNT 4: PUBLIC SEXUAL INDECENCY TO A MINOR, A CLASS 5 FELONY (JASON DONALD SIMPSON)
COUNT 5: INVOLVING OR USING MINORS IN DRUG OFFENSES, A CLASS 2 FELONY DANGEROUS CRIME AGAINST CHILDREN (JASON DONALD SIMPSON)

COUNT 6: INVOLVING OR USING MINORS IN DRUG OFFENSES, A CLASS 2 FELONY DANGEROUS CRIME AGAINST CHILDREN (JASON DONALD SIMPSON)
COUNT 7: CONTRIBUTING TO DELINQUENCY OF A CHILD, A CLASS 1 MISDEMEANOR (JASON DONALD SIMPSON)
COUNT 8: CONTRIBUTING TO DELINQUENCY OF A CHILD, A CLASS 1 MISDEMEANOR (JASON DONALD SIMPSON)
COUNT 9: PUBLIC SEXUAL INDECENCY TO A MINOR, A CLASS 5 FELONY (JASON DONALD SIMPSON)
COUNT 10: PUBLIC SEXUAL INDECENCY TO A MINOR, A CLASS 5 FELONY (JASON DONALD SIMPSON)
COUNT 11: ATTEMPT TO COMMIT MOLESTATION OF A CHILD, A CLASS 3 FELONY DANGEROUS CRIME AGAINST CHILDREN (JASON DONALD SIMPSON)
COUNT 12: ATTEMPT TO COMMIT MOLESTATION OF A CHILD, A CLASS 3 FELONY DANGEROUS CRIME AGAINST CHILDREN (JASON DONALD SIMPSON)
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COUNT 15: CHILD PROSTITUTION, A CLASS 2 FELONY DANGEROUS CRIME AGAINST CHILDREN (JASON DONALD SIMPSON)
COUNT 16: CHILD PROSTITUTION, A CLASS 2 FELONY DANGEROUS CRIME AGAINST CHILDREN (JASON DONALD SIMPSON)
COUNT 17: INVOLVING OR USING MINORS IN DRUG OFFENSES, A CLASS 2 FELONY (JASON DONALD SIMPSON)
COUNT 18: INVOLVING OR USING MINORS IN DRUG OFFENSES, A CLASS 2 FELONY DANGEROUS CRIME AGAINST CHILDREN (JASON DONALD SIMPSON)

COUNT 19: CONTRIBUTING TO DELINQUENCY OF A CHILD, A CLASS 1 MISDEMEANOR (JASON DONALD SIMPSON)
COUNT 20: CONTRIBUTING TO DELINQUENCY OF A CHILD, A CLASS 1 MISDEMEANOR (JASON DONALD SIMPSON)
COUNT 21: FURNISHING OBSCENE OR HARMFUL ITEMS TO MINORS, A CLASS 4 FELONY (JASON DONALD SIMPSON)
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COUNT 28: ATTEMPT TO COMMIT MOLESTATION OF A CHILD, A CLASS 3 FELONY DANGEROUS CRIME AGAINST CHILDREN (JASON DONALD SIMPSON)
COUNT 29: ATTEMPT TO COMMIT SEXUAL CONDUCT WITH A MINOR, A CLASS 3 FELONY DANGEROUS CRIME AGAINST CHILDREN (JASON DONALD SIMPSON)
COUNT 30: ATTEMPT TO COMMIT SEXUAL CONDUCT WITH A MINOR, A CLASS 3 FELONY DANGEROUS CRIME AGAINST CHILDREN (JASON DONALD SIMPSON)
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COUNT 32: ATTEMPT TO COMMIT SEXUAL CONDUCT WITH A MINOR, A

CLASS 3 FELONY DANGEROUS CRIME AGAINST CHILDREN (JASON DONALD SIMPSON)
COUNT 33: ATTEMPT TO COMMIT SEXUAL CONDUCT WITH A MINOR, A CLASS 3 FELONY DANGEROUS CRIME AGAINST CHILDREN (JASON DONALD SIMPSON)

The Grand Jurors of Maricopa County, Arizona, accuse JASON DONALD SIMPSON, on August 4, 2015, charging that in Maricopa County, Arizona:

COUNT 1:

JASON DONALD SIMPSON, on or between May 1, 2015 and July 13, 2015, in the presence of Victim A, intentionally or knowingly did engage in an act of sexual contact and was reckless about whether a minor who was under fifteen years of age was present, (to wit: first incident with Victim B present) in violation of A.R.S. §§ 13-1403, 13-1401, 13-3821, 13-610, 13-701, 13-702, 13-801 and 13-812.

COUNT 2:

JASON DONALD SIMPSON, on or between May 1, 2015 and July 13, 2015, in the presence of Victim B, intentionally or knowingly did engage in an act of sexual contact and was reckless about whether a minor who was under fifteen years of age was present, (to wit: first incident with Victim A present) in violation of A.R.S. §§ 13-1403, 13-1401, 13-3821, 13-610, 13-701, 13-702, 13-801 and 13-812.

COUNT 3:

JASON DONALD SIMPSON, on or between May 1, 2015 and July 13, 2015, in the presence of Victim A, intentionally or knowingly did engage in an act of sexual contact and was reckless about whether a minor who was under fifteen years of age was present, (to wit: last incident with Victim B present) in violation of A.R.S. §§ 13-1403, 13-1401, 13-3821, 13-610, 13-701, 13-702, 13-801 and 13-812.

COUNT 4:

JASON DONALD SIMPSON, on or between May 1, 2015 and July 13, 2015, in the presence of Victim B, intentionally or knowingly did engage in an act of sexual contact and was reckless about whether a minor who was under fifteen years of age was present, (to wit: last incident with Victim A present) in violation of A.R.S. §§ 13-1403, 13-1401, 13-3821, 13-610, 13-701, 13-702, 13-801 and 13-812.

COUNT 5:

JASON DONALD SIMPSON, on or between June 1, 2015 and July 27, 2015, knowingly did sell, transfer, or offer to sell or transfer marijuana to Victim B, a minor under fifteen years of age, (to wit: first incident with Victim C present) in violation of A.R.S. §§ 13-3401, 13-3405, 13-3409, 13-3418, 13-705, 13-701, 13-702, and 13-801.

COUNT 6:

JASON DONALD SIMPSON, on or between June 1, 2015 and July 27, 2015, knowingly did sell, transfer, or offer to sell or transfer marijuana to Victim C, a minor under fifteen years of age,(to wit: first incident with Victim B present) in violation of A.R.S. §§ 13-3401, 13-3405, 13-3409, 13-3418, 13-705, 13-701, 13-702, and 13-801.

COUNT 7:

JASON DONALD SIMPSON, on or between June 1, 2015 and July 27, 2015, did cause, encourage, or contribute to or be responsible for the delinquency of Victim B, a child, (to wit: first incident with Victim C present; alcohol) in violation of A.R.S. §§ 13-3613, 13-3612, 13-3614, 13-707, and 13-802.

COUNT 8:

JASON DONALD SIMPSON, on or between June 1, 2015 and July 27, 2015, did cause, encourage, or contribute to or be responsible for the delinquency of Victim C, a child, (to wit: first incident with Victim B present: alcohol) in violation of A.R.S. §§ 13-3613, 13-3612, 13-3614, 13-707, and 13-802.

COUNT 9:

JASON DONALD SIMPSON, on or between June 1, 2015 and July 27, 2015, in the presence of Victim B, intentionally or knowingly did engage in an act of sexual contact and was reckless about whether a minor who was under fifteen years of age was present, (to wit: first incident with Victim C present) in violation of A.R.S. §§ 13-1403, 13-1401, 13-3821, 13-610, 13-701, 13-702, 13-801 and 13-812.

COUNT 10:

JASON DONALD SIMPSON, on or between June 1, 2015 and July 27, 2015, in the presence of Victim C, intentionally or knowingly did engage in an act of sexual contact and was reckless about whether a minor who was under fifteen years of age was present, (to wit: first incident with Victim B present) in violation of A.R.S. §§ 13-1403, 13-1401, 13-3821, 13-610, 13-701, 13-702, 13-801 and 13-812.

COUNT 11:

JASON DONALD SIMPSON, on or between June 1, 2015 and July 27, 2015, intentionally or knowingly did attempt to molest Victim B, a child under the age of fifteen years, by causing another to engage in sexual contact with the Victim B, a child under fifteen years of age, (to wit: first incident with Victim C present, Defendant asked them to touch his penis) in violation of A.R.S. §§ 13-1001,13-1401, 13-1410, 13-3821, 13-610, 13-705, 13-701, 13-702, and 13-801.

COUNT 12:

JASON DONALD SIMPSON, on or between June 1, 2015 and July 27, 2015, intentionally or knowingly did attempt to molest Victim C, a child under the age of fifteen years, by causing another to engage in sexual contact with the Victim C, a child under fifteen years of age,(to wit: first incident with Victim B present, Defendant asked them to touch his penis) in violation of A.R.S. §§ 13-1001,13-1401, 13-1410, 13-3821, 13-610, 13-705, 13-701, 13-702, and 13-801.

COUNT 13:

JASON DONALD SIMPSON, on or between June 1, 2015 and July 27, 2015, intentionally or knowingly did attempt to engage in sexual intercourse or oral sexual contact with Victim B, who was a minor under the age of fifteen years, (to wit: first incident with Victim C present, Defendant asked them to "finger" eachother) in violation of A.R.S. §§ 13-1001,13-1401, 13-1405, 13-3821, 13-610, 13-705, 13-301, 13-302, 13-303, 13-304, 13-701, 13-702, and 13-801.

COUNT 14:

JASON DONALD SIMPSON, on or between June 1, 2015 and July 27, 2015, intentionally or knowingly did attempt to engage in sexual intercourse or oral sexual contact with Victim C, who was a minor under the age of fifteen years, (to wit: first incident with Victim B present, Defendant asked them to "finger" eachother) in violation of A.R.S. §§ 13-1001,13-1401, 13-1405, 13-3821, 13-610, 13-705, 13-301, 13-302, 13-303, 13-304, 13-701, 13-702, and 13-801.

COUNT 15:

JASON DONALD SIMPSON, on or between June 1, 2015 and July 27, 2015, who was at least eighteen years of age, knowingly did engage in prostitution with Victim B, a minor who was under fifteen years of age, (to wit: last incident with Victim C present) in violation of A.R.S. §§ 13-3212, 13-3211, 13-705, 13-701, 13-702, and 13-801.

COUNT 16:

JASON DONALD SIMPSON, on or between June 1, 2015 and July 27, 2015, who was at least eighteen years of age, knowingly did engage in prostitution with Victim C, a minor who was under fifteen years of age, (to wit: last incident with Victim B present) in violation of A.R.S. §§ 13-3212, 13-3211, 13-705, 13-701, 13-702, and 13-801.

COUNT 17:

JASON DONALD SIMPSON, on or between June 1, 2015 and July 27, 2015, knowingly did sell, transfer, or offer to sell or transfer marijuana to Victim B, a minor under fifteen years of

age, (to wit: last incident with Victim C present) in violation of A.R.S. §§ 13-3401, 13-3405, 13-3409, 13-3418, 13-705, 13-701, 13-702, and 13-801.

COUNT 18:

JASON DONALD SIMPSON, on or between June 1, 2015 and July 27, 2015, knowingly *did sell, transfer, or offer to sell or transfer marijuana to Victim C, a minor under fifteen years of* age, (to wit: last incident with Victim B present, alcohol and/or e-cigarette) in violation of A.R.S. §§ 13-3401, 13-3405, 13-3409, 13-3418, 13-705, 13-701, 13-702, and 13-801.

COUNT 19:

JASON DONALD SIMPSON, on or between June 1, 2015 and July 27, 2015, did cause, encourage, or contribute to or be responsible for the delinquency of Victim B, a child, (to wit: last incident with Victim C present, alcohol and/or e-cigarette) in violation of A.R.S. §§ 13-3613, 13-3612, 13-3614, 13-707, and 13-802.

COUNT 20:

JASON DONALD SIMPSON, on or between June 1, 2015 and July 27, 2015, did cause, encourage, or contribute to or be responsible for the delinquency of Victim C, a child, (to wit: last incident with Victim B present, alcohol and/or e-cigarette) in violation of A.R.S. §§ 13-3613, 13-3612, 13-3614, 13-707, and 13-802.

COUNT 21:

JASON DONALD SIMPSON, on or between June 1, 2015 and July 27, 2015, with knowledge of the character of the item involved, recklessly did furnish, present, provide, make available, give, lend, show, advertise, or distribute to Victim B, a minor, a vibrator and/or dildo and/or strap on, an item that is harmful to minors, (to wit: last incident with Victim C present) in violation of A.R.S. §§ 13-3501, 13-3506, 13-701, 13-702, and 13-801.

COUNT 22:

JASON DONALD SIMPSON, on or between June 1, 2015 and July 27, 2015, with knowledge of the character of the item involved, recklessly did furnish, present, provide, make

available, give, lend, show, advertise, or distribute to Victim C , a minor, a vibrator and/or dildo and/or strap on, an item that is harmful to minors, (to wit: last incident with Victim B present) in violation of A.R.S. §§ 13-3501, 13-3506, 13-701, 13-702, and 13-801.

COUNT 23:

JASON DONALD SIMPSON, on or between June 1, 2015 and July 27, 2015, intentionally or knowingly did engage in sexual intercourse or oral sexual contact with Victim B, who was a minor under the age of fifteen years, (to wit: last incident with Victim C present, penetration with vibrator and/or dildo and/or strap on) in violation of A.R.S. §§ 13-1401, 13-1405, 13-3821, 13-610, 13-705, 13-301, 13-302, 13-303, 13-304, 13-701, 13-702, and 13-801.

COUNT 24:

JASON DONALD SIMPSON, on or between June 1, 2015 and July 27, 2015, intentionally or knowingly did engage in sexual intercourse or oral sexual contact with Victim C, who was a minor under the age of fifteen years, (to wit: last incident with Victim B present, penetration with vibrator and/or dildo and/or strap on) in violation of A.R.S. §§ 13-1401, 13-1405, 13-3821, 13-610, 13-705, 13-301, 13-302, 13-303, 13-304, 13-701, 13-702, and 13-801.

COUNT 25:

JASON DONALD SIMPSON, on or between June 1, 2015 and July 27, 2015, in the presence of Victim B, intentionally or knowingly did engage in an act of sexual contact and was reckless about whether a minor who was under fifteen years of age was present, (to wit: last incident with Victim C present) in violation of A.R.S. §§ 13-1403, 13-1401, 13-3821, 13-610, 13-701, 13-702, 13-801 and 13-812.

COUNT 26:

JASON DONALD SIMPSON, on or between June 1, 2015 and July 27, 2015, in the presence of Victim C, intentionally or knowingly did engage in an act of sexual contact and was reckless about whether a minor who was under fifteen years of age was present, (to wit: last

incident with Victim B present) in violation of A.R.S. §§ 13-1403, 13-1401, 13-3821, 13-610, 13-701, 13-702, 13-801 and 13-812.

COUNT 27:

JASON DONALD SIMPSON, on or between June 1, 2015 and July 27, 2015, intentionally or knowingly ~~did~~ attempted to molest Victim B, a child under the age of fifteen years, by causing another to engage in sexual contact with the Victim B, a child under fifteen years of age, (to wit: last incident with Victim C present, Defendant asked them to touch his penis) in violation of A.R.S. §§ 13-1401, 13-1410, 13-3821, 13-610, 13-705, 13-701, 13-702, and 13-801.

COUNT 28:

JASON DONALD SIMPSON, on or between June 1, 2015 and July 27, 2015, intentionally or knowingly did attempt to molest Victim C, a child under the age of fifteen years, by causing another to engage in sexual contact with the Victim C, a child under fifteen years of age, (to wit: last incident with Victim B present, Defendant asked them to touch his penis) in violation of A.R.S. §§ 13-1001,13-1401, 13-1410, 13-3821, 13-610, 13-705, 13-701, 13-702, and 13-801.

COUNT 29:

JASON DONALD SIMPSON, on or between June 1, 2015 and July 27, 2015, intentionally or knowingly did attempt to engage in sexual intercourse or oral sexual contact with Victim B, who was a minor under the age of fifteen years, (to wit: last incident with Victim C present, Defendant asked to put his penis in them) in violation of A.R.S. §§ 13-1001,13-1401, 13-1405, 13-3821, 13-610, 13-705, 13-701, 13-702, and 13-801.

COUNT 30:

JASON DONALD SIMPSON, on or between June 1, 2015 and July 27, 2015, intentionally or knowingly did attempt to engage in sexual intercourse or oral sexual contact with Victim C, who was a minor under the age of fifteen years, (to wit: last incident with Victim B

present, Defendant asked to put his penis in them) in violation of A.R.S. §§ 13-1001,13-1401, 13-1405, 13-3821, 13-610, 13-705, 13-701, 13-702, and 13-801.

COUNT 31:

JASON DONALD SIMPSON, on or between June 1, 2015 and July 27, 2015, intentionally or knowingly did attempt to engage in sexual intercourse or oral sexual contact with Victim B, who was a minor under the age of fifteen years, (to wit: last incident with Victim C present, Defendant asked them to "finger" eachother) in violation of A.R.S. §§ 13-1001,13-1401, 13-1405, 13-3821, 13-610, 13-705, 13-301, 13-302, 13-303, 13-304, 13-701, 13-702, and 13-801.

COUNT 32:

JASON DONALD SIMPSON, on or between June 1, 2015 and July 27, 2015, intentionally or knowingly did attempt to engage in sexual intercourse or oral sexual contact with Victim C, who was a minor under the age of fifteen years, (to wit: last incident with Victim B present, Defendant asked them to "finger" eachother) in violation of A.R.S. §§ 13-1001,13-1401, 13-1405, 13-3821, 13-610, 13-705, 13-301, 13-302, 13-303, 13-304, 13-701, 13-702, and 13-801.

COUNT 33:

JASON DONALD SIMPSON, on or between June 1, 2015 and July 27, 2015, intentionally or knowingly did attempt to engage in sexual intercourse or oral sexual contact with Victim C, who was a minor under the age of fifteen years, (to wit: last incident with Victim B present, Defendant asked her to suck his penis) in violation of A.R.S. §§ 13-1001,13-1401, 13-1405, 13-3821, 13-610, 13-705, 13-301, 13-302, 13-303, 13-304, 13-701, 13-702, and 13-801.

a true bill
("A True Bill")

WILLIAM G MONTGOMERY
MARICOPA COUNTY ATTORNEY

Sara Micflikier
Deputy County Attorney

mm

Date: August 4, 2015

FOREPERSON OF THE GRAND JURY

IMPORTANT NOTICE

JVSC

THIS IS A JUVENILE VICTIM SEX CRIME CASE

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ARIZONA SUPERIOR COURT

MARICOPA COUNTY

THE STATE OF ARIZONA, Plaintiff, vs. JASON DONALD SIMPSON, aka JASON DONALD SIMPSON, SR., Defendant.	Case No. CR2015-134762-001 **DEFENDANT'S MOTION FOR IMMEDIATE RELEASE** **OR, IN THE ALTERNATIVE,** **DEFENDANT'S MOTION FOR BAIL HEARING WITH AN INDIVIDUALIZED EVALUATION AS MANDATED BY THE U.S. AND ARIZONA CONSTITUTIONS** (Oral Argument Requested) (The Hon. Phemonia Miller)

On October 15, 2014, the Ninth Circuit Court of Appeals held that A.R.S. § 13-3961 was unconstitutional because it did not require an individualized hearing to determine whether a particular arrestee poses an unmanageable flight risk [or public safety

threat]." See Lopez-Valenzuela v. Arpaio, 770 F.3d 772, 785 (9th Cir. 2014). In light of this ruling, the Defendant, Jason Donald Simpson ("Mr. Simpson" or the "Defendant"), by and through undersigned counsel, requests his immediate release from pretrial detention.

In the alternative, Mr. Simpson requests that this Court expeditiously set a hearing to determine his eligibility for bond. Pursuant to the mandate of the Ninth Circuit, at the conclusion of this hearing, Mr. Simpson must be released unless the State can demonstrate, by clear and convincing evidence, that:

(1) the proof is evident and the presumption great that Mr. Simpson committed one of the offenses enumerated in A.R.S. § 13-3961; ***and***

(2) there are no conditions of release that can adequately protect public safety or guard against the risk of flight.

Lopez-Valenzuela, 770 F.3d at 785.

This Motion is supported by the attached Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND PROCEDURAL POSTURE.

On July 27, 2015, Jason Donald Simpson was arrested by the Phoenix Police Department ("PPD") following a traffic stop. See, e.g., Phoenix Police Department Report No. 2015-02416200, Jul. 26, 2015. The arrest was the culmination of a short and limited investigation into conflicting allegations offered against Mr. Simpson by his girlfriend's daughter and her friend. These allegations arose after years of tension between the girlfriend's ex-husband and Mr. Simpson.

The investigation was launched less than 24 hours before Mr. Simpson's arrest. It began when the alleged victims claimed that Mr. Simpson allowed them to consume edible marijuana and that he watched them engage in inappropriate sexual conduct with each other. Although the alleged victims claimed that Mr. Simpson masturbated while watching them, none of the alleged victims claimed that he ever physically touched them.

As they provided more-detailed accounts of their allegations, the alleged victims' stories diverged and the two provided inconsistent details regarding the nature of their sexual conduct. While one alleged victim claimed that the two vaginally penetrated one another, the other alleged victim denied that any penetration occurred. Although there were other inconsistencies in the alleged victims' stories, PPD detectives chose to quickly arrest Mr. Simpson without further investigation or the identification of any evidence that would corroborate the allegations.

While none of the allegations lent themselves to charging Mr. Simpson with a "non-bondable" offense as enumerated in A.R.S. §13-3961, the State seemed determined to prevent Mr. Simpson's release. Ignoring the contradictory testimony regarding the nature of the alleged sexual conduct, and relying on the unusual theory that Mr. Simpson was an accomplice to the alleged sexual activities of the two juveniles, the State secured an indictment of Mr. Simpson on two counts of Sexual Conduct with a Minor, in violation of A.R.S. §§ 13-1405(A) and 13-303, in addition to other counts. As a result of the indictment for Sexual Conduct with a Minor, Mr. Simpson was held without bond pursuant to § 13-3961.

The State's machinations to hold Mr. Simpson without bond ignore the fact that he neither poses a public safety threat nor a flight risk. Mr. Simpson has spent his entire adult life living in Arizona. He has built a successful automobile dealership and other small businesses, employing twenty-seven (27) individuals. His entire family resides in Arizona, and he is very active in both church and community activities. The totality of the circumstances does not warrant that this court continue to hold Mr. Simpson without bail.

II. THE UNITED STATES AND ARIZONA CONSTITUTIONS REQUIRE THIS COURT TO CONDUCT AN INDIVIDUALIZED EVALUATION OF MR. SIMPSON'S RISK TO DETERMINE BOND ELIGIBILITY.

Mr. Simpson's continued detention is unlawful. The State has not demonstrated by clear and convincing evidence that no conditions of release can protect the public or ensure the appearance of Mr. Simpson at future hearings. As is set forth below, the U.S. and Arizona Constitutions demand such a showing before a pretrial defendant can be held without bond for a non-capital offense.

A. Pretrial Detention Triggers Heightened Constitutional Scrutiny.

The United States Supreme Court has long found that the Due Process clause and the Excessive Bail provisions of the United States Constitution restrict the state's ability to detain an individual prior to trial. See Stack v. Boyle, 342 U.S. 1, 4-5 (1951); Gerstein v. Pugh, 420 U.S. 103, 114 (1975); United States v. Salerno, 481 U.S. 739, 748-51 (1987); Schall v. Martin, 467 U.S. 253, 269-74 (1984). Recognizing that pre-trial detention "may imperil the suspect's job, interrupt his source of income," and affect his "ability to assist in the preparation of his defense," the Court has found that heightened scrutiny is warranted when evaluating the constitutionality of pretrial detention given that detention impinges on a fundamental right. Salerno, 481 U.S. at 755.

The heightened scrutiny required when analyzing the pretrial deprivation of liberty requires that the restriction on liberty be narrowly tailored and "carefully limited." Lopez-Valenzuela, 770 F.3d at 783. As the Supreme Court has held, "liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." Salerno, 481 U.S. at 755.

B. Due Process Mandates an Individualized Evaluation to Support Pre-Trial Detention.

As the Ninth Circuit recently confirmed, A.R.S. § 13-3961 is neither narrowly tailored nor carefully limited. Lopez-Valenzuela, 770 F.3d at 783. Although defendants are afforded an adversarial hearing that includes various rights, detention decisions are

based solely on a determination as to whether the defendant committed the underlying offense and do not require "an individualized hearing to determine whether a particular arrestee poses an unmanageable flight risk." Id. As such, Mr. Simpson's continued detention runs afoul of the holdings of both the United States Supreme Court and the Ninth Circuit that the constitutional guarantee of due process requires an individualized determination of the defendant's public safety and flight risk. Salerno, 481 U.S. at 755; Lopez-Valenzuela, 770 F.3d. at 788.

The Ninth Circuit's decision relied largely upon the Supreme Court's evaluation of the constitutionality of the federal Bail Reform Act ("Act") in United States v. Salerno. Lopez-Valenzuela, 770 F.3d. at 784. In finding that the Act was sufficiently tailored to pass constitutional muster, the Salerno relied upon the Act's requirement that there be a "full-blown adversary hearing" where the government is required to "*convince a neutral decision maker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person.*" Salerno, 420 U.S. at 755 (emphasis added). Emphasizing that this individualized assessment and heightened standard ensured that the Act's scope was carefully limited to those who actually posed a threat to the community, the Court found that "under these narrow circumstances" the state's interest outweighed the "individual's strong interest in liberty." Id.

In Lopez-Valenzuela, the Ninth Circuit carefully analyzed § 13-3961(A)(5)'s categorical denial of bond for undocumented immigrants charged with certain crimes. 770 F.3d at 776. While the Court recognized that the State has a legitimate interest in ensuring the appearance of a defendant (and in protecting public safety), it rejected the notion that Arizona's categorical denial of bail for undocumented immigrants satisfied the Due Process requirement that pretrial detention be carefully limited. Id. at 783.

The crux of the Ninth-Circuit's determination was the failure of § 13-3961(A)(5) to provide an "individualized hearing to determine whether a particular arrestee poses an

unmanageable flight risk." Id. at 784. The Court found that the State utilized an overbroad approach by categorically assuming that all undocumented immigrants presented a flight risk and that any such risk could not be mitigated through alternative release conditions. Id. at 785. In failing to take a more "narrowly focused" and "carefully limited" approach to preventing flight, the Court held that non-bondable scheme was unconstitutionally overbroad as it resulted in the detention of those who posed no flight risk. Id. at 782.

Section 13-3961(A)(3)'s requirement that all individuals charged with Sexual Conduct with a Minor be held without bond suffers from the same constitutional infirmities as § 13-3961(A)(5). The statute unconstitutionally infringes upon the fundamental right to liberty as it lacks any particularized inquiry as to whether the State's interests of protecting public safety or assuring the appearance of the accused can be satisfied through alternative release conditions.

Admittedly, the Arizona Court of Appeals previously stated that Arizona law does not require "that a risk of flight or a risk of recidivism be considered before bail is denied." Simpson v. Owens, 207 Ariz. 261, 277, 85 P.3d 478, 494 (App. 2004). Unfortunately, this acknowledgment only confirms the unconstitutionality of § 13-3961. As the Ninth Circuit has made clear, the Due Process clause of the U.S. Constitution requires an individualized evaluation of an accused public safety and flight risks prior to the denial of bail. Lopez-Valenzuela, 770 F.3d at 782.

C. Section 13-3961(A)(3) Is Unconstitutionally Punitive.

Moreover, § 13-3961(A)(3) constitutes unconstitutional punishment before trial. To determine whether a restriction on liberty, such as pretrial detention, "constitutes impermissible punishment or permissible regulation," courts first examine whether the restriction is based on an express intent to inflict punishment. Salerno, 481 U.S. at 747. If no express legislative intent is present, courts will infer a punitive purpose if the

restriction appears excessive in relation to a nonpunitive purpose. Id.; see also Lopez-Valenzuela, 770 F.3d at 790. Here, § 13-3961(A)(3) is excessive to any nonpunitive purpose, such as managing flight risks, because it prevents any individual consideration as to the necessity of the arrestee's pretrial detention. Lopez-Valenzuela, 770 F.3d at 790. The statute necessarily sweeps in individuals who may not pose any danger to the community or flight risk. Indeed, there is no mechanism to ensure that pretrial detention is limited to cases where it would serve the nonpunitive purpose. This "*severe* lack of fit" between objective and restriction shows that § 13-3961(A)(3) is punitive rather than regulatory. Id.

D. Other Jurisdictions Have Reached the Same Conclusion as the Ninth Circuit.

Several other courts reached the same conclusion as the Supreme Court and the Ninth Circuit when analyzing similar statutes.

In Hunt v. Roth, the Eighth Circuit examined the constitutionality of a Nebraska bail provision that denied bail when the "proof is evident or the presumption great" that the defendant committed sexual offenses involving "penetration by force or against the will of the victim." Hunt v. Roth, 648 F.2d 1148, 1165 (8th Cir. 1981), *vacated on other grounds sub nom.* Murphy v. Hunt, 455 U.S. 478 (1982). Similar to § 13-3961, the Nebraska bail provision did not require an individualized evaluation of the pretrial defendant's risk. Hunt, 648 F.2d at 1151.

In finding the Nebraska bail provision unconstitutional, the Eighth Circuit focused on the failure of the provision to require the individual evaluation of the defendant's risk. Id. As the court stated, "The fatal flaw in the Nebraska constitutional amendment is that the state has created an irrebuttable presumption that every individual charged with this particular offense is incapable of assuring his appearance by conditioning it upon reasonable bail or is too dangerous to be granted release. The constitutional protections

involved in the grant of pretrial release by bail are too fundamental to foreclose by arbitrary state decree." Id. at 1165.

Numerous other state and federal courts have recognized the constitutional requirement of an individualized evaluation. See Clark v. Hall, 53 P.3d 416, 417 (Okla. 2002) ("We find the statute is unconstitutional because it violates the due process rights of citizens of this State to an individualized determination to bail."); Witt v. Moran, 572 A.2d 261, 267 (R.I. 1990) (procedural requirements of Federal Bail Reform Act, including allowing trial judge to consider alternative to bail and prompt detention hearing, "were necessary in order to make the statute conform with due process"); Huihui v. Shimoda, 644 P.2d 968, 978 (Haw. 1982) (state statute "exceed[ed] the bounds of reasonableness and due process by conclusively presuming a defendant's dangerousness from the fact that he had been charged previously with a serious crime and presently with a felony, and by leaving no discretion in the trial judge to allow bail based on other factors"); Steiner v. State, 763 N.E.2d 1024, 1027-28 (Ind. Ct. App. 2002) ("we find that the trial court must make an individualized determination that the accused is likely to use drugs while on bail before it is reasonable to place restrictions on the individual based on that contingency"); Escandar v. Ferguson, 441 F. Supp. 53, 59 (S.D. Fla. 1977) (holding that it is "forbidden by the Due Process Clause to blanketly deny bail to the Petitioners on the basis of a permanent and irrebuttable presumption that they will not appear in court at all times their presence is required," the defendant must be afforded a hearing on the issue); Aime v. Com., 611 N.E.2d 204, 214 (Mass. 1993) (finding that statute did not "pass constitutional muster under the due process clause" because it did not provide for full hearing procedures); United States v. Moore, 607 F. Supp. 489, 494 (N.D. Cal. 1985) (holding that statute designating certain offenses as nonbailable "will not pass constitutional muster unless its provisions are construed in such a way that defendant can make a showing based on the particular facts of the case in order to overcome the presumption"); Augustus

v. Roemer, 771 F. Supp. 1458, 1466 (E.D. La. 1991) ("a statute that creates a class for the purpose of limiting bail eligibility must also provide for a method of individualized determination citing a compelling reason or reasons when denying bail"); State v. Wilcenski, 827 N.W.2d 642, 650 (Wis. 2013) (finding bail conditions justified because court made an individualized determination but cautioning that "a mandatory condition of release based solely on the nature of a charged crime without considering a defendant's individual circumstances constitutes an erroneous exercise of discretion in setting bail conditions").

E. There Is No Justification for the Categorical Denial of Bail for Those Charged with Sexual Conduct with a Minor.

In enacting § 13-3961(A)(3), Arizona adopted a categorical requirement that all individuals charged with Sexual Conduct with a Minor be held without bond (provided the proof is evident and presumption great). However, the Lopez-Valenzuela court strongly suggested that such a categorical approach to pre-trial detention is never appropriate for a noncapital offense. 770 F.3d at 786-87. As the Court noted, "at a minimum, to survive heightened scrutiny any such categorical rule, requiring pretrial detention in all cases without an individualized determination of flight risk or dangerousness would have to be carefully limited. The state's chosen classification would have to serve as a convincing proxy for unmanageable flight risk or dangerousness." Id. at 786.

There is no evidence, however, to support § 13-3961(A)(3)'s categorical assumption that no conditions of release can protect the public from individuals charged with sexual conduct with a minor[1]. In fact, the contrary is true. Study after study that monitors recidivism rates for individuals convicted of sexual conduct with a minor (or its

[1] Neither the legislative history of § 13-3961 nor the publicity pamphlets promoting the amendments to Article 2, section 22 of the Arizona Constitution, provide any data that suggests individuals charged with sexual conduct with a minor pose an unmanageable public safety risk. Ariz. Sec'y of State, 2002 Ballot Propositions, at 16-17 (2002).

statutory equivalent) demonstrate that only a small percentage of offenders are later convicted of new crimes.

For example, a 2003 Department of Justice study that tracked sex offenders released from prison in 1994 revealed that only 20.4% of child sex offenders were convicted of a new crime within three years of their release and only 9.1% of all child sex offenders were sentenced to prison for the commission of a new offense. See Langan, Patrick et al., *Recidivism of Sex Offenders Released from Prison in 1994*, Bureau of Justice Statistics (November 2003) at http://www.bjs.gov/content/pub/pdf/rsorp94.pdf, last accessed Aug. 25, 2015. Comparatively, a 2010 Department of Justice study that tracked all prisoners released in 2005 found that over 67% of all offenders recidivated within 3 years of their release. See Durose, Matthew, *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010*, Bureau of Justice Statistics (April 2014) at http://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf, last accessed Aug. 25, 2015. As such, convicted offenders for this type of offense are over three (3) times ***less*** likely to commit a new offense than the general population of criminal offenders.

A 2009 Arizona Criminal Justice Commission study of released sex offenders provided similar results. Monitoring the recidivism rates of 290 sex offenders released from prison in 2001, this study found that less than 1% of the released "child molesters" were convicted of a new sex crime within three years of their release and no released "statutory rapists" were convicted of a new sex crime against a child or an adult. See Rodriguez, Nancy, *Recidivism of Sex Offenders Released from the Arizona Department of Corrections in 2001*, Arizona Criminal Justice Commission (2009) at https://cvpcs.asu.edu/sites/default/files/content/projects/Rodriquez%20stevenson.pdf), last accessed Aug. 25, 2015.

It defies common sense to suggest that categorical pretrial detention is necessary for a population that is statistically less likely to offend than the general population. It is

also impossible to claim that a system that results in the pretrial detention of so many individuals who are unlikely to commit new crimes is a "narrowly focused" and "carefully limited exception." Salerno, 481 U.S. at 749-50. Any scheme that categorically calls for the pretrial detention of everyone charged with a particular offense - when more than 75% of the individuals ***convicted*** of that offense do not commit new offenses within three years of their release from prison - is unquestionably unconstitutionally overbroad as it requires the pretrial detention of those who pose no threat to public safety and no risk of flight.[2]

F. Alternative Release Conditions Are Available that Satisfy the State's Interest in Preserving Public Safety and Preventing Flight.

Even if the category of individuals accused of Sexual Conduct with a Minor posed a heightened risk (an assumption undermined by all available evidence), such a heightened risk would be insufficient to justify the categorical impingement of a fundamental right. As the Lopez-Valenzuela court emphasized, the proper inquiry is not whether a category of pretrial defendants pose any risk, but whether the category of defendants pose an ***"unmanageable" risk***. 770 F.3d at 786 (emphasis added).

Recent advances in technology provide the State with a number of highly effective tools to monitor the whereabouts of a defendant. Electronic monitoring that relies upon GPS satellite technology provides pretrial services officers with the precise location of the Defendant in real-time. Paired with other traditional release conditions, electronic monitoring can mitigate the risk that the defendant fails to appear or commits a new offense. In light of the technological advances in electronic monitoring and the effectiveness of other forms of supervision, there is no lawful justification for a categorical rule of pretrial detention for individuals charged with Sexual Conduct with a Minor.

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[2] Critically, the above noted studies all measure the recidivism rates of ***convicted*** sex offenders whose crimes were serious enough to merit a sentence of imprisonment, not those merely charged with criminal conduct.

III. THIS CASE HIGHLIGHTS THE NEED FOR AN INDIVIDUALIZED HEARING.

The facts of this particular matter underscore the flaws in the State's categorical approach to pretrial detention. Although § 13-3961(A)(3) lumps all those accused of Sexual Conduct with a Minor together, this case presents exceptionally unusual allegations.

Unlike the overwhelming majority of individuals charged with sexual conduct with a minor, there are no allegations that Mr. Simpson actually engaged in any sexual **contact** with any minors. Rather, he has been charged under a theory of accomplice liability for allegedly encouraging two minors to engage in sexual activities. Moreover, and as detailed above, the alleged victims have provided conflicting statements that cast serious doubt on the veracity of the allegations. Setting aside the significant questions of whether these allegations are legally sufficient under to hold Mr. Simpson without bond under the current scheme, they clearly refute the appropriateness of lumping together all individuals charged with this offense.

To be sure, Mr. Simpson also poses no flight risk. Mr. Simpson is forty-five years of age, and he has resided in Maricopa County, Arizona for over thirty (30) years. Mr. Simpson owns residential and commercial property in Maricopa County, and he also owns an investment property in Coconino County. Mr. Simpson has three children, all of whom reside in Arizona. Mr. Simpson's parents, sister, aunts and uncles also reside in Maricopa County.

Mr. Simpson is a business owner. During the last twelve years, he has run a successful small business that employs twenty-five (25) full-time employees and two (2) part-time employees. These employees rely on Mr. Simpson and his business in order to maintain their livelihood. While Mr. Simpson's employees are aware of the allegations against him, not one employee has quit working for Mr. Simpson.

Mr. Simpson is also very involved in his community. He is a member of Christ Church of the Valley ("CCV"), where he regularly attends weekly services and participates in CCV's Men's Bible Study program, Neighborhood Group, and Life Study Program. Mr. Simpson is also extremely charitable, and he and his business regularly give to those less fortunate. Mr. Simpson and his company regularly provide charitable donations to Big Brothers/Big Sisters, Crisis Nursery, New Vision, Glendale Little League, and Tolleson Little League. During the holidays, Mr. Simpson and his company also participate in food drives for the less fortunate.

Nevertheless, the State would argue that the mere fact that Mr. Simpson has been charged with a non-bondable offense demonstrates that he poses such a risk that no release conditions are sufficient to protect the public or guarantee his appearance. Moreover, the State would argue that this Court should not even engage in an individualized assessment of Mr. Simpson's risk profile, despite the unique allegations attenuate to his case. The absurdity of these arguments highlights the reasons courts have continuously rejected categorical deprivations of liberty for pretrial defendants.

IV. BECAUSE § 13-3961 IS UNCONSTITUTIONAL, THE DEFENDANT MUST BE IMMEDIATELY RELEASED. IN THE ALTERNATIVE, THE DEFENDANT MUST RECEIVE AN ADVERSARIAL HEARING THAT INCLUDES AN INDIVIDUAL EVALUATION.

"Where differing constructions of a statute are possible," the court has a duty "to construe it in such a manner that it will be constitutional." Schecter v. Killingsworth, 93 Ariz. 273, 282, 380 P.2d 136, 142 (1963); see also State v. McDonald, 191 Ariz. 118, 120, 952 P.2d 1188, 1190 (App. 1998) ("This court has a duty to construe a statute so that it will be constitutional if possible.") (emphasis added). This is not a blank check to effectively rewrite the statute. The court "cannot interpret a statute in such a way as to do violence to the words or the legislature's intent." Readenour v. Marion Power Shovel, a Div. of Dresser Indus., Inc., 149 Ariz. 442, 445, 719 P.2d 1058, 1061 (1986).

Accordingly, if no plausible reading of the statute would comply with the constitution, the statute must be struck down as void. For example, in State v. Seyrafi, 201 Ariz. 147, 151 ¶ 19, 32 P.3d 430, 434 (App. 2001), the court of appeals found that a city ordinance creating a mandatory evidentiary presumption could not be interpreted to be constitutional and hence was facially invalid and void as unconstitutional.

In light of the Ninth Circuit decision in Lopez-Valenzuela, it is clear that § 13-3961 cannot be interpreted in a constitutional manner. The plain language of the statute clearly states that bond eligibility hinges solely on whether the "proof is evident or presumption great" that the defendant committed the offense. A.R.S. § 13-3961. This language cannot be construed in a manner consistent with the constitutional requirement that bond eligibility hinges on an individual evaluation of the defendant.

To the extent, however, that this Court believes the statutory language may be interpreted in a manner that allows for the constitutionally mandated individualized evaluation, than it must immediately set a hearing regarding Mr. Simpson's eligibility for bond. Following this hearing, Mr. Simpson must be released unless the State is able to "convince a neutral decision maker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person." Salerno, 420 U.S. at 755.

V. CONCLUSION.

Due Process mandates that this Court conduct an individualized assessment of whether any release conditions can assure the safety of the public and Mr. Simpson's appearance in future proceedings. The categorical assumption that any individual charged with Sexual Conduct with a Minor presents an unmanageable risk is unsupported by evidence and unconstitutionally overbroad.

Therefore, and for the reasons stated above, the Defendant requests that this Court immediately release him from detention subject to appropriate conditions. In the

alternative, the Defendant requests that this court conduct a hearing to determine appropriate release conditions. At this hearing, to the extent that the State seeks to hold Mr. Simpson without bond, this Court must reject the State's motion absent a showing, by clear and convincing evidence, that Mr. Simpson poses an unmanageable risk and that no conditions of release can protect the public or adequately ensure Mr. Simpson's appearance.

DATED this 4th day of September, 2015.

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ARIZONA SUPERIOR COURT

MARICOPA COUNTY

THE STATE OF ARIZONA, Plaintiff, vs. JASON DONALD SIMPSON, aka JASON DONALD SIMPSON, SR., Defendant.	Case No. CR2015-134762-001 **MOTION FOR RELIEF BASED UPON THE STATE'S FAILURE TO TIMELY RESPOND TO DEFENDANT'S MOTION TO DISMISS** (The Hon. Phemonia Miller)

Pursuant to Rules 35.1 of the Arizona Rules of Criminal Procedure, the Defendant, JASON DONALD SIMPSON ("Mr. Simpson" or "Defendant"), by and through undersigned counsel, respectfully requests that this Court rule on *Defendant's Motion for Immediate Release or, in the Alternative, Defendant's Motion for Bail Hearing with an Individualized Evaluation as Mandated by the U.S. and Arizona Constitutions* (the "Motion") on the record submitted. The State has altogether failed to respond to the

Motion. Accordingly, pursuant to Ariz. R. Crim. P. 35.1(a), the Motion is deemed submitted on the record and the State has waived its right to present evidence, testimony or argument.

Arizona Rule of Criminal Procedure 35.1 provides that a party responding to a motion has a responsibility to file a written response if it wishes to be heard. Specifically, the rule provides:

> Each party may within 10 days file and serve a response, and the moving party may within 3 additional days file and serve a reply, which shall be directed only to matters raised in a response. Responses and replies shall be in the form required for motions. **If no response is filed, the motion shall be deemed submitted on the record before the court.**

Ariz. R. Crim. P. 35.1(a) (emphasis added).

Defense counsel filed the Motion on September 4, 2015 with this Court and delivered a copy to the State via email. Any response to the Motion was due within 10 days pursuant to Rule 35.1, with an additional five calendar days for mailing according to Ariz. R. Crim. P. 1.3(a). Thus, the State's response was due by September 21, 2015. **To date, the State has not filed any response to the Motion**. There is no rule excepting the State from the rules of procedure or specifically from the necessity of filing timely responses to motions filed by the defense. The Rules are clear that when there is no timely-filed response then the Court **shall** deem the motion submitted on the record and the opposing party has no standing to submit evidence or argument.

The State has waived its right to present testimony, evidence, or argument in opposition to the Motion by failing to file a timely response. Therefore, Defendant asks the Court to enter a ruling based on the record before it in accordance with the Rules.

DATED this 22nd day of September, 2015.

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,	)	
	)	
Plaintiff,	)	
	)	CR2015-134762-001
vs.	)	
	)	
JASON SIMPSON,	)	
	)	
Defendant.	)	

Phoenix, Arizona
September 24, 2015

BEFORE THE HONORABLE PHEMONIA MILLER

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Evidentiary Hearing

PREPARED FOR:
COPY

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A P P E A R A N C E S

FOR THE STATE:

BY: MR. BRADLEY LEWIS MILLER
Deputy County Attorney

FOR THE DEFENDANT:

BY: MR. WOODROW THOMPSON and
MR. HECTOR J. DIAZ

I N D E X

Phoenix, Arizona
September 24, 2015

P R O C E E D I N G S

(Whereupon, the following proceedings commenced in open court.)

THE COURT: This is the time set for an evidentiary hearing in number 11 on today's calendar, CR2015-134762-001. It's in the matter of the State of Arizona versus Jason Simpson.

Would counsel announce for the record?

MR. MILLER: Good morning, Your Honor. Brad Miller for the State.

THE COURT: Good morning.

MR. THOMPSON: Good morning, Your Honor. Woody Thompson on behalf of Mr. Simpson.

MR. DIAZ: Good morning, Your Honor. Hector Diaz on behalf of Mr. Simpson.

THE COURT: And Mr. Simpson, would you please state your full name and date of birth for the record, sir?

THE DEFENDANT: Jason Simpson, [redacted]69.

THE COURT: Good morning to you, sir.

THE DEFENDANT: Good morning.

THE COURT: You can have a seat.

Mr. Miller, is the State ready to proceed?

MR. MILLER: The State is ready, Your Honor.

THE COURT: And Mr. Thompson and Mr. Diaz, is the defense ready to proceed?

MR. THOMPSON: Yes, we are. Before we go into the taking of the evidence in the hearing, I did want to, for the record, re-urge my position specifically with regards to our motion for immediate release, or in alternative, defendant's motion for a bail hearing with an individualized evaluation as mandated by the U.S. and Arizona Constitutions.

THE COURT: All right. Let me hear from you.

MR. THOMPSON: Yes. So we put together a very thorough and comprehensive motion indicating that we believe the due process and the United States Constitution does mandate a second prong to these release hearings. Not just that there be proof evident presumption great, but there be an individualized evaluation of the defendant's individualized and manageable flight risk.

So I would stand by the motion on that.

And I wanted to make sure for the record that if we go in and we start taking evidence right now, in no way are we waiving this constitutional argument because I do believe that this is -- there are two steps to this hearing. There is an individualized evaluation for the reasons that we put into the motion.

THE COURT: And Mr. Miller, is there a response from the State?

MR. MILLER: Your Honor, the response from the State is -- well, first of all, just so I understand the argument, I believe defense counsel spoke about just preserving the record. I ask that the Court take evidence, make a determination that there is proof evident presumption great. And then based upon not only the Arizona Constitution, but the rules regarding the Simpson Hearings, we ask that the Court -- once the Court finds proof evident presumption great that there has been a crime that is non-bondable, we ask the Court find the defendant have no bond. That's going to be the State's position after the end of taking this evidence here today.

THE COURT: And Mr. Thompson?

MR. THOMPSON: Yes. Again, for the reasons

stated in the comprehensive motion, I would -- we would ask for an individualized assessment.

Also, I would indicate that the State did fail to respond to this motion, so we would ask that Your Honor, under Rule 35.1, this be taken on the pleadings as well.

THE COURT: All right. With respect to the State not filing a response, I am not going to grant relief based on the reason that the State failed to respond to your motion -- to your motion for immediate release, or in the alternative, your motion for bail hearing with an individualized evaluation as mandated by the U.S. and Arizona Constitution.

Mr. Thompson, if I rule on the -- if I decide that the proof is evident or presumption great, then would not your motion for bail hearing with an individualized evaluation be moot?

MR. THOMPSON: No, because what --

THE COURT: Under the Arizona Constitution.

MR. THOMPSON: No, I don't believe so. Because I believe that due process and the U.S. Constitution are very clear, especially given the recent Lopez versus -- Lopez Valenzuela case that came out very recently. I think it's very clear

that there needs to be that individual evaluation. So it's really a two-step process. If there is proof evident presumption great, which again, we will argue there clearly is not, but if that is found, then there does need to be the individualized assessment for the reasons stated in the motion.

THE COURT: Thank you. All right. The record will reflect that you're -- you are not waiving your position on both motions. In addition, Mr. Thompson, I am in receipt of your motion for relief based upon the State's failure to timely respond to your motion to dismiss.

This issue would be more appropriate in front of the case management assignment judge, who is Judge Steinle, instead of this division. Would not you agree, Mr. Miller?

MR. MILLER: Yes, Your Honor.

THE COURT: And Mr. Thompson, your response?

MR. THOMPSON: I would say it's part and parcel to these types of hearings. If I may, in diving into the motion, I would say that the Lopez Valenzuela case walked right up to denying a categorical denial of bond for certain defenses.

Now, the Lopez Valenzuela case, the defendant in those cases were being held non-bondable for a different offense altogether.

However, as stated in my motion, they seriously questioned whether any non-capital cases would ever pass constitutional muster to be held non-bondable without an individualized assessment. And so the motion goes to great lengths to talk about the progeny from Salerno to the Simpson v. Owens case, and into the Lopez Valenzuela case.

It talks about the due process and how specifically there needs to be this individualized assessment unless the categorical approach can be upheld.

But again, under Lopez Valenzuela, they seriously question whether in a non-homicide setting that that can ever pass constitutional muster.

Here what we've done is in the motion produced argument and studies that show that there is not a nexus to an unmanageable flight risk for type of offense, so we would ask for an individualized evaluation in this case.

Again, we did put together a comprehensive motion. I don't know that Your Honor wants me to

read it back to you.

THE COURT: You don't need to.

MR. THOMPSON: But for the reasons stated in the motion, we certainly -- we do certainly believe that that's appropriate, especially in light of the fact that given current technology, there are so many alternatives available today with GPS, electronic monitoring. We can know where somebody is in real time at any time. So there are ways to effectively manage that risk.

THE COURT: All right. Thank you, Mr. Thompson.

And Mr. Miller, any response?

MR. MILLER: Yes, Your Honor. The current state of the law is that there are certain offenses, including sexual conduct with a minor, that are non-bondable under Arizona state law. We ask that the Court just follow the current state of the law. Thank you.

THE COURT: With respect to the defendant's motion for release based upon the State's failure to timely respond to the defendant's motion to dismiss, it is ordered denying this motion without prejudice. However, Mr. Thompson, you are certainly free to re-raise this issue in front of

Judge Steinle if you need to.

With respect to the defendant's motion for immediate release, I am prepared to proceed with the evidentiary hearing on that issue with respect to the second part of the defendant's motion for bail hearing with an individualized evaluation as mandated by the U.S. and Arizona Constitution. I will take that matter under advisement and rule after the State finishes with its presentation of its evidence.

Mr. Miller.

MR. MILLER: Thank you, Your Honor. At this time the State calls Detective Barrios to the witness stand.

DOMINIC MICHAEL BARRIOS,

having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MILLER:

Q. Good morning, Detective Barrios.

A. Good morning.

Q. Please introduce yourself to Commissioner Miller.

A. Hello. I'm Dominic Michael Barrios. I'm a detective with the Crimes Against Children's Unit,

Phoenix Police Department.

Q. If you could just go through a brief description of your experience.

A. I've been on for 21 years. Three and a half years working with the Crimes Against Children's Unit. I first started in 1994, did approximately six years of patrol, went to the school resource department for approximately eight years. After completing that, I returned back to patrol for several years. Became a detective with the burglary TASC force, and then eventually ended up in my position currently.

Q. And in your position you have to go through certain training classes; is that correct?

A. That's correct.

Q. Like the advanced forensic interview training; is that right?

A. That's correct.

Q. That's a 40-hour training?

A. That's correct.

Q. And that's to learn how to interview -- interview child victims; is that correct?

A. Yes.

Q. All right. Let's talk about this particular case. You had the opportunity to --

well, first of all, you are the case agent on this case; is that right?

A. I am now, yes.

Q. You had the opportunity to investigate the case involving Jason Simpson?

A. I did.

Q. And I want to talk about just some preliminary matters.

First of all, there are three alleged victims; is that right?

A. That's correct.

Q. And each victim, if served a subpoena, would be willing to come in and testify?

A. Yes.

Q. Let's talk about the location of the incidents that each of the victims speak about. The location of the incidents all occurred in Glendale; is that right?

A. That's correct.

Q. Glendale, Arizona?

A. Correct.

Q. The perpetrator or the defendant for each of the crimes that the victims allege also involve a Mr. James Simpson; is that right?

A. Yes.

Q. And James Simpson is sitting right here?
A. That's correct.
Q. He's the defendant in this case?
A. That's correct.
Q. All right. Let's talk about the beginning.

I want to -- just so we get some context of what we are talking about, if you could tell Commissioner Miller who all is involved. Can you start with the victims and list them for us?

A. As we have listed as victim one, would be [redacted]. Second victim is [redacted]. And the third one is [redacted] --

Q. [redacted]?

A. Yes.

Q. [redacted]?

A. That's correct.

Q. Now, we have three victims in this case. Let's talk about how the disclosure of the incidents came about.

A. On July 26th of 2015, the police department received a telephone call requesting that officers respond to an address on Parkview. One of the -- actually, [redacted] residence. The person had called stating that they had information that Jason was providing his daughter, along with another

female friend, alcohol and edibles or desserts with marijuana in it.

Q. THC?

A. Correct.

Q. When police received that phone call, do police respond to that address?

A. Yes, they did.

Q. And you said that's Parkview, and that's in Glendale, Arizona?

A. Yes, that's correct.

Q. So police respond to that address. Tell Commissioner Miller what happens once police respond to that address.

A. Two separate officers, one of them being Officer Babcock, conducted interviews with each one of the people that were there, which consisted of interviews with [redacted] Andrew, April, Andrea Glenn.

Q. So hang on one second. When you introduce these folks, please tell us how they fit in to the case, who they are related to.

A. Okay. To begin with, Andrew is -- we have him listed in the report as Parent 1. He is [redacted] father. There was April DeLeon that was involved. She is [redacted] stepmother, the wife of

Andrew.

P3 or Parent 3 is listed as Andrea Leger or Lejay (phonetic), I apologize. That is [redacted] biological mother.

Parent 4 is Glenn Leger. He is [redacted] father.

They also spoke to the sisters of [redacted] which are listed as witness one, Leandra Parker; and witness two, Alexandra Leger.

Q. And Alexandra is the older sister of [redacted]

A. That's correct.

Q. All right. Now that we've talked about who all was at that home, take us through each one of the interviews and how the case developed from there.

A. Officer Babcock had conducted an individual interview with each one of these people. It was audio recorded. They were very short interviews, but consisted of getting the information that each person had for him in order to determine what they were dealing with.

MR. MILLER: And Your Honor, that's actually all contained on Exhibit 20. All of those interviews.

BY MR. MILLER:

Q. So Officer Babcock interviews all these folks. Eventually there were forensic interviews done of the three victims; is that right?

A. That's correct.

Q. A forensic interview is a special type of interview where an officer does not lead a minor, typically it's a minor in their interview process; is that right?

A. That is correct.

Q. In that case was the protocol followed for those forensic interviews?

A. Yes, they were.

Q. And that protocol is laid down not only by the standard operating procedures of Phoenix Police Department, but also Arizona state law; is that right?

A. That's correct.

Q. So let's go through each of the forensic interviews starting with [redacted] and what each of the victims stated.

A. Just to allow you to understand, I just received all of this case on Monday and have had to attempt to memorize as much as I can of this case. Though I was involved in it, I have not been

involved for the past month. But so I'm going to use some of my notes in order to recall what was said during the interviews.

Q. And just so Commissioner Miller knows, these notes were taken directly from the audios; is that right?

A. That's correct.

Q. Okay. So go ahead, talk to us about what [redacted] stated.

MR. THOMPSON: I would just ask that the record reflect that it does appear that the witness is referring to notes during his testimony.

THE COURT: And the record will reflect that the witness is referring to notes during his testimony.

THE WITNESS: Okay. Thank you.

BY MR. MILLER:

Q. Okay, please.

A. On the 26th of July, Detective Keys had conducted an interview, a forensic interview with [redacted] about the same time that I was conducting an interview with [redacted].

Q. And what did [redacted] say?

A. [redacted] spoke about a time that she was dropped off at Jason's house.

Q. Before -- I apologize. I apologize for interrupting. She discussed how many incidents?

A. A total of two. And then mentioned about eating some gummy bears at a later time, which were -- which had THC in it.

Q. And just so we understand the context, what was the approximate date of the first incident?

A. She did not indicate in -- she did not indicate that.

Q. Did she indicate it was about 30 days prior to the interview?

A. It was within -- yes, it was within the summertime of our -- just prior to our interviews.

Q. So let's talk about what she stated during the first incident.

A. She had stated that she was dropped off at Jason's house. She said as she was visiting there, [redacted] had also come to visit -- I'm sorry, [redacted] had come to visit. Jason had offered them some new chocolate, as she said. And then offered them a hundred dollars in order for him to masturbate in front of them. He said that -- or she said that this occurred -- the time after they had consumed the chocolate, they began to get goofy. They had consumed some alcohol consisting

of vodka and Mike's Hard Lemonade when Jason had approached them and made the offer.

He then took off his clothes and began to masturbate himself in their presence. He had asked them to digitally penetrate each -- for [redacted] to digitally penetrate [redacted] and [redacted] to do the same. But they told him no. He then proceeded until he ejaculated on the bed. She had stated that some white stuff had come out of his penis, and then he ended with giving them that hundred dollars that he had promised them.

Q. Did you eventually find hundred dollar bills in his home?

A. Yes.

Q. Where did you find those?

A. In a small black safe that was next to his bed.

MR. MILLER: And Your Honor, that's Exhibit 19.

THE COURT: Are you moving to admit Exhibit 19?

MR. MILLER: Yes, I ask that all of these exhibits actually be admitted. So --

THE COURT: Is there an objection to Exhibit 19, Mr. Thompson?

MR. THOMPSON: I have no objection to 19. But I would ask that foundation be laid for the other photos to be admitted.

THE COURT: And what about Exhibit 20, which is the CD that was mentioned earlier?

MR. THOMPSON: The CD has -- I haven't reviewed that actual version of the CD, which I think I should.

THE COURT: Okay.

MR. THOMPSON: But if it has what I believe is in it, I am going to object for the purposes of this hearing, given confrontation issues. I understand there is a limited due process right in this hearing. But I would still object to the interviews being admitted in their totality. But I certainly would need to review them, nonetheless.

THE COURT: So I will not rule on Exhibit 20 just yet. But Exhibit 19 is admitted into evidence.

(Whereupon, Exhibit No. 19 was admitted into evidence.)

MR. MILLER: Your Honor, did you want to take a look at that?

THE COURT: Exhibit 19?

MR. MILLER: Yes.

THE COURT: Yes. Thank you.

BY MR. MILLER:

Q. So that was [redacted] speaking about the first incident. Did she mention anything else?

A. She spoke about an incident that happened the week before.

Q. And tell us what she discussed about the second incident.

A. Again, she had said she was dropped off at Jason's house, and by her mother; that [redacted] was visiting. Again, Jason gave these desserts with the THC in it, along with alcohol. Again, referring to stuff such as the vodka or the Mike's Hard Lemonade.

She said that Jason had invited them into the room. They went into his room where he showed them several sex toys, one of them to include a black dildo with -- that they called themselves strap-ons.

Actually, [redacted] also referred to it as looking like a dick.

She said that [redacted] had actually tried the strap-on as they were being introduced to the

toys, but she still had her clothes on.

Jason had requested in this -- during this incident that they either use the strap-on on each other and/or digitally penetrate each other with their fingers.

When they both denied this, Jason then removed his clothes. As he began to masturbate himself, he asked [redacted] if he could ejaculate on her face. She said no. And so he sat back on a couch that in the photographs it's in his bedroom, it's kind of like -- well, she explained the couch. He then sat on the sofa thing, as she called it, and ejaculated in their presence. Afterwards he drove them to McDonald's and they returned home.

Q. During the second incident, did [redacted] state that the defendant asked to have sex with her?

A. Yes.

Q. You mentioned prior to this there was something involving alcohol or Mike's Hard Lemonade?

A. Correct.

Q. Can you discuss that a little bit more?

A. She had just -- well, in every one of the disclosures made by the victim, the alcohol, vodka

and Mike's Hard Lemonade was introduced by Jason, where they consumed it, along with these edibles, as they refer to it a lot during their interviews. When asked about what the edibles were, they stated that it was THC, that they were made with THC.

MR. MILLER: Your Honor, I would ask that Exhibits 2 through 17 be admitted.

THE COURT: And what are Exhibits 2 through 17?

MR. MILLER: They are all photographs, Your Honor. I have them here.

THE COURT: Mr. Thompson?

MR. THOMPSON: I don't believe sufficient foundation has been laid, but these have been disclosed to me. They are in the State's disclosure. We've reviewed them. We will go ahead and not object to admission.

THE COURT: Exhibits 2 through 17 are admitted.

(Whereupon, Exhibit Nos. 2 through 17 were admitted into evidence.)

BY MR. MILLER:

Q. I want to discuss a couple of these. You

did -- there was a search warrant done on defendant's home; correct?

A. That's correct.

Q. And there were certain photographs and people -- crime scene technicians took photographs; is that right?

A. That's correct.

Q. And Exhibit 17, what is that?

A. That is the black dildo or a black dildo with a red strap-on that was located in like an armoire in the room, master bedroom.

Q. Is that what you are talking about in Exhibit 16?

A. Yes.

Q. Additionally, there was other photographs taken of alcohol, including vodka, found in defendant's home in Exhibit 12; is that right?

A. That's correct.

Q. Exhibit 11, what is that?

A. These are found in the indoor -- or the inside house refrigerator.

Q. Exhibit 7. What is Exhibit 7?

A. This is the square piece of chocolate that's identified and was impounded with the letter T that was found on -- in the master bathroom.

Q. Can you tell us what Exhibit 6 and 5 are?

Your Honor, here's Exhibit 7, so you can see that.

A. Exhibit 6 and 5 are a plastic baggie that was located in the office closest to the kitchen. It contained the name, or it's called Yilo.

Q. Can you spell that?

A. Y-I-L-O.

Q. Okay.

A. It said on the corner that's actually got like a little Panda on it. THC, 120 milligrams is on the corner.

Q. Okay. I will take those.

What is Exhibit 4?

A. No. 4 is a picture of the office with the -- that clear plastic baggie that contained the gummy bears. Exhibit -- or item number nine. And then the bag that it was located on is sitting on top of that.

Q. Is this where those gummy bears and the other exhibits were found, were in this bag?

A. Correct.

Q. And this is Exhibit 4. And I think you have 2 and 3 with you; right?

A. That's correct.

Q. And what are those?

A. These are pictures of the packages that were located in the small refrigerator in the master bathroom. It's a stimulating oral spray. Dose it Canyon Cultivation Wintergreen, Cannibis infused oral spray.

Number 3 has the picture of the three packages. And then No. 2 appears to be an open package of the same.

MR. MILLER: And here's 2 and 3 and the rest of those Your Honor, including those pictures of the alcohol.

BY MR. MILLER:

Q. All right. We've spoken about what [redacted] said during the forensic interview. Let's talk about what [redacted] said during the forensic interview.

A. Throughout her interview she spoke about mainly two different times. Initially she had spoke about the last time, which was about five to seven days prior to the interview. She had stated that she was at Jason's house, was given permission that day to visit [redacted], but not to spend the night.

She said at about like 4 o'clock in the

afternoon Jason had come home, offered them -- or Jason was there, offered them brownies, which they later -- well, they consumed and then went to a Circle K. He purchased some hookah pins or cigarettes, and then returned back to the house.

When they returned, [redacted] had stated that she started to feel the effect of just feeling weird. She said that Jason had invited them into his bedroom where he -- he showed them the sex toys. She spoke about the toys, said that one of them was a -- was black and red in color, the strap-on. And then she also spoke about a silver dildo that he had shown them.

Q. Showing the witness Exhibit 18. Tell us what Exhibit 18 is.

A. This was located in what we believe to be [redacted] bedroom because of some pictures that were in the bedroom and the way the other ones were -- they were boy's rooms, I guess you could say. They had sports stuff.

It is a picture of a massager, gray in color and silver. It was approximately, I don't know, like 10, 12 inches long. That was located on actually underneath her bed, but the cord was sticking out where it was exposed when we were

doing the search.

MR. MILLER: Your Honor, I ask that 18 be admitted.

THE COURT: Any objection?

MR. THOMPSON: No, Your Honor.

THE COURT: Exhibit 18 is admitted.

(Whereupon, Exhibit No. 18 was admitted into evidence.)

BY MR. MILLER:

Q. If you wouldn't mind handing that to Commissioner Miller.

A. Yes.

Q. Thank you.

All right. So what else did she say about the first incident?

A. She said that Jason had -- again, had offered a hundred dollars in order for them to use the dildos on each other. He had initially -- well, she told me it was a hundred times -- that he had made a deal with them that if they just only did it a hundred times, he would give them a hundred dollars.

[redacted] said that they then started to

insert the dildos into each other's vaginas as he was masturbating next to them on his bed.

Q. So Danielle said they actually did perform sex acts on each other?

A. That's correct.

Q. Did [redacted] say the same thing?

A. She eventually disclosed that to the SANE nurse after, yes.

Q. Just so we understand, during [redacted] initial forensic interview, did she disclose actual penetration or actual sex acts?

A. No.

Q. Did she deny that that occurred?

A. No.

Q. But she eventually did disclose it to the Sexual Assault Nurse Examiner?

A. That's correct.

Q. On a later date?

A. That same -- so after we were done with our interviews, the SANE nurse conducted her medical exam. And it was during that initial evaluation and documented in her report where she stated that [redacted] had disclosed that to her.

MR. THOMPSON: I'm going to object to hearsay. And specifically not reliable hearsay and

the SANE report.

THE COURT: Mr. Miller, why don't you lay some foundation for the SANE report --

MR. MILLER: I can, Your Honor.

THE COURT: -- because I'll have to sustain the objection that it's not reliable hearsay at this point.

BY MR. MILLER:

Q. Have you -- did the girls speak with a Sexual Assault Nurse Examiner?

A. Yes.

Q. When did that occur?

A. Following their interviews.

Q. How did they get there?

A. They were already there. We were at the Child Help facility, which consists of detectives and the family advocacy center. And with that, we have nurses that assist us with medical examinations for children of a younger age. And then upstairs there are SANE nurses that assist us with teenagers and adults when they need to be examined.

Q. One question I forgot to ask you were the dates of birth for [redacted] and [redacted] and [redacted] Do you have that information handy?

A. If I can look at the report, yes.
Q. Sure.
A. For [redacted], her date of birth is [redacted]01. For --
Q. How old would she have been at the time?
A. Thirteen.
Q. Okay.
A. For [redacted] she would be 13 at the time, date of birth of [redacted] of 2002. And [redacted] -- I'm sorry, [redacted], she would -- well, she was 14 at the time that we conducted our interview. Date of birth of [redacted] of 2001.
Q. Now, for the Sexual Assault Nurse Examiners that work at the Child Help facility, do you know whether it's a policy of theirs to answer to subpoenas?
A. Yes, it is.
Q. If called in; is that right?
A. Yes.
Q. So if they were to receive a subpoena in order to testify, they would answer that subpoena?
A. That's correct.
Q. Now, I'll talk about the actual reports themselves in a minute. But let's talk about [redacted] So she actually discussed an actual

penetration incident during that first time; is that right?

A. That's correct.

MR. THOMPSON: I'm going to object. I don't know if he is talking about the SANE nurse or not, but I still would like to re-urge my objection to the hearsay with regards to dis- -- alleged disclosures to the SANE nurse, because I don't believe that sufficient foundation has been laid with regards to those communications. And if necessary, I would be happy to voir dire the witness with respect to my objection only.

THE COURT: All right. I will allow you to voir dire the witness.

MR. THOMPSON: Briefly.

VOIR DIRE EXAMINATION

BY MR. THOMPSON:

Q. Officer, what's the name of the SANE nurse?

A. I would have to look at the report. Kimberlee Chislock.

Q. And what date did Ms. Chislock interview or speak with [redacted]

A. She conducted the medical examinations on the 26th, the same day, of July.

Q. July 26, 2015?

A. Correct.

Q. Okay. Have you spoken with Ms. Chislock?

A. I have not.

MR. THOMPSON: I would re-urge my objection. He hasn't actually spoken with the witness. So I would ask that any testimony regarding anything that was disclosed to the SANE nurse and any reports that she wrote be stricken as testimony because it's unreliable hearsay. He hasn't actually spoken to the witness.

THE COURT: Thank you. Mr. Miller, your response?

MR. MILLER: Your Honor, we did lay foundation. That's why I asked the questions that I did regarding the Sexual Assault Nurse Examiner's standard operating procedure. They work in the same facility, in the Child Help facility. Detective Barrios is familiar with their standard operating procedures, and that they do answer to subpoenas, if willing to come in. Based upon those standard operating procedures, and obviously what they do and where they work, I believe sufficient foundation has been laid for that testimony to be reliable.

THE COURT: All right. Mr. Thompson?

MR. THOMPSON: Yes, thank you. I would just argue that I understand that the rules of evidence are relaxed in these types of procedures, akin to preliminary hearings. I understand that. But the rulings and the case law says that the hearsay has to be reliable.

Typically judges look at this, has the witness actually spoken to the person that he is hearsaying the documents or the statements in from. This witness hasn't even spoken to the person. I don't think it's too much to ask, for the purposes of the rules of evidence and limited due process, that the State's witness actually have a conversation with the person before they try to admit evidence. So I would stand by my objection.

THE COURT: Thank you. Is Ms. Chislock still employed with Child Help?

THE WITNESS: She is. And it's documented in her report, the SANE.

THE COURT: The objection is overruled.

BY MR. MILLER:

Q. Now, I was talking about [redacted] forensic interview regarding the first incident. She disclosed an actual penetration incident; is that right?

A. That's correct.

Q. On that particular date?

A. That's correct.

Q. Please tell us what she actually stated about that penetration incident.

A. You want me to read some of the quotes that she said?

Q. Please.

A. If I may. To be specific to the report itself, which is what I documented.

When she referred to the incident, she talked about the quote, like brownies. Talked about going to the Circle K. Mentioned the, quote, hookah pins, end of quote. Proceeded to talk about how she started to get, quote, crazy, end of quote.

She said that they were, quote, drinking and doing edibles when Jason offered them -- or asked them what they were going to do for, quote, money today.

She proceeded to explain that he had invited them into the bedroom where he showed them, quote, different sex toys. Jason asked them to put the, quote, 200 -- I'm sorry, put the toy, quote, 200 times, end of quote, into each other. But she thought that she had only done this, quote, 100

times each -- or that they had only done it one hundred times each. When asked where she had put the toy, she stated vaginas -- quote, vaginas, as he was right next to them while they were inserting the toy.

Q. Tell me this. Was she talking about inserting the sex toy into [redacted] vagina and into her own vagina?

A. That's what I believed, yes.

Q. So both?

A. Correct.

Q. So there was actually two separate penetration incidents?

A. Well, a total of a hundred times is what she recalled. But wasn't very specific as to how many times each.

Q. Okay. [redacted] then discussed a second incident; is that right?

A. That's correct.

Q. So tell us about the second incident.

A. That was reference a -- actually, when she first learned about what was going on at Jason's house. She stated that it was about a month prior. She, [redacted] and how we learned about [redacted] the victim three, were all out driving in Jason's

Mercedes, along with some other boys, but she couldn't remember what their names were. She said as they were driving around, they ran out of money. They returned back to Jason's house where Sabrina and Sierra had exited the vehicle and said they would be right back, they were going to go get some money. They were in there for, I want to say like 30, 40 minutes. When they returned, they had cash on them. [redacted] thought that that was odd, but they proceeded with their night out. She said that was about 1 o'clock in the morning.

They eventually dropped off [redacted] and the others and returned back to Jason's house where they were later that morning were laying on the bed --

Q. Who would have been left in the house at that time?

A. Well, what she -- she only spoke about her and [redacted] at that time.

Q. And the defendant?

A. Eventually he came into the discussion, yeah.

Q. Okay. So as they are laying in the bedroom, she and [redacted] she says that they didn't have their bottoms on, and that they were covered

with the bed cover when Jason came to the bedroom. [redacted] had warned him not to come in because they weren't clothed, and that she was -- and that [redacted] didn't have any pants on. Jason had made a comment such as "ooh, I want to see that," removed the cover, and it was at that time that he had exposed her buttocks. But she was wearing a thong at the time.

She says that she got up, went to the restroom. When she -- as she was doing that, Jason began to compliment her butt. When she returned, Jason asked them to place themselves on the floor, remove their pants. Apparently [redacted] still had hers on. She removed her pants. They both were wearing thongs. She said they faced away from him. As they faced down onto the floor, he then proceeded to what she remembered taking pictures and masturbate himself as they lay on the floor.

I asked her how she was able to recall this or see this. She said she looked back, saw that at one point he was taking a picture, and then at another point he ejaculated and then ended up ejaculating on the floor of the bedroom.

He then paid them their money, took them to the Circle K where he bought them $30 worth of

stuff each, and then returned back home and again provided them with brownies.

Q. During this search warrant, was defendant's phone taken?

A. Yes.

Q. Was there a preliminary analysis done on defendant's phone?

A. Yes.

Q. And were photos found?

A. Yes.

Q. Was a photo of two young ladies found wearing just thongs facing away from the defendant?

A. Yes.

Q. Did [redacted] speak about anything that occurred after they went to Circle K?

A. Other than consuming the brownies and -- that was about it.

Q. Did she discuss another incident?

A. She just believed that it was -- that it had occurred at least one or two more times.

Q. In [redacted] forensic interview did she ever state that the defendant asked the girls to use the sex toys on each other?

A. Yes.

Q. When did that -- when did she state that?

A. That was during the -- the first incident that she spoke about.

Q. Did [redacted] state that during the second incident that there was any penetration regarding any of the sex toys or any other items?

A. She did not.

Q. It was just during the first incident?

A. Correct.

Q. Finally, was there a forensic interview of Sabrina?

A. Yes, there was.

Q. And tell us what [redacted] stated.

A. Through the interview with [redacted] we were able to identify who [redacted] was in asking both girls of any information that they could provide. [redacted] was able to provide that information to us, a phone number, and her last name.

I ended up making a phone call. Didn't identify myself with the child, only advised her that I needed to speak to her mother. She identified who her mother was, stated that she was in a different state.

MR. THOMPSON: Your Honor, I'm going to object to the testimony as it relates to [redacted]

I believe it's outside the scope of this hearing for the purposes of this hearing. I believe that the issue is really whether or not there was sex conduct with a minor, and the two victims do not include [redacted] So I would argue that it's outside the scope of this hearing for the bondability.

THE COURT: Mr. Miller.

MR. MILLER: Your Honor, I'm just attempting to provide context. I don't necessarily disagree with defense counsel, but just that -- just to provide context for the investigation. That was it.

THE COURT: The objection is sustained.

BY MR. MILLER:

Q. All right. So but there was a forensic interview done of [redacted]

A. Yes.

Q. Okay. Let's talk about the Sexual Assault Nurse Exams. Are you familiar with the Sexual Assault Nurse Exams?

A. Yes.

Q. And you've read over both of those?

A. That's correct.

Q. In a Sexual Assault Nurse Exam, a nurse

practitioner actually performs those?

A. That's correct.

Q. A nurse practitioner is there in order to treat the patient to see if there is anything wrong with a particular patient?

A. Yes.

Q. They also ask the patient why they are there and ask the patient other types of questions regarding the assault history; is that right?

A. That's correct.

Q. In this case, both [redacted] and [redacted] submitted to a Sexual Assault Nurse Exam; is that right?

A. Yes.

Q. I want to go through each of those in order. First starting with [redacted] What did [redacted] tell the nurse examiner regarding the assault?

MR. THOMPSON: Your Honor, I would like to object again on the same basis as my previous objection. I would like a standing objection to any evidence coming in from disclosures through the SANE examination.

THE COURT: Thank you. Your objection is noted for the record and it is a standing

objection. Mr. Miller, you can proceed.

MR. MILLER: Thank you.

BY MR. MILLER:

Q. Please, what did she say to the nurse?

A. If I may read it exactly how the nurse --

Q. Sure.

A. -- documented it in her report?

She stated, "He had sex toys. One was a vibrator. He forced [redacted] to put it in my vagina. He did it a few times. He made me do it to her. He asked me and [redacted] to put his dick inside of us. We both said no. He had a strap-on dildo he asked [redacted] to use on me, but both of us said no to that too. He played with himself until he came. He came on the bed right by our faces where we were laying. He asked me and [redacted] to help him, but we said no. That's all. He closed the door so we couldn't go out. He has a door to the backyard and he locked it. He paid us money and said don't tell anyone or he will hurt us. He said, guys, I got a piece of chocolate. Do you want some? We didn't know it had drugs in it. It tasted kind of weird. He said, does it taste okay? After it kicked in, he started handing us alcohol. It was Mike's Hard Lemonade. There were times we drank out of the

vodka bottle."

There is another statement here stating, "By forcing us to do drugs and alcohol and finger each other with dildos and all that. He had -- he hads done this to us like three or four times. It was the same."

Q. In another part of the nurse's exam is to draw blood and take urine; is that right?

A. That's correct.

Q. And urine and blood was taken from [redacted]

A. That's correct.

Q. Based upon the lab analysis, were any controlled substances found in [redacted]

A. No.

Q. That includes alcohol also?

A. That's correct.

Q. But the nurse exam occurred, at a minimum, at least a week prior to the last incident that [redacted] described?

A. A week after?

Q. Yes.

A. Yes.

Q. Let's go and speak about -- all right, let's talk about [redacted] examination.

Can you tell us what [redacted] told the

nurse?

A. I will read what she documented.

MR. THOMPSON: Can I have one moment?

THE COURT: Yes.

(Short pause.)

MR. MILLER: Your Honor, may I approach the witness?

THE COURT: Yes.

BY MR. MILLER:

Q. All right. Please, Detective Barrios.

A. If I may, just to inform you, it's three paragraphs.

"We went over there and he was like, let's do some edibles. So he gave me some brownies. It kicked in like 40 minutes. He said, what do you want to do for money? I didn't know what he meant because I was messed up. He said, you know, our thing. So we all went in his bedroom and he pulled out a bunch of sex toys. He said if we used it on each other and he masturbated next to us, he would pay us $100 each. He had a strap-on red dick and vibrators. He made us use the silver vibrator on each other. He said, how about you do it for two min each? We said no. Then he said, fine, 200 times each in and out. We said no. He said do 100

on her and then switch and do 100 on you. That's a deal; right? He stopped after he cummed right next to us on the bed. He used hand. He made us compliment his dick. He gave us money. That's about it."

New paragraph. "He always makes comments like, you look cute. That fits you good. Your ass looks good. I think he likes anal. He has a strap-on. I put it on. He told me to F him with it. I said no, and took it off. The first time me and [redacted] were sleeping. He came in the room and woke us up. He said he was bored and wanted to hang out. [redacted] told him not to take off the covers because we had no pants on. He ripped them off and was complimenting our asses. I got up to pee and he complimented my ass. He told us he would give us edible weed. You are only supposed to take half. He said to lay on floor and take your pants off. And then he masturbated. He kept grabbing my leg. He said turn around and look at it. Isn't it the biggest you've ever seen? He cummed and said okay, let's go to Circle K for electric cigarettes. He gave us $100 each and $65 for E cigs."

New paragraph. "He smacks my ass. I feel

like he has done this like four times, but I can't remember. It kicks in in like 40 minutes. But he would get us at like 30 minutes. We would feel so weird, but kind of know what's going on. If he did it after that, we wouldn't know. He might have done more when I was out. He said it would --"

I'm sorry, let me start over. "He said if it ever got out, he would hurt me. He was cautious. He said to make sure all pictures and messages are deleted."

Q. In all the searching, were any text messages found?

A. Yes.

Q. And can you describe the -- some of the text messages that you found?

A. Some of the messages that were told to us during this investigation were messages that were being sent at about a midnight hour in reference to Jason asking [redacted] what she was doing and if she knew where [redacted] was at, because [redacted] wasn't answering her phone.

[redacted] said that she was texting [redacted] So Jason asked for [redacted] to let [redacted] know he is trying to get ahold of her.

He, also, in the messages, then asked her

if she wanted to do -- I'd have to look at messages the again, but something about freaky.

Q. Did he ask to come over and get freaky?

A. Yes.

Q. And get more like last time?

A. Yes.

Q. There is also mention of dollar signs; is that right?

A. That's correct, after one of those messages.

Q. And edibles?

A. Correct.

Q. In those text messages; right?

A. That's correct.

Q. Also during this case there is interviews with [redacted] older sister?

A. That's correct.

Q. And that's Alexandra; correct?

A. There was one with Leandra and then Alexandra.

Q. And I believe it was Alexandra. Alexandra stated something to the -- stated that she saw a photo on [redacted] phone?

A. That's correct.

Q. What did she describe that photo being?

A. I'm going to refer to my report.
Q. It's in sup three.
A. Yeah. She said that she had seen a snapshot of Jason's questions to [redacted]
Q. Did she also see a photo of two girls drinking alcohol?
A. Yes, I'm sorry, she did.
Q. Also, there was an interview with Glenn. Do you remember that?
A. Yes.
Q. And who is Glenn?
A. Glenn is [redacted] father.
Q. He also saw a text message from the defendant on his daughter's phone?
A. That is correct.
Q. And what did that say?
A. He told me that it said, "What are you doing? Do you want me to get freaky with you?"
Q. Now, the items that we saw in the photos that have been admitted, those items were impounded by Phoenix Police Department?
A. Yes.
Q. Including the edibles; right?
A. That is correct.
Q. Now, through this investigation, has

[redacted] or [redacted] ever denied the penetration incident?

A. Have they ever denied it?

Q. Correct.

A. No.

Q. During the investigation, did -- were the girls, meaning [redacted] or [redacted] ever found to have hundred dollars bills on them?

A. Yes.

Q. Tell us about that.

A. During the interview with [redacted] that Detective Keys-Nunez had conducted, she had stated that she still had $300 from Jason in her wallet, but indicated -- well, they eventually found the wallet at her mother's house.

Q. And were there -- did they find the $300?

A. Yeah, three $100 bills.

Q. Was that impounded?

A. Yes, it was.

Q. Has there been a DNA analysis done on any of the items impounded by Phoenix Police?

A. They have been requested. I don't know what stage they are in the process.

Q. There is no results though?

A. No results that I'm aware of.

Q. I don't think I asked you about [redacted] tox screen. Can you tell us about the toxicology for [redacted] Did that also come back negative for any controlled substances?

A. Yes, it did.

Q. And alcohol?

A. That's correct.

Q. And just to be clear again, that was urine and blood?

A. Correct.

MR. MILLER: Your Honor, I have no other questions at this time. Thank you.

THE COURT: I think this is a good time for us to recess for lunch. And I will see you back at 1:30.

Anything you need to put on the record before we recess, Mr. Thompson?

MR. THOMPSON: Not at this time. Thank you.

THE COURT: Mr. Miller?

MR. MILLER: No, Your Honor.

THE COURT: All right. You are excused. I will see you back at 1:30.

(Whereupon, the luncheon recess was taken.)

C E R T I F I C A T E

I, Patricia Nunes Kotarba, Certified Reporter, Registered Professional Reporter, do hereby certify that I am a court reporter doing business in the city of Phoenix; that I reported in shorthand the Evidentiary Hearing on September 24, 2015; and that the foregoing is a true and correct transcript of my shorthand notes so taken aforesaid.

I further certify that I am neither counsel for nor related to or employed by any of the parties to this action and that I am not a relative or employee of any counsel employed by the parties hereto or financially interested in this action.

Dated at Phoenix, Arizona, this 21st day of October, 2015.

Patricia Nunes Kotarba /s/

Certified Reporter
Registered Professional Reporter
AZ #50878

5

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CR2015-134762-001
	)	
JASON DONALD SIMPSON,	)	
	)	
Defendant.	)	
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	)	
	)	

Phoenix, Arizona
September 24, 2015

BEFORE THE HONORABLE PHEMONIA MILLER

REPORTER'S TRANSCRIPT OF PROCEEDINGS

EVIDENTIARY HEARING - P.M. ONLY

PREPARED FOR:
ORIGINAL

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APPEARANCES

FOR THE STATE:

BY: Bradley L. Miller, Esq.
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FOR THE DEFENDANT:

BY: Woody Thompson, Esq.
Attorney for the Defendant

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Attorney for the Defendant

The Defendant was present

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Phoenix, Arizona

September 24, 2015

P R O C E E D I N G S

(Whereupon, the following proceedings commenced in open court.)

THE COURT: We're back on the record in CR2015-134762-001. It's the matter of the State of Arizona versus Jason Simpson. The record will reflect the presence of counsel and Mr. Simpson.

Mr. Thompson, is the Defense ready to proceed?

MR. THOMPSON: Yes, Your Honor.

THE COURT: All right.

MR. MILLER: Your Honor, prior to that the State would move to admit Exhibit 20.

THE COURT: Any objection, Mr. Thompson?

MR. THOMPSON: That's the disc --

THE COURT: Yes, that's --

MR. THOMPSON: -- and we, co-counsel, did review that and we are not objecting.

MR. DIAZ: Correct.

THE COURT: So Exhibit 20 is admitted into evidence.

Mr. Thompson, with respect to the

individualized evaluation, do you want to present evidence in your case?

MR. THOMPSON: If I may real quick on that, on the no objection to the CD being admitted --

THE COURT: To the CD, okay.

MR. THOMPSON: -- it was for the purposes of this hearing.

THE COURT: Right.

MR. THOMPSON: I thought that was implicit but I wanted to put it for the record, so we have no objection for the purposes of this hearing.

THE COURT: All right.

MR. THOMPSON: Thank you. And then with regard to the individualized assessment, I wanted to point to Page 5 of my brief where Salerno talks about how basically there's a -- they call it a -- a full-blown adversary hearing where, quote, the government is required to -- I'm sorry, where the government is required to, quote, convince a neutral decision maker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person. And that's Salerno at 755.

So I would argue that that clearly puts the burden on the State to prove to Your Honor that there are no conditions of relief that can reasonably assure the

safety of the community or any persons or -- or put another way, establish that there is an unmanageable fright -- flight risk in this case. So I would argue that it's the State's burden to -- to move forward on that and then we would go after to rebut that.

THE COURT: All right.

And, Mr. Miller, is there -- your response?

MR. MILLER: Your Honor, same argument. That's not the state of the law in Arizona right now under 13-3961. Sex conduct with a minor is still a non-bondable offense and I just ask the Court to follow the current state of the law. Thank you.

THE COURT: All right. Thank you.

And, Mr. Thompson, I do agree with Mr. Miller on this point. However, if the Defense is willing to submit information to show to the Court that your client does not pose a flight risk or a detriment to the community, you're certainly welcomed to do it. So either during your case or during closing argument.

MR. THOMPSON: One -- one moment.

Okay. So at this -- a this point I'd like to move forward with the cross-examination of -- of the officer. But before I do that, I would just ask that the record reflect that I'm limiting my cross-examination strictly to the purposes of the -- of the release hearing

today, and I'm not going into a comprehensive exhaustive interview of the witness.

THE COURT: All right. The record will so reflect.

MR. THOMPSON: Obviously to retain future interview --

THE COURT: Sure.

MR. THOMPSON: -- rights of this witness.

CROSS-EXAMINATION

BY MR. THOMPSON:

Q. Okay. Officer, you -- you indicated that you're trained to do forensic interviews, correct?

A. That's correct.

Q. Okay. And Detective Keys Nunez (ph) is as well?

A. Yes.

Q. And what -- what is your title right now?

A. Detective.

Q. Of what unit?

A. The Crimes Against Children's Unit.

Q. And how long have you been in that unit?

A. Three and a half years.

Q. How about Detective Keys Nunez?

A. I want to say about 7, 8 years. Something like that.

Q. Okay. And is he somebody that you've worked with

before?

A. He's on my squad, yes.

Q. And you have worked cases with him in the past in this unit, correct?

A. Yes.

Q. Has he actually trained or mentored you with regarding forensic interviews?

A. No.

Q. Okay. Have you done forensic interviews with him?

A. I would imagine so, I just can't think of any right now.

Q. Okay. But you've watched many -- you've watched many of his forensic interviews?

A. Correct.

Q. Okay. And when you're trained to interview children you -- you actually have special training about that, correct?

A. That's correct.

Q. And these interviews are done at advocacy centers?

A. Correct. Most of them are.

Q. Okay. And -- and does that create a neutral environment for the interview?

A. Yes.

Q. Why is that?

A. So that you can have a one-on-one conversation with the victim or witness themselves so you can have the -- the privacy and so that there isn't any influence by being at a particular place.

Q. You're trying to eliminate any outside influence, correct?

A. Correct.

Q. And you're -- you're also trying to get the truth out of the subject that you're -- that you're interviewing, correct?

A. Yes.

Q. Okay. And you're trying to elicit a comprehensive description as much as you can out of the subject that you're interviewing, correct?

A. That's correct.

Q. But without leading?

A. Correct.

Q. By and large you're -- that's one of the big issues to avoid in these types of interviews, is -- is leading, correct?

A. Correct.

Q. Okay. And in this case you interviewed [redacted], is that correct?

A. That's correct.

Q. And Detective Keys Nunez interviewed [redacted]
A. Correct.
Q. And that was done in a child help room?
A. Yes. At a facility, yes.
Q. At one of the advocacy centers?
A. Correct.
Q. It was done in a neutral setting?
A. Correct.
Q. And it was done pursuant to that exhaustive training that -- that you and Detective Keys Nunez had gone through?
A. That's correct.
Q. Okay. We spoke briefly during the break that I was going to ask you specifically about penetration, correct?
A. Correct.
Q. Okay. And you did issue reports in this matter, correct?
A. Correct.
Q. And you've actually generated some -- some handwritten notes?
A. Correct.
Q. And you've reviewed audio and audio/video recordings of different interviews, correct?
A. Correct.

Q. Do you have anything to add to your report based on any of those interviews?

A. No. Based on what I -- what I listened to, no.

Q. Okay. All right. So I'm going to refer you to [redacted] interview that was done with Detective Keys Nunez, correct?

A. Okay.

Q. During that interview would you agree that [redacted] gave a detailed description of certain events in -- certain allegations -- and let me back up. Sorry. Would you agree that [redacted] provided details about the allegations?

A. Yes.

Q. And when I say details, specifically what clothes different people were wearing?

A. At times, yes.

Q. At one point she was able to provide details about what Mr. Simpson was wearing, correct?

A. Correct.

Q. And she also provided details about what [redacted] was wearing, correct?

A. Correct.

Q. Now do you remember saying something to the effect of, I think she's wearing the same shirt today, referring to the interview day?

A. I believe so, yes.

Q. Okay. And during this interview, isn't it true that Detective Keys Nunez did ask [redacted] about vaginal penetration?

A. Yes.

Q. And isn't it true that in that interview [redacted] denied that there was any vaginal penetration?

A. That's correct.

Q. Okay. In fact, isn't it true that [redacted] described an incident with Mr. Simpson requested that she and [redacted] digitally penetrate one another with a sex toy?

A. That's correct.

Q. And in describing that incident she informed Detective Keys Nunez that she refused to allow [redacted] to insert the toy into her vagina?

A. Correct.

Q. And she went on to say that although [redacted] played with the toy she, quote -- she did, quote, nothing with it. Does that sound correct?

A. Correct.

Q. She went on to describe another incident where Mr. Simpson is alleged to have asked the girls to penetrate one another, correct?

A. Correct.

Q. And when Detective Keys Nunez asked if, quote,

anything like that happened -- if anything happened like that rather, sorry, anything happened like that, she responded with a firm no?

A. Correct.

Q. As the interview progressed there was actually a discussion about uncomfortable touching, correct?

A. Correct.

Q. A discussion about good touches and bad touches, correct?

A. Correct.

Q. And [redacted] expressed that she understood this concept of uncomfortable touching, is that correct?

A. Correct.

Q. And she -- she did inform Detective Keys Nunez that she had never been touched in an uncomfortable manner, is that correct?

A. Correct.

Q. All right. And finishing up with regard to Detective Keys Nunez's interview, nowhere in the interview does [redacted] ever acknowledge any penetration, correct?

A. Correct.

Q. As a matter of fact, when she specifically asked about specific instances of penetration she denies it, correct?

A. That's correct.

Q. Okay. [redacted] was also interviewed by Officer Babcock at a home, is that correct?

A. Yes.

Q. And again, during -- during this interview [redacted] was able to provide a detailed description of the events, correct?

A. She provided some details, yes.

Q. Okay. And again, in that -- in that interview there was absolutely no mention of penetration, correct?

A. That is correct.

Q. Okay. All right. And now I'm going to move into [redacted] interview. You testified earlier that [redacted] indicated there was penetration, correct?

A. Correct.

Q. Isn't it true that you -- you actually did this interview?

A. That's correct.

Q. Pursuant to your forensic training?

A. Correct.

Q. And isn't it true that as the interview started she actually described that Mr. Simpson -- she alleged that Mr. Simpson produced sex toys and requested that the girls use them on one another, correct?

A. Correct.

Q. Towards the beginning of the interview. And she

said -- at that point she said she couldn't remember if the girls actually used the toys, is that correct?

A. That's correct.

Q. Okay. And she went on to say, quote, I really -- can't really say if I did it or not, regarding the use of the -- the toys on each other?

A. Correct.

Q. Okay. And as the interview progressed [redacted] repeatedly indicated that she relacked -- that she lacked a specific recollection of the alleged events, is that correct?

A. She -- yes, she was indicating that she was having some issues recollecting.

Q. She said, quote, I don't remember what was going on at one point?

A. At one point in the interview, yes.

Q. Okay. And [redacted] was also interviewed by Officer Babcock, correct?

A. Correct.

Q. And let me back up because I'm not sure if this was -- because I'm not sure if this was flushed out earlier. But Officer Babcock's interview was done prior to the forensic interviews, correct?

A. Yes.

Q. Okay. And so when -- when Babcock interviewed

[redacted] -- or [redacted] she, again, made no reference to any vaginal penetration, correct?

A. Correct.

Q. There was also -- Babcock also interviewed family members of the victims, correct?

A. Correct.

Q. Okay. And there was a -- and I -- I want to make sure I'm trying to say the right -- name right. Andrea, is it, Leger?

A. Leger.

Q. Leger. Andrea Leger informed Babcock that [redacted] quote, had limited to no memory of what happened?

A. I'm sorry, repeat your question.

Q. Yeah, if you -- actually, you know, it might be helpful to refer to -- it is Babcock's report. And do you have Bate stamped ones?

A. I --

Q. Because mine is Bate stamped 12.

A. No, you can just refer to the supplement.

Q. Supplement 2.

A. You think it's Number 2?

Q. Supplement 2, it would be the third paragraph on that page.

A. Okay.

Q. If you want to -- if you want to read that third paragraph, and then just let me know when you're ready.

A. The third paragraph of Page 1?

Q. I'm sorry.

MR. THOMPSON: May I approach?

THE COURT: Yes.

Q. (By Mr. Thompson, continuing) Let me see here. This one. Next page.

A. Okay.

Q. Right there. Third paragraph, Page 2, supplement 2.

A. Okay.

Q. Okay. You would agree that Andrea Leger informed Officer Babcock that [redacted] had, quote, limited to no memory of what happened, is that correct?

A. That's correct.

Q. And also interviewed was -- oh, I'm sorry. And in that interview that Andrea had with Officer Babcock there was no mention of any penetration, correct?

A. That's correct.

Q. Also Officer Babcock interviewed Glenn Leger, is that correct?

A. Yes.

Q. And that would be the next paragraph down.

A. Correct.

Q. I'll give you one moment to read that.
A. Okay.
Q. Okay. And Babcock describes Glenn Leger's recitation of [redacted] allegation as vaguely remembering, correct?
A. Correct.
Q. And again, there is no mention of any penetration in that interview, correct?
A. Correct.
Q. Okay. Officer Babcock was also able to interview Andrew De Leon, is that correct?
A. Correct.
Q. Can you read the next paragraph on -- it'll be the last paragraph on Supplement 2, Page 2 and then it would go into the top paragraph of Supplement 2, Page 3.
A. Okay.
Okay.
Q. You would agree that Officer Babcock interviewed Andrew De Leon?
A. Yes.
Q. And Mr. De Leon, when speaking about [redacted] allegations to him, indicated that [redacted] told him she had limited to no memories, is that correct?
A. Uhm, it says vague memory. If you could point out where it says limited to no?

Q. If I may --

MR. THOMPSON: May I approach the witness?

THE COURT: Yes.

Q. (By Mr. Thompson, continuing) Just compare mine. Maybe it's a different page. Sorry.

A. Top paragraph?

Q. Okay.

A. I think he says vague. Yes. Okay. Yeah, he does say vague down here. Yes, he does say both of them.

Q. So just to confirm, Babcock's report indicates that Andrew De Leon said that [redacted] told him she had limited to no memory and that it was a vague memory, correct?

A. Correct.

Q. Okay. There's also no mention of any vaginal penetration, correct?

A. Correct.

Q. I questioned you briefly earlier about the SANE nurse, Nurse Chislock. Is that her name?

A. Something like that, yeah.

Q. Okay. You indicated to the Court that you believe she is still employed with -- is it Child Help?

A. It wouldn't be with Child Help. It would be with the adult section of sex crimes with the Family Advocacy Center.

Q. The Family Advocacy Center?
A. Correct.
Q. You also indicated that you had not spoken to her since -- you had not spoken to her about this case, correct?
A. Correct.
Q. When you said that she was still employed there, were you saying she was still employed there as of July 26th, 2015?
A. When anybody leaves these details, they send out an e-mail saying that these people are leaving us and that someone else is replacing them, and that hasn't come across with her.
Q. Okay. So I think what you're saying is because you never -- because you haven't seen any e-mails that she left, you're presuming that she's still there.
A. Correct.
Q. Have you spoken to Nurse Chislock in the past?
A. I have not. Not with this case, no.
Q. Have you ever -- about any case?
A. She -- she's helped out in other cases, yes.
Q. And what is her purpose? Is her purpose to do a -- a medical evaluation?
A. Correct.
Q. Okay. But you did not watch the interview during

the medical evaluation, correct?

A. At -- I did not watch it, but what I failed to say earlier is that the statements that I read earlier were in quotes to -- to state that the girls are the ones that stated this to her. Whether it was in writing or not, I don't know.

Q. Okay. And -- so you don't -- you don't know if she was careful to not lead either of these witnesses, correct?

A. I have no idea.

Q. Okay.

MR. THOMPSON: One moment, Your Honor.

THE COURT: Yes.

Q. (By Mr. Thompson, continuing) And then I would just -- I would just ask on the record that you did author some notes for this testimony. I would just ask that you retain the notes and provide those to the State for disclosure in this case.

MR. THOMPSON: Thank you.

THE COURT: Mr. Miller.

REDIRECT EXAMINATION

BY MR. MILLER:

Q. From your best recollection, the forensic nurse examiner is still employed?

A. Yes.

Q. Child Help?

A. That's correct.

Q. And she actually works for the health -- a health organization that has a contract with the Child Advocacy Center, is that right?

A. That's correct.

Q. So I want to talk about -- you have performed lots of forensic interviews, right?

A. Yes.

Q. How many do you think you've done?

A. I -- I couldn't --

Q. Ballpark?

A. -- even tell you.

Q. More than 20?

A. Yeah, on an average -- I think on an average we get about 80 cases a year, and then I -- I assist with other cases because I'm a Spanish speaker.

Q. And you've been in this group for 3 years, so we're talking over 200 forensic interviews, is that right?

A. Yeah, easily.

Q. Has there ever been a situation where a person comes in and is uncomfortable with speaking to you because you're a male?

A. Yes.

Q. What is the standard operating procedure in those

cases?

A. Uhm, you still attempt to make them feel comfortable, give them an idea that you're just there to understand what may or may not have occurred, and then proceed with that. If it's -- if it's completely uncomfortable and they're just not stating anything, even in a case where it's Spanish speaking I've had to go from English to Spanish, you just convert to Spanish; and with this situation you would ask the victim if they felt better speaking to a female -- a female detective.

Q. Is it possible that a person could be so uncomfortable that they are even uncomfortable to ask for a female forensic interviewer?

A. Yes.

Q. Now, we have spoken about -- you -- you had questions regarding [redacted] interview. I want to talk about that a little bit, her forensic interview.

A. Okay.

Q. Okay. I want to provide a little context. So she -- at some point she did deny vaginal penetration. At what point during the forensic interview did that occur?

A. Uhm, if I recall it was somewhere towards -- well, the issue was brought up a couple of times during the interview.

Q. How did it -- how did the interview end? Did the

tenor of her discussion regarding vaginal penetration change?

A. I don't recall.

Q. What about with Officer Babcock during that interview, was there any mention of vaginal penetration?

A. No.

Q. That issue wasn't even discussed?

A. Correct.

Q. Now patrol officer -- you were a patrol officer once. Does a patrol officer receive special training in interviewing children?

A. No.

Q. Are they supposed to be interviewing children?

A. No. And in fact, Mr. Babcock actually is very specific with them in the interviews and tells them he's only going to ask them who, what, where, when, and why I believe it is.

Q. And he specifically doesn't go into detail because he isn't supposed to be doing that?

A. Correct.

Q. And that was the same with Officer Babcock's interview with [redacted]

A. That's correct.

Q. He specifically states, I'm just going to ask you who, what, when, where, and why?

A. Yes, they were very, very short.

Q. Now the forensic nurse examiner is a female, correct?

A. Correct.

MR. MILLER: Your Honor, I have no further questions.

THE COURT: All right. Thank you.

Thank you, Detective. You can step down.

THE WITNESS: All right. Thank you.

THE COURT: Mr. Miller, does the State have any other witnesses?

MR. MILLER: Nothing additionally, Your Honor. Thank you.

THE COURT: All right. And Mr. Thompson?

MR. THOMPSON: One moment.

Your Honor, just -- just so the record's clear --

THE COURT: Okay.

MR. THOMPSON: -- are we -- are we still on the -- the first prong or are we --

THE COURT: If you want to do the individualized evaluation, I'm -- I know you said that it was the State's burden.

MR. THOMPSON: Yes.

THE COURT: However, I'm allowing you to present

the information whether or not Mr. Simpson poses a flight risk or --

MR. THOMPSON: With -- with respect to -- to that, again, I would -- I would -- I would say that the case law is clear that it is the State's burden. But with that said, I would stand by -- by the motion and also the letters that have been provided to show Mr. Simpson's ties to the community, and -- and there's a significant amount of letters. I believe close to 30 letters.

THE COURT: Do you want to admit these letters into evidence? Are you asking?

MR. THOMPSON: Yes. Yes. I would like to do that.

THE COURT: Mr. Miller, any objection?

MR. MILLER: No objection.

THE COURT: All right.

MR. THOMPSON: I believe they're marked as one.

THE CLERK: Exhibit 1.

THE COURT: So Defense's Exhibit 1 is admitted into evidence.

MR. THOMPSON: Thank you.

THE COURT: Okay.

MR. THOMPSON: And again, I believe it's -- it's flushed out in a -- in a very thorough and comprehensive manner in my motion, but I would also say that there are

statistics that we are referring to in the motion, and that's in Subsection E --

THE REPORTER: B?

MR. THOMPSON: I'm sorry, E --

THE REPORTER: E.

MR. THOMPSON: -- as in elephant.

THE REPORTER: Thank you.

MR. THOMPSON: No, echo. That's more efficient.

Okay. And -- and in Subsection E of my motion, and again, I don't want to -- I don't want to just read -- read it in, but I do think it's an important section, so if I could address it briefly.

THE COURT: Sure.

MR. THOMPSON: Again, the Lopez-Valenzuela court, so the Ninth Circuit, looked at Arizona's law on holding anybody illegal non-bondable, and they -- and they were -- they were looking at that categorical approach, and it said, At a minimum to survive heightened scrutiny, any such categorical rule requiring pretrial detention in all cases without an individualized determination of flight risk or dangerousness would have to be carefully limited. The State's chosen classification would have to serve as a convincing -- I'm sorry -- yeah, convincing proxy for unmanageable flight risk or dangerousness.

And then they basically go on to talk about

these offenses and how the State produced no evidence that illegal immigrants were somehow a worse flight risk.

So what we've done in the rest -- in the rest of that section is to produce statistics that we believe are persuasive, and they're essentially recidivism rates. And the recidivism rates as -- as compared to normal offenses are actually lower. So we argue that they're significantly lower and, therefore, charged with this type of offense there -- we're not triggering that convincing proxy to -- to stop an unmanageable flight risk because there's not an increased risk. As a matter of fact, it's a decreased risk -- risk versus the normal population.

We have -- we have links in the motion to where the studies can be found on line. If Your Honor would prefer, I can -- I can print them out and provide you copies of the studies as well.

THE COURT: I can go to the link.

MR. THOMPSON: Okay.

THE COURT: All right.

MR. THOMPSON: All right. And then it dovetails -- it dovetails into Section F, and in Section F, again, the Lopez-Valenzuela court looked at what is a manageable flight risk, and we did -- and the court in looking at -- and so I would ask Your Honor to -- when

considering a manageable flight risk, consider all the other options available: Electronic monitoring with GPS satellite technology. If Mr. Simpson has an ankle bracelet on he can be monitored by pretrial services where they'll know -- they can basically pinpoint his location at any given time. He can be given restrictions, but most importantly, he can also, as due process dictates, he can participate in his own defense, he can be more accessible to counsel and to participate in his own defense.

So I would argue that given what's specifically addressed in Subsection E and F; meaning, he's actually a lower recidivism risk, with all these other alternatives that can be put in place, that the State has not produced anything that shows that Mr. Simpson is somehow an unmanageable flight risk.

Okay. Now, with -- that's -- I'm unclear exactly how you want me to proceed on this, but that was my argument --

THE COURT: Keep going until I tell you to stop.

MR. THOMPSON: Okay.

THE COURT: Go ahead.

MR. THOMPSON: So that's my argument on the -- on the individualized evaluation.

THE COURT: Okay.

MR. THOMPSON: Would now be a good time to go

into the proof evident, presumption great argument?

THE COURT: So you have no -- you have no witnesses to present?

MR. THOMPSON: At this time, no. I'm going to stand -- I'm going to stand --

THE COURT: Okay.

MR. THOMPSON: -- on the motion and the exhibit that we filed.

THE COURT: All right. So now let me hear your argument.

And then I'll hear from you, Mr. Miller.

MR. MILLER: I -- I did want to let the Court know that we do have at least two witness who would like to speak regarding the individualized assessment on his release status and some of those issues.

THE COURT: Okay.

MR. MILLER: I don't know if the Court wanted to hear from those right now or would wanted to wait?

THE COURT: All right. When -- before you make your argument, then I can hear from --

MR. MILLER: That's fine.

THE COURT: -- those witnesses. Okay.

MR. MILLER: Thank you, Your Honor.

THE COURT: Mr. Thompson.

MR. THOMPSON: I was going to say if -- if they

were going to call witnesses on that, I may want to call a rebuttal witness then on that, on the -- on the flight risk.

THE COURT: The -- the rebuttal witnesses can then make a statement to the Court. Or do you want them to take the witness stand?

MR. THOMPSON: Well --

THE COURT: Because these witnesses are just addressing the Court --

MR. MILLER: Correct.

THE COURT: -- is that correct?

MR. MILLER: Yes.

THE COURT: Your rebuttal witnesses can certainly address the Court unless you want --

MR. THOMPSON: Yes.

THE COURT: -- them to take the -- witness to --

MR. THOMPSON: Yes. Yes, depending on what's presented --

THE COURT: Okay.

MR. THOMPSON: -- by the State, I would -- I would like to be able to preserve the opportunity to produce --

THE COURT: Okay.

MR. THOMPSON: -- rebuttal speakers as well.

THE COURT: All right. Well then let me hear

from the speakers first and then we'll do argument.

MR. MILLER: Thank you, Your Honor.

THE COURT: Yes.

Nope. Nope. Nope. Right here.

MS. LEGER: Oh, right there. Sorry.

THE COURT: All right. Tell me your name, ma'am.

MS. LEGER: Andrea Leger.

THE COURT: All right. And what is it that you want me to know?

MS. LEGER: I want to ask that Jason Simpson not be allowed out on bail or bond.

THE COURT: And you are the mother --

MS. LEGER: I am the mother of [redacted]

THE COURT: [redacted] Okay.

MS. LEGER: Yes.

THE COURT: All right.

MS. LEGER: Okay. I want to ask that he remains in custody until we are able to go to trial on all evidence is -- comes forth, to be able to prove. Because we don't want him out is because my daughter, we live three and a half miles from him. We go to the same grocery stores. He goes by high schools. He lives by a high school that he has to go by that my daughter has gone to, my older daughter. I don't want her to have to tell her that he's out because she's scared.

She has been seeing a counselor once a week. She is on anxiety medication. She cannot sleep by herself. For weeks she couldn't sleep by herself because she was scared because she said he's a very smart man and he had said he was going to harm her.

So to have to go back and tell me daughter that he is afraid (sic) and out, she's going to be scared.

We've had to work with her school counselor to change her school schedule so that she could not have any male teachers and so that she could have time off in the mornings to be able to go to her counselors so that she could keep up with her schooling.

She's struggling in school where she's always been principal's lists, honor -- honor rolls, and this year she's struggling and trying to keep up because she's having a hard time trying concentrating. She has -- is now on anxiety medication because of this.

We just -- I -- we ask that he remain in custody because we've seen our daughter change drastically: To be scared, to change her friends, to not want to go out and do things as much; and again, we do live in the same area and we do not want to have to take the chance of running into him. We're within 3 miles of each other, three and a half miles.

If he is let out, I would ask that he is

not allowed to even go on any -- anywhere on [redacted] Road because that is where we reside. That is where we live. That is where we shop. That is where my 17-year-old daughter goes to school. I would ask -- and -- and my daughter playing volleyball.

He's been allowed at all these events before with volleyball and school events, and I ask that he not be allowed.

He has a 16-year-old son that has friends. How are we to know that there are not going to be any children over there that are his son's friends? How are you going to be able to keep those children away from that household and that road that he has two houses on now? Because his children are gonna have friends over as well, and who's to say that he won't do the same thing to them that he has done to my daughter?

THE COURT: Thank you, ma'am.

MS. LEGER: Okay. Thank you.

THE COURT: Your name, sir?

MR. DE LEON: Andrew De Leon.

THE COURT: And you are [redacted] dad?

MR. DE LEON: Yes.

THE COURT: Okay. Thank you.

MR. DE LEON: The first -- first thing I'm going to read off is a letter from my wife --

THE COURT: Okay.

MR. DE LEON: -- because she would not be able to read it.

THE COURT: Okay.

MR. DE LEON: This is going to help and explain to Your Honor -- and thank you for having me up -- the Defense's case of -- they're trying to show good citizenship, how he should be let out on bail, stuff like that. This is going to show the negative effects of letting a child predator out into the community.

Okay. Dear Judge and the State of Arizona. I am here today in support of the victims and the trauma the victims would suffer, seeing and knowing that there are child predators out of jail and are freeing (sic) to contact them, see them in a public place, or even harm them again.

I myself was sexually molested when I was 7 years old by an older neighbor boy. 34 years later I still remember every small detail of that day. I remember the room; the nightstand next to the bed; the clock; the phone on the nightstand; the color of the curtains; the plain white walls; the messy, unmade bed; the cold, white tiled floors; the yellow outfit I was wearing. It was a halter top that tied around the back of my neck. It had a sunset on the front and matching yellow shorts. The

bathroom where I was sent to clean myself off. I also remember the smell of his odor.

His parents moved away and I thought I would never have to see him again until 18 years later I was attending a funeral. Every detail of that horrific day when I was seven came rushing back to me. The fear of anxiety overwhelmed me. I hid behind my parents and I left immediately after the service in fear he would see me.

The victims today are 13 years old and the events happened on more than one occasion. They were molested multiple times by Jason D. Simpson. The healing process never ends for victims of sexual abuse. It is a process they will continue to deal with for the rest of their lives.

No amount of time or years will ever take away the details or the pain, but knowing they will never have to see him again will help them move on as best they can, living a somewhat normal, happy life, and not have to live in complete fear of harming them again. Sincerely April De Leon.

THE COURT: Thank you, sir.

MR. DE LEON: Thank you.

Then myself, I would just like to read off molestation of a child. A.R.S. 13-14.10. A person

commits molestation of a child by intentionally or knowingly engaging in or causing a person to engage in sexual contact, except sexual contact with the female breast, with a child who is under 15 years age.

I heard the three dates of birth of the children that were given in the testimony today. I think we can all agree they're under 15.

The Defense is going to argue proof evident, presumption great. Based upon the stories, the evidence that was gathered, it is quite clear there's some serious harm done on multiple occasions. There's even a -- a photo on the -- the Defendant's phone that ties into exact things that the young girls were talking about. Now they will try to tongue twist everything around and say someone's not clear, someone's not clear. But I want to remind Your Honor these are 13-year-old girls that, A, may not want to come disclosed right away. As the process started they did start disclosing more.

My daughter, [redacted] has known the Defendant for 9 years. I -- I in my heart know I will never know the full disclosure and it will take many and many of years for that to maybe even come out. The evidence that has been proved by the State today is presumption great and I feel he should fall into one of the three non-bondable categories. So my position is Mr.

Simpson to remain non-bondable.

As far as, you know, if -- if Your Honor so wanted to look into bail, he has great access -- access to funds. They're talking about flight risk and statistics. Well, I -- I can counter and provide statistics that people released back into the community are of a greater harm; hence, my wife bumping into her molester years later.

These girls live around Mr. Simpson and it would be a great embarrassment, great harm. Both of their statements said that they -- that he threatened them personally if this ever got out. So for their lives he must remain in custody and learn how to do his trial behind bars, non-bondable.

THE COURT: All right. Thank you, sir.

MR. DE LEON: Thank you.

THE COURT: Anyone else, Mr. Miller?

MR. MILLER: No other witnesses. Thank you, Your Honor.

THE COURT: Okay.

And, Mr. Thompson, any rebuttal witnesses?

MR. THOMPSON: One moment.

MR. MILLER: We have one more witness, Your Honor.

THE COURT: All righty.

MR. MILLER: May I just have one moment?

THE COURT: Yes.

Your name?

MS. LEGER: Alexandra.

THE COURT: All right. Alexandra --

MS. LEGER: Leger.

THE COURT: -- you are --

MS. LEGER: [redacted] older sister.

THE COURT: Okay.

MS. LEGER: I request that Jason Simpson not be let out on bond. My sister is scared to death to even leave the house. She won't even stay at my dad's house. She refuses to be around any male over the age of 40 because of what he did to her.

She's had to have all of her classes switched so she has no male teachers. She's been going to counseling at least once a week and seeing a therapist. She can't sleep through the night. She always wants to sleep with me, never wants to be alone.

He has ruined her childhood. That's something she can never get back. She will never be the same because of what he did to her.

His youngest son has a girlfriend who will be over at his house. Who knows if he will do the same to her what he did to my sister or how many other little

girls.

I do request that he stays behind bars and is not let unbondable (sic).

THE COURT: Thank you, ma'am.

Anyone else?

MR. MILLER: No, Your Honor.

THE COURT: Okay.

Mr. Thompson.

MR. THOMPSON: Okay. I think we can -- within the frame work of your ruling, I would just at this point give additional argument in -- in light of the State's speakers.

THE COURT: Okay.

MR. THOMPSON: And again, I'm specifically limiting to the individualized evaluation at this point. I've -- I've not gone into my legal argument on proof evident, presumption great.

THE COURT: Sure. And just so the record is clear with respect to your request for an individualized evaluation, I'm denying that request and that is pursuant -- pursuant to Article 2, Section 22, of the Arizona State's Constitution, A.R.S. 13-3961, and to Rule 7.4 B, the Arizona Rules of Criminal Procedure.

So however, if you want to present information to me to show why Mr. Simpson is not a flight

risk or -- or harm to the community, you can certainly do so at this time.

MR. THOMPSON: Yes. Again, I would stand by those recidivisms statistics that were presented by the Defense, as well as the letters that had been submitted that had established that Mr. Simpson has significant ties to the community, he does have the support of community, and then, again, with respect to alternatives.

With technology today there are so many different alternatives besides incarceration and my -- Mr. Simpson would be willing to stipulate that he would stay -- he would not go to -- he would not shop on [redacted] [redacted] Road. He would stipulate that he would not have, besides his relatives, children under the 18 -- under the age of 18 at his house.

We can carefully craft release conditions that can address those concerns. We can -- he can have electronic monitoring, he can be confined to the home during certain hours with limited exceptions to conduct business or meet with his legal defense team. There are things that we can do to address that. And so I would -- I would respectfully argue that given, again, this recidivism statistics, Mr. Simpson's ties to the community, his community support, that the balance -- the balance clearly tends towards allowing him to be released

on bond with carefully crafted release conditions. Thank you.

THE COURT: All right. Thank you.

Mr. Miller.

MR. MILLER: I, again, same argument under A.R.S. 13-3961. I believe the state of law is clear, specifically Alpha 3 for sex conduct with a minor is a non-bondable offense. I ask that you hold him non-bondable.

Would you -- would the Court like me to address the closing argument essentially on the issue of proof evident, presumption great?

THE COURT: Yes.

MR. MILLER: Okay. Thank you very much, Your Honor.

Based upon the information we've heard, and we've heard a lot of information, I believe the State has met its burden of proof evident, presumption great.

As the Court knows it is a lesser burden than beyond a reasonable doubt, but based upon evidence that we heard today I believe the State can and will convict the Defendant beyond a reasonable doubt based upon this evidence.

Not only have you -- has -- have you heard about the statements of two of the young females -- and

we're talking about young females, 13 years old -- who went over to the Defendant's house and where the Defendant gave them drugs and alcohol. Again, a crime in and of its own right. Class 2 felonies, providing young minors with drugs is a felony, which is on the Indictment.

But then pulling out a dildo and a strap-on dildo and a vibrator and asking those young females to insert that into themselves in order to allow the Defendant to sexually gratify himself. That is a crime in Arizona, sex conduct with a minor.

There's a few -- there's a couple of ways to commit that specific crime in Arizona. It's to actually do it yourself or to cause another to do it, and obviously the State's argument is the latter, to cause another to do it based upon the girls' statements.

Now I'm sure Defense is going to get up here and say, Well, [redacted] didn't say initially that -- that that occurred. She actually said that it didn't occur. And that's true, she didn't -- she did say that it didn't occur initially. She's also speaking with a male. We're talking about a 13-year-old girl describing her vaginal area.

Now I bet if we polled just random jurors or random people in the community and asked them to use words like vulva and vagina, vaginal canal, labia majora

or minora, they would be -- have a difficult time even mentioning those words, some of those words. Mentioning a strap-on dildo. And we're asking a 13-year-old girl and holding her to a standard in saying, Well, because she was embarrassed to talk about it she must not be telling the truth. Well, that's -- shouldn't be the case, and it isn't the case.

Once [redacted] and [redacted] went to the forensic nurse examiner they told her exactly what was done to them, what the Defendant caused them to do, and because of their fear they didn't tell everything initially. They didn't know everything initially and they probably still don't know everything the Defendant did to them because of the alcohol and drug-induced party that the Defendant caused. He enticed them into going into his home to do that.

Now we've heard lots of evidence, not only from the girls themselves, we've heard about the corroborating evidence from the search warrant, including the pictures on the Defendant's phone of [redacted] and [redacted] wearing thongs in the photos, exactly corroborating what the girls said.

We've seen text messages seen by [redacted] mother and father saying -- written by the Defendant saying, Let's come get freaky again, something that no

male should be talking to a 13-year-old about. Mentioning dollar signs, mentioning drugs, and alcohol.

There's also corroborating evidence of a strap-on, a strap-on with a red light. It's very specific. The vibrator and then the marijuana products, the THC edibles that the Court has pictures of, not only the chocolates -- and again, that's specific -- but the edibles, specifically to Gummy Bears.

All of this evidence shows that the Defendant is guilty. The State has proven its case by proof evident, presumption great, and I ask the Court to deny the Defendant bond under A.R.S. 13-3961, Alpha 3. Thank you, Your Honor.

THE COURT: Thank you.

Mr. Thompson.

MR. THOMPSON: Okay. Your Honor, Mr. Simpson is not charged with molestation. That count on the Indictment was amended to attempt. So the two counts that would trigger the release hearing, the reason we're here, are Counts 22 and -- or 23 and 24?

THE COURT: That's correct.

MR. MILLER: Correct.

THE COURT: It's 23 and 24.

MR. THOMPSON: And so those -- those are sex conduct with a minor under an accomplice liability theory.

To be clear, you did not hear any evidence that Mr. Simpson illegally touched, for purposes of this Simpson hearing, the girls. What we're talking about is accomplice liability. And so we need to look at for sex conduct with a minor, was there actual penetration? So is there proof evident, presumption great that there was actual penetration?

Your Honor, you heard evolving stories from the detective of what the girls had to say. [redacted] was interviewed first by Officer Babcock. They said, Oh, well that's just -- that's not to ask for specifics, but they also say it's asked to ask for who, what, when, where, why. That sounds like specifics. Who? That's -- that's specifics that you ask for, the who, what, the when, the where, the why. So in that interview of asking the who, what, when, where, why, there was no mention of penetration.

[redacted] was then forensically-interviewed by the officer. She expressed doubts and she indicated in that interview that she couldn't remember if they actually used the toys. I can't really say if I did it or not, and I don't remember what was going on.

Then the officer indicated at the very end of the interview there's mention of penetration at the very end, again, after expressing doubt about what she

could even remember and stating she couldn't remember if they actually used the toys. I can't really say if we did or not.

There's been talk of the SANE nurse's evaluation. So again, I would ask Your Honor -- Your Honor over -- overruled my objection but I would ask Your Honor to consider what weight to give that in light of the fact the detective has not spoken to the SANE nurse, we do not know that that was in a controlled -- forensically-controlled environment, and what type of questioning was done. Were leading questions used? We -- we don't know the entire context.

But we do know that when [redacted] was interviewed by the officers, when she was interviewed by Officer Babcock, there was no mention of penetration at all.

When [redacted] was forensically-interviewed by Officer Keys Nunez she gave specific details about who was wearing what types of clothes and she indicated with regard to inserting any of the sex toys in the vagina she said no. She said she did, quote, nothing with it.

And she did acknowledge or allege that Mr. Simpson asked the girls to penetrate one another, but when Detective Keys Nunez followed up asking, Did anything -- if anything happened like that? She said no. She denied

it. It was a flat denial. She was clear. She was asked about penetration, and she said no.

She was then asked about the concept of uncomfortable touchings, good touches/bad touches. And she confirmed that she had never been touched in an uncomfortable manner; and that was in a forensically-controlled environment with a trained forensic interviewer.

It's consistent with her previous interview, it's also consistent with the interviews of the parents and family members. There was no mention of penetration.

There was some photos produced. There was -- there was mention of a photo on Mr. Simpson's phone, but none of those photos go to penetration. And that's what we're looking at here.

So we have to look at proof evident, presumption great for was there penetration. What we have is we have one statement that started out with no penetration. Then it evolves into it but acknowledging that it's a vague and limited memory on one side, and then on the other side we have somebody who says it infirmedly (sic) did not happen, but then the State brings in a SANE report where somebody who hasn't -- from somebody who hasn't even been spoken to says, Well, it happened like

this.

So, Your Honor, I would submit that you have a significantly tainted allegation on one side and then one on the other that is more affirmative that it did not happen, and so it's akin to more of a 50/50, which is more close to the civil preponderance. I would submit we don't even get to the civil preponderance in this case, but it's certainly not to the proof evident, presumption great.

Counsel's correct, I know it's not proof beyond a reasonable doubt, and the case law says it's not exactly clear and convincing but then they dance around it. I think we can all agree it's pretty darn close to clear and convincing. It hovers right around there. But it's certainly well above civil preponderance, and at best for the State it's a coin flip. It's a coin flip with the holes and the flip flopping and the changing of the stories and the affirmative denials.

So I would submit to Your Honor that the evidence that was presented does not pass the muster for proof evident, presumption great.

Accordingly, I would ask that Mr. Simpson be released on the -- a bond and a reasonable bond in light of his manageable flight risk. Thank you.

THE COURT: All right. Thank you.

Mr. Miller.

MR. MILLER: The problem with Defense argument is that it interprets [redacted] and [redacted] statements from an adult's perspective. For a 13-year-old young female who has just been sexually abused on multiple different occasions by the Defendant, everything has been found out, they're speaking to police, they're asked to describe parts of their body that they probably never described in their entire lives, and the Defense counsel is saying that they're changing their story. Well, that's absolutely not the case. Defense counsel's saying that they're giving vague recollections but, again, that's not the case.

I ask the Court to look back at the forensic nurse examiner's report, specifically with [redacted] statement. It's three paragraphs long where she gives a lot of detail of exactly what the Defendant did to them.

I ask the Court to look and to remember about [redacted] statement to the forensic nurse examiner regarding exactly what the Defendant had done to them in great detail.

Now when a person is given drugs and alcohol, yes, they're going to have faded memories, and that's what [redacted] and [redacted] are speaking about, but that doesn't mean they have no memory. They clearly do

because of the things that they describe and the corroborating evidence that they provided.

It is not mutually exclusive to say on one case he didn't penetrate us here but he penetrated us here. Those girls are referring to two different times. There are many times where the girls mentioned that on the first occasion he didn't do certain things and on the second occasion he did other things. He asked us to penetrate him and he said no at one time and then eventually we did penetrate another at another time. They're not mutually exclusive.

Just because one time she says that we were penetrated and one time says we weren't doesn't mean that she's not telling the truth. She's talking about two separate occasions.

I ask the Court to look at it from the context of a 13-year-old scared female who's never been in this position. Look at the words. Look at the writings. Look at the corroborating evidence. And the corroborating evidence corroborates [redacted] and [redacted] statements and it corroborates the things that the Defendant did to them.

I ask the Court to find that the State has met its burden and the Defendant should remain in jail. Thank you.

THE COURT: All right. Thank you.

I will take this matter under advisement and issue my ruling by way of minute entry. It is ordered affirming the initial pretrial conference date of September 25th, 2015, at 8:15 in front of Commissioner Richter.

Anything further from the State?

MR. MILLER: No, Your Honor. Thank you.

THE COURT: Anything further from the Defense?

MR. THOMPSON: No. Thank you.

THE COURT: All right. There's nothing further, you're excused. Prior custody orders are affirmed.

(The proceedings came to a close at this time.)

* * *

CERTIFICATE

I, ***VANESSA M. MELSTR M*** Official Certified Reporter herein, hereby certify that the foregoing is a true and accurate transcript of the proceedings herein all done to the best of my skill and ability.

Dated at Phoenix, Arizona, this 10th day of November, 2015.

/s/ Vanessa M. Melstrom

Vanessa M. Melstrom, RMR

Certified Reporter No. 50892

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Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
11/06/2015 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2015-134762-001 DT

11/05/2015

COMMISSIONER PHEMONIA L. MILLER

CLERK OF THE COURT
Y. King
Deputy

STATE OF ARIZONA

BRADLEY LEWIS MILLER

v.

JASON DONALD SIMPSON (001)

HECTOR J DIAZ

UNDER ADVISEMENT RULING

After an Evidentiary Hearing, the Court took the Defendant's Motion For Immediate Release under advisement. Prior to the Court issuing its ruling, the Defendant filed his Request to file Notice of Filing Forensic Interview Transcripts Under Seal. The Court has considered the initial motions and associated pleadings, the testimony and exhibits introduced at the evidentiary hearing, the interview transcripts and the arguments of counsel. The Court has observed the demeanor of the witness while testifying and the following findings are based on the evidence as well as the Court's assessment of credibility:

Brief background is instructive:

The Maricopa County Grand Jury returned an Indictment charging Defendant a number of crimes including two counts of Sexual Conduct With A Minor, Class 2 Felonies.

At the Defendant's Initial Appearance Hearing, he was held non-bondable pursuant to A.R.S. 13-3961 (A)(3) on all of the above referenced counts. Defense counsel requested a hearing pursuant to *Simpson v. Owens,* 207 Ariz. 261, 85 P.3d 478 (App. 2004) on the issue of the defendant being held non-bondable. A.R.S. §13-3961 (A)(3) reads as follows:

"A person who is in custody shall not be admitted to bail if the proof is evident or the presumption great that the person is guilty of the offense charged and the offense charged is one of the following:.....**3**. Sexual conduct with a minor who is under fifteen years of age.

At the Evidentiary Hearing, the State's evidence included, but is not limited to, the following:

On July 25, 2015, Victims 1 and 2 (hereinafter V1 and V2), both 13 years of age, were interviewed by the police. V1 stated that on one occasion Defendant had her and V2 take off their clothes and digitally penetrate each other with a dildo while Defendant watched. Defendant ejaculated after seeing victims digitally penetrate each other. V1 told the SANE exam nurse that Defendant forced them to put the dildo in each other and he played with himself and ejaculated by their faces.

V2 stated that while at Defendant's home, Defendant showed them a silver and black dildo and offered each of them $100 to use the dildo on each other. V2 said they inserted the dildo into each other while the defendant masturbated. V2 made the same statements to the SANE exam nurse.

The Defendant's evidence included, but is not limited to, the following:

When V1 was interviewed by Officer Babcock, she was specifically asked about digital penetration with a sex toy and stated that she refused to allow V2 to insert it in her vagina. Victim's father was interviewed by Officer Babcock and stated that V1 had limited to no memories of what had happened and that her memory was vague. V1 never mentioned penetration.

V2 said that she can't really say if she did it or not with the dildo and said that she didn't remember what was going on. V2 was interviewed by Officer Babcock as well and made no reference to vaginal penetration. Additionally, V2's family members said that V2 had limited to no memory of what happened because of the edible marijuana that was given to her.

Simpson hearings are not for the Court to decide the guilt or innocence of a Defendant. *Simpson* hearings are for this Court to decide whether, based upon the evidence presented, defendant should be held non-bondable or be allowed to post a bond. Additionally, the Court must decide whether all of the evidence, fully considered by the Court, makes it plain and clear to the understanding, and satisfactory and apparent to the well-guarded, dispassionate judgment of the court that the accused committed one of the offenses enumerated in the statute; proof must be substantial, but it need not rise to proof beyond a reasonable doubt. *Simpson v. Owens,* 207 Ariz. 261, 85 P.3d 478 (App. 2004).

In this case, even though V1 never mentioned penetration to one of the officers, the Court finds V1 statements credible. Additionally, even though V2 initially reported that she had little to no memory of the event, the court finds V2 statements credible. The victims' statements

are consistent with the evidence found in defendant's home. The victims' statements are consistent with Exhibits 2-20. The Court further finds that all of the evidence considered by this Court makes it plain and clear that defendant committed Counts 23 and 24 of the indictment. Hence, based upon the evidence presented, the Court finds that the proof is evident or the presumption great that Defendant committed the offenses. Therefore, the Defendant is non-bondable.

For the foregoing reasons,

IT IS ORDERED denying Defendant's Motion For Immediate Release.

IT IS ORDERED affirming the Comprehensive Pretrial Conference date of **October 26, 2015 at 8:30 a.m.** in Judge Steinle's division.

IT IS ORDERED signing this minute entry as a formal written order of the Court.

/s/ JUDGE PRO TEM PHEMONIA L. MILLER

JUDICIAL OFFICER OF THE SUPERIOR COURT

7

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff, vs. JASON DONALD SIMPSON, Defendant.	)	Superior Court No. CR 2014-134762-001

VERBATIM TRANSCRIPT OF PROCEEDINGS

SEPTEMBER 17, 2015 EVIDENTIARY HEARING

PHOENIX, ARIZONA

Before the

HONORABLE PHEMONIA L. MILLER, COMMISSIONER

(COPY)

JANE ANNE WESTLUND, RPR NO. 813626, CSR NO. 50894

A P P E A R A N C E S

For the State: MS. FRANKIE GRIMSMAN
ON BEHALF OF BRADLEY MILLER
DEPUTY COUNTY PROSECUTOR
Phoenix, Arizona

For the Defendant: MR. HECTOR J. DIAZ
MR. WOODROW C. THOMPSON
ATTORNEYS AT LAW
Phoenix, Arizona

BE IT REMEMBERED that on September 17, 2015, the above-captioned cause came on duly for hearing before the HONORABLE PHEMONIA L. MILLER, Commissioner of the Superior Court in and for the County of Maricopa, State of Arizona; the following proceedings were had, to wit:

--o0o--

THE COURT: This is the time set for the Evidentiary Hearing, in 2015-134762-001, in the matter State of Arizona vs. Jason Simpson.

Counsel announce for the record.

MS. GRIMSMAN: Frankie Grimsman, on behalf of Bradley Miller for the State.

MR. THOMPSON: Woody Thompson --

MR. DIAZ: Hector Diaz.

MR. THOMPSON: -- both on behalf of Mr. Simpson.

THE COURT: Mr. Simpson, would you please stand and state your full name and date of birth for the record?

THE DEFENDANT: Jason Simpson. [redacted]69.

THE COURT: Good afternoon to you, sir. You can have a seat. Ms. Grimsman, is the State ready to proceed with the Evidentiary Hearing?

MS. GRIMSMAN: The State is ready to proceed, but I believe there's a pending motion by defense.

THE COURT: And I have received the Defendant's Motion for Immediate Release and also reviewed the Defendant's Motion in Limine to Preclude Evidence of Alleged Prior Criminal History, and I'm in receipt of the Defendant's Motion to Compel Discovery and Exclude Evidence, so, Mr. Thompson, let me hear from you first.

MR. THOMPSON: Specifically, with respect to the last motion, the Motion to Compel and the Motion to Exclude Evidence, I would reurge what we just urged in chambers, which is that the State should not be allowed to use the evidence of any victim's statements or witness' statements that have been recorded and relied upon by the investigator, because according to the police reports, those statements were recorded and impounded and we have been requesting that information for the last easily 30 days continually.

We've made several requests for it. The discovery rules provide that it is due within 30 days, which would have been last Friday. It is a discovery violation. Again, it is not something that we laid in wait for this. We were specifically asking for these tape recordings and video recordings, and I understand

the State's position is they don't have to bring them for this sort of a hearing, because I believe the State's position is due process does not apply.

I would respectfully disagree and point out that this hearing -- this release hearing is borne of due process. It starts from the *Salerno* case, as well as the *Simpson vs. Owens* case, and in there they talk about a due process right for somebody that's being held on non-bondable status; and those cases also talk about a hearing and that hearing being a meaningful hearing and a contested hearing, and so I respectfully submit to the Court that, if the State is allowed to take this evidence, impound it, use it, and then sit on it for in excess of 50 days, without disclosing it to the defense, then, that is not a meaningful contested hearing. That's an one-sided hearing.

And, furthermore, I would also point out that the State did send out a disclosure letter late last night, after the close of business indicating that numerous recordings were made available to the defense and then also photos as well were disclosed late last night, and I believe the State has already started marking those, so for the record, I'd also like to point out to the judge that the State is actually relying on this and using it in this hearing, but the defense is

left out of the picture and at the very 11th hour given notice. That certainly I would argue does not comport with due process. It doesn't comport with the discovery rules. It is a violation of the discovery rules.

We're not asking the charges be dismissed. We're asking for a much lesser sanction, and the sanction that would be appropriate would be to preclude them from using the evidence in this hearing, only. That's with respect to that motion.

MS. GRIMSMAN: Do we want to argue the motions separately, so that we can discuss one motion?

THE COURT: Let's talk about the Motion to Preclude, then, your other part is to compel discovery. Has the discovery been completed and complete, Mr. Thompson? You have a Motion to Compel and to Exclude.

MR. THOMPSON: Well --

THE COURT: Regarding the Motion to Compel.

MR. THOMPSON: Well, I know that we need to review it, before I can tell you, if they have actually complied with compelling everything. Off the top of my head, I seem to believe that there's still DNA evidence out there, phone evidence, which I would expect to be voluminous and may even require some sort of proprietary software to review, so I expect there are still

outstanding discovery issues there, but at a minimum I would need time to review -- to do the documents or the videos that have been disclosed.

THE COURT: Let me hear Ms. Grimsman's response to your Motion to Exclude.

MS. GRIMSMAN: Yes, your Honor, first off, we're mixing apples and oranges. There's a due process right to review for a non-bondable offense, to have a hearing, to be able to have a discussion about whether or not you should be held non-bondable, and that right was granted through Simpson. That due process right did not create a discovery right. There are no rules in Arizona creating a discovery right for either party at a Simpson Hearing, so it is apples and oranges that are being mixed here.

The federal law, which is the due process clause is constitutional, states: "There is no general constitutional right to discovery in a criminal case, and Brady did not create one. As the Court wrote recently, the due process clause has little to say, regarding the amount of discovery, which the parties must be afforded." And I'm quoting from *Weatherford vs. Bursey*, 429 U.S. 545 from 1977, which was quoting *Wardius vs. Oregon*, W-A-R-D-I-U-S, 412 U.S. 470, which was decided in 1973.

Due process clause has been around for ages, and there's voluminous case law on it. This is a well established fact that due process in and of itself does not create a discovery burden, just like defense can stand up and can call witnesses during a Simpson hearing, without noticing them to the State. They can present evidence that they have not disclosed to the State. They can discuss things with the witnesses that hasn't been disclosed to the State.

The State often presents witnesses, without even the prosecutor having reviewed audio and video recordings, because these hearings can happen sometimes within days of arrest. There is no discovery violation for a Simpson Hearing.

With regard to the Motion to Compel and to preclude, based on a violation of Rule 15.1, I can tell the Court that there has been a significant amount of discovery done in this case, and I want to go through that: Back in August, we disclosed 213 pages of Bates. That was followed by a second disclosure on August 21 and another disclosure on August 27. There was a request to the detective for a significant amount of disclosure and the detective complied with that by getting it to our office on September 3rd.

Now, the significance of that date is that

September 3rd was just before the Labor Day weekend. September 4 was a work day, then, we had the Labor Day weekend, and, then, we had last week, so the State has not been sitting on this evidence for a significant amount of time.

And I'd also like to point out that any documents that have to be disclosed by the State have to be reviewed for redaction. We're supposed to review audio and video and redact too. The paralegal was in the process of doing that, when the assigned prosecutor told the paralegal, go ahead and release the audio and video, without what we would normally do as redaction, because the parties involved know the dates of birth of these witnesses, they know most of the addresses involved. We don't have victims in this particular case that have moved to another location, so we went ahead and prepared the documentation, and we released these videos last night, but this type of discovery requires a certain amount of review by the prosecutor and by the assigned paralegal, before it can just be turned over to defense.

It is just not a matter of complying with discovery rules or discovery requests. We also have a burden that's placed on us to make sure victim's rights are complied with, so the State has been processing

this.

I would also point out that part of the reason that this has been tied up is not only did defense ask us for these documents, but they also did a public record's request through the paralegal of the City of Phoenix, and so the detective had to go and review all these audio and video and do redactions on them to be released as a public record's request, which has slowed down the rest of the disclosure of the rest of the discovery.

Had the detective not been forced to try and handle the public record's request that defense did, we probably would have already had the analysis of the phones completed, but because not only was our office reviewing these audio and video, so was the detective, because the defense went two different ways to try and get them. I'm not saying that's not the right to do it, but it does impact the disclosure of everything in this case.

We're talking about extremely voluminous records, cell phones -- I believe is there a computer also? Just cell phones, but there's a tremendous amount of data on these cell phones that the detective is processing. That is not complete. He doesn't have an analysis completed of it. The State doesn't have it

yet. The DNA testing is not completed, so I can't disclose what we haven't completed yet.

We have made every effort to come forward with this discovery. Defense is getting it in a timely manner. It is not an intentional withholding of evidence. They did start asking us for evidence that we didn't have, when they started asking us for it. We have been responsive to their E-mails. We've informed them that we're working on it. We've done our due diligence to request this evidence from the detective. It is not at all unusual in criminal cases, which all parties are familiar with, for it to take a certain amount of time to get audio and video processed and disclosed to defense.

We provided the addresses and the names of the witnesses by our deadline. We complied with Rule 15.1. We have done discovery to the best of our ability, and to somehow come in Court and say that we want to proceed with the hearing, but we want to preclude the State from using the evidence that was presented at Grand Jury, that was presented to prove these charges to the Grand Jury and would be the evidence that would prove presumption great in this courtroom, we want you to preclude that only for the purposes of this hearing is just a maneuvering to try and circumvent what is the

normal process of the Simpson hearing, because due process does not create this discovery right, and the proper response to an initial Motion to Compel is to compel that evidence, and the State is coming forward with that evidence.

THE COURT: Thank you. Mr. Thompson.

MR. THOMPSON: Yes. First off, I would like to read a section from *Simpson vs. Owens* that talks about the hearing that's afforded.

THE COURT REPORTER: Please speak up and slow down. I just say that at the beginning, so thank you.

MR. THOMPSON: I would like to read a portion from *Simpson vs. Owens*, 207 Az. 261:

"The accused is entitled to counsel. The parties must have the right to examine, cross-examine the witnesses and to review in advance those witnesses' prior statements."

So it is not coming out of left field that this hearing would entail some right of discovery. In no way am I coming up here, your Honor, and saying that at this point in time we need to have the State make everybody available to be interviewed, that sort of thing. No. We need enough to comport with due process. We need enough to know what they know, so that we can have a contested and appropriate hearing.

The Rules of Criminal Procedure provide them a time line to do this. Rule 15.1 says 30 days. They have 30 days. So Frankie gave all kinds of reasons or explanations for why it hasn't been done and why it may take them a long time, but the Rules of Criminal Procedure say, you know what? For all those reasons, you get 30 days to get this done, and we're outside of 30 days, your Honor, so that's why the motion is filed. We're outside of 30 days. The State has not produced any explanation or acceptable reason for their delay for not providing this documentation.

Again, the recorded statements and interviews are marked in the police reports that they were recorded and impounded, so those have been in the possession of the State for close to 50 days. The fact that they are only disclosed at the 11th hour last night is troubling, and I would argue it certainly does violate my client's due process, but it also -- it flies in the face of Rule 15.1, and there's been offered no excuse for the delay of disclosure in that, so I would reurge that the State not be able to use this information that they have not disclosed to the defense.

THE COURT: Thank you. Ms. Grimsman, the arraignment hearing was August 11, 2015, and when was the first request, Mr. Thompson, for the discovery? If

it was 30 days after arraignment, that would be put the State at September 11.

MS. GRIMSMAN: That's correct, your Honor. It would have been Friday last week, last Friday, and we disclosed them on Wednesday, so it was three business days late.

THE COURT: So is there a reason why that it was three business days late, Ms. Grimsman?

MS. GRIMSMAN: It is strictly the voluminous amount of discovery involved in this case. The State has been working towards getting it disclosed. We were certainly working on accomplishing that, but because of the voluminous nature of this case, which is not unusual, when you have a voluminous amount of discovery, it takes slightly longer to process. I don't think that three days is in any way unheard of and certainly not an intentional or malicious violation of the rules.

THE COURT: And, Mr. Thompson, when was the first request?

MS. GRIMSMAN: I actually have that information, your Honor.

MR. THOMPSON: I'm going to refer to the actual pleadings here.

THE COURT: I think it was August 14.

MS. GRIMSMAN: I have August 19 is the first

request, and that's the exhibits that they attached to the motion.

MR. DIAZ: Those are E-mails, your Honor, submitted directly to the State, but our 15.1 --

THE COURT: The 15.1 discovery request was filed on August 14.

MR. DIAZ: August 14.

THE COURT: August 14, 2015. Anything further from you, Mr. Thompson?

MR. THOMPSON: Yes, I do. I'd just like to point out that the State keeps saying "voluminous nature," well, of the first portion that was provided, there are reports through Bate's 77 that are Phoenix Police Department reports relevant to this case. After that, Bate's 78 is disclosing information from a 2003 Peoria matter and documents best I can tell that are all relevant to that matter, so I would point out that 77 pages that are related to the actual Simpson hearing is certainly not voluminous.

And then the other thing I would point out is the recordings they have had, since those recordings were taken in late July, so -- and some of them may have been done later, because one was done in New Hampshire, but they have had these, and they have had them impounded, and those are not voluminous. It is burn it

to a CD and get it out to us, so I would argue that does not excuse missing the discovery deadline.

And I would also urge, again, the rules say 30 days, but mind you this whole 30 days, while it is ticking, all the while, while this discovery deadline is going, and, then, after, we're on the outside of it, my client is in custody being held non-bondable, so it is very important to him.

It is not that this is a discovery violation of no moment. He's being -- he's not at home. He's not able to defend this case from the outside. He's in custody. I would argue it couldn't be any much more significant to the defense. Thank you.

THE COURT: Thank you.

MS. GRIMSMAN: Your Honor, I just --

THE COURT: One second. I do agree that the State failed to comply with Rule 15.1 B, in not disclosing the evidence in a timely manner, however, I don't think the appropriate remedy is preclusion.

I will allow you an opportunity, Mr. Thompson, to review the evidence, and I can step off the bench now and give you some time to review it. If that's not enough time for you, I'm certainly willing to reset this matter for a time that's convenient for you to review all of the evidence, prior to proceeding with this

Evidentiary Hearing.

MS. GRIMSMAN: Your Honor, just so the record is clear, when I refer to "voluminous discovery," it was not the 77 pages that was disclosed. It was the hours of audio and video that the paralegals are supposed to review for redactions, which was voluminous. It is approximately I think about 15 different audio and videos, so that is voluminous.

THE COURT: So I've made my ruling.

Mr. Thompson, I could certainly step off the bench and let you have a chance to review what you have received already.

MR. THOMPSON: I would also like to make a record, with regard to the other two motions.

THE COURT: The Motion in Limine to preclude evidence of the alleged prior?

MR. THOMPSON: Yes, your Honor. May we approach?

THE COURT: Yes.

(WHEREUPON A SIDE BAR WAS HELD.)

MR. THOMPSON: Mr. Diaz is going to argue this point, but before we do, I want to say something: I think we're walking a tight rope here, because they have referred to this prior incident.

MR. DIAZ: The Probable Cause statement where

it comes out in form four, the detective makes reference to 2003 then a 2003 arrest and a 2006 investigation. Starting with the '06 material in the 2006 investigation, we've got no disclosure, nothing.

THE COURT: I can tell you my inclination is not to allow the State to introduce --

MS. GRIMSMAN: It wasn't my intent to argue to introduce it, with regard to Simpson.

THE COURT: Just with regard to Simpson.

MS. GRIMSMAN: Correct.

THE COURT: It is just with regard to this hearing. With the other -- Mr. Diaz, come forward please. The other issue is the Motion for a Bail Hearing, with an individual assessment that's for an evaluation. Can't we address that during the time of the -- after the Simpson hearing is completed?

MR. THOMPSON: I just want to put on the record that I'm not waiving any rights or requests with respect to that request, so if I've done that right now that's fine. I just want to make sure it is clear we're still urging that.

THE COURT: You are.

MS. GRIMSMAN: I think it is on the record.

THE COURT: It is on the record now you are not waiving it.

MR. THOMPSON: Thank you, your Honor.

(BACK FROM SIDE BAR.)

THE COURT: With respect to the defendant's Motion in Limine to Preclude Evidence of an Alleged Prior Criminal History in a bail hearing, it is ordered granting that motion. If the State intended to use any of that evidence -- and this just pertaining to this hearing only, Ms. Grimsman.

MS. GRIMSMAN: Yes, your Honor, that would be my intent, just with regard to the Simpson portion of the hearing. Should even in the future the Court determine that the defendant is bondable, the State believes that the Court can make an inquiry into any additional arrests or anything. There may be some discussion about the 2003 matter, at that point, but with regard to the 2006 matter, I believe that at that point there might need to be a discussion, but that would only happen, if we complete the Simpson hearing, the Court were to determine that the defendant should be bondable, and then want to proceed to some type of hearing on that.

THE COURT: Anything else we need to discuss?

MR. THOMPSON: No, thank you.

THE COURT: So I'll step out, and let me know when you are ready.

(WHEREUPON THE PROCEEDING WAS CONCLUDED.)

--o0o--

C E R T I F I C A T I O N

I, Jane Westlund, Official Court Reporter for the Maricopa County Superior Court, Phoenix, Arizona, herein, hereby certify that the foregoing is a true and accurate transcript of the proceedings herein all done to the best of my skill and ability.

Dated this 8th day of October, 2015, in Phoenix, Arizona.

/s/ Jane Anne Westlund

Jane Anne Westlund
Official Court Reporter
RPR No. 813626
AZ. CSR No. 50894

REPORTER'S CERTIFICATE

Exhibit 1

IN THE

Court of Appeals

STATE OF ARIZONA
DIVISION ONE

DIVISION ONE
FILED: 12/8/2015
RUTH A. WILLINGHAM, CLERK
BY: RB

JASON DONALD SIMPSON, a.k.a. JASON DONALD SIMPSON, SR., Petitioner, v. THE HONORABLE PHEMONIA MILLER, Commissioner of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA, Respondent Commissioner, STATE OF ARIZONA, Real Party in Interest.	Court of Appeals Division One No. 1 CA-SA 15-0292 No. 1 CA-SA 15-0295 Consolidated Maricopa County Superior Court No. CR2015-134762-001 No. CR2014-118356-001
JOE PAUL MARTINEZ, Petitioner, v. THE HONORABLE ROLAND J. STEINLE, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA, Respondent Judge, STATE OF ARIZONA, Real Party in Interest.	

ORDER (amended)

These matters came on for a telephonic status hearing on December 7, 2015. Counsel for both Petitioners and Real Party in Interest, State of Arizona, appeared.

At this time a request to consolidate these special action matters is before the court and oral consent being given to the motion to consolidate,

IT IS ORDERED consolidating these two special action matters and assigning the case to Department A and vacating the previous assignment of 1 CA-SA 15-0295 (Martinez) to Department B. Arizona Court of Appeals No. 1 CA-SA 15-0292 shall be the primary cause number, and the above caption shall be used on all future filings with this court.

IT IS ALSO ORDERED **the response of the State of Arizona to the Petition for Special Action shall be filed with this court on or before December 9, 2015 and any Reply thereto by Petitioner Martinez shall be filed on or before December 18, 2015.**

IT IS FURTHER ORDERED any reply by Petitioner Simpson shall be due on or before December 11, 2015.

IT IS ALSO ORDERED Petitioners shall serve before the close of business on December 8, 2015, the Arizona Attorney General, the Speaker of the Arizona House of Representatives and the President of the Arizona Senate with complete copies of the Petitions for Special Actions and other pleadings filed in these special action matters, together with a copy of this Order, to comply with the notice requirements of A.R.S. § 12-1841(B) and to provide notice of compliance of such service to this court and all parties who have appeared herein.

IT IS FURTHER ORDERED that any submission by the Arizona Attorney General, Speaker of the House of Representatives or the President of the Arizona Senate shall be filed with this court on or before January 4, 2016 and with copies served on all parties who have entered an appearance herein. Arizona Rules of Civil Appellate Procedure (ARCAP) 13 and 14 shall govern any submission by the Arizona Attorney General, Speaker of the House of Representatives and President of the Senate, except such submissions shall not exceed 12,000 words in length if done in proportionately-spaced typeface, or 35 pages if done in mono-spaced typeface. Any submission shall be for the sole purpose of addressing the constitutionality of A.R.S. § 13-3961(A)(3).

IT IS ALSO ORDERED that any party in this matter wishing to respond to any submission made by the Attorney General, Speaker of the House of Representatives or the President of the Senate shall file such response with the court on or before the 8th day of January, 2016 and serve such response on all parties who have appeared herein. All responses shall comply with ARCAP 13 and 14 except that responses shall not exceed 7,000 words in length if done in proportionately-spaced typeface, or 20 pages if done in a mono-space typeface. Unless the Attorney General, Speaker of the House or President of the Senate actually files a submission in response to this order, neither party shall file any additional brief or other document further addressing the constitutionality issues raised herein.

IT IS FURTHER ORDERED vacating this court's prior orders setting these matters for consideration and oral argument on December 16, 2015 and December 29, 2015, respectively. This consolidated matter is set for consideration and oral arguments on Wednesday, January 13, 2016 at the hour of 11:00 a.m. in Courtroom number Two before Department A of the Arizona Court of Appeals, State Court's Building, 1500 West Washington, Phoenix, Arizona 85007.

/s/

_____

PETER B. SWANN, Judge

To:
James L Burke
Hector J Diaz
Woody Thompson
Hannah H Porter
David R Cole
Jean-Jacques Cabou
Sarah R Gonski
Brian F Russo
Arthur G Hazelton Jr

From:	Brnovich, Mark
To:	Bailey, Michael
Cc:	Anderson, Ryan
Subject:	FW: Potential violation of state law by Treasurer"s office regarding use of legal counsel
Date:	Monday, December 14, 2015 11:41:51 AM
Attachments:	LT AG re Potential Fraud, Waste, and Abuse Claim for Engagement of Private Counsel 23049811_3.docx

Is someone following up on this?

From: Lisa Graham Keegan [mailto:[redacted]@aol.com]
Sent: Friday, December 11, 2015 3:24 PM
To: Brnovich, Mark
Cc: jm@ma-firm.com; Anderson, Ryan; Garcia, Mia
Subject: Potential violation of state law by Treasurer's office regarding use of legal counsel

Dear Attorney General Bronovich,

Please see the attached notice of a potential violation of state law regarding use of legal counsel by Treasurer DeWit that I am filing on behalf of myself and fellow superintendent of public instruction Jaime Molera.

Either of us are happy to answer any questions you may have of us.

Sincerely,

Lisa Graham Keegan

Lisa Graham Keegan
www.keegancompany.com
(602) [redacted]

Attorney General Mark Brnovich
Office of the Arizona Attorney General
1275 W. Washington St.
Phoenix, AZ 85007

December 11, 2015

Re: Potential Fraud, Waste, and Abuse due to Office of the Arizona State Treasurer's Engagement of Private Counsel regarding Proposition 123

Dear Attorney General Brnovich,

We write to bring a potential violation of the Arizona law on fraud, waste and abuse to your attention. The Office of the Arizona State Treasurer has retained private counsel, Cantelme & Brown, to provide legal guidance on Proposition 123. Under Arizona law, however, the Treasurer's Office does not have the authority to make such expenditures.

Although we initially intended to wait to review documents responsive to a December 3, 2015, request filed under A.R.S. § 39-121, we have received neither the documents nor any acknowledgement of our request. However, recent comments to the media made by the Treasurer's office provide additional reason to believe the office may have violated and continues to violate state law.

Specifically, Deputy Treasurer Mark Swenson indicated to the Yellow Sheet Report publication that the Treasurer's Office is not subject to any restrictions on use of private legal counsel and that independent counsel had been retained due to a "conflict" with the Arizona Attorney General's Office.

Under A.R.S. § 35-318, the Arizona state treasurer may enter into an agreement with advisors (including "legal advisors") for investment strategies or tactics to invest treasury funds. However, an attorney's paid advice on how to prevent a proposition from becoming law is neither an "investment strategy" nor a method of investing state treasury funds. If the Treasurer's Office is using state funds to pay for these private attorneys, those payments overstep its authority.[1]

Additionally, the law requires the treasurer to pay these "legal advisors" from the proceeds of any investment earnings. If the Treasurer's Office is paying for these advisors with those proceeds, it is spending money destined for schools on attorneys working to prevent money from reaching schools and children.

The Treasurer's Office is also violating Arizona law if it has entered into a contingency-fee contract with private counsel. Under A.R.S. § 41-4802, Arizona state agencies cannot enter into a contingency-fee contract with a private attorney unless the Attorney General makes a written determination that the contract is both cost effective and in the public interest.

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[1] Former Treasurer Dean Martin's statements during February 24, 2009, testimony before the House Committee on Government show the bill that became the current version of A.R.S. § 35-318 was only intended to provide the Treasurer with access to an "expert in securities law." For "anything that deals with . . . state government stuff, we're still going to use the Attorney General," Martin said.

We believe that the Treasurer may have violated Arizona law by hiring outside counsel and, if so, may have committed fraud, waste, and abuse by illegally spending taxpayer money on these services. We ask that you promptly investigate these payments to make sure the law is upheld.

Sincerely,

Jaime Molera
300 W. Clarendon Ave., Suite 200
Phoenix, AZ 85013
602[redacted]

Lisa Graham Keegan
14770 N. 88th Lane
Peoria, AZ 85381
602[redacted]

From: Brnovich, Mark
To: Watkins, Paul; Bailey, Michael
Subject: FW: Repeated Nuisance / Harassing Phone calls to RISS Centers
Date: Tuesday, October 06, 2015 12:08:40 PM

From: RMINInfo [mailto:RMINInfo@rmin.riss.net]
Sent: Tuesday, October 06, 2015 11:37 AM
To: Brnovich, Mark
Subject: Repeated Nuisance / Harassing Phone calls to RISS Centers

Click Here for information and analysis on incidents regarding an individual who identified himself as Robert YOUNT. He has recently and repeatedly made lengthy "nuisance" and veiled threats phone calls to multiple RISS centers.

From: Brnovich, Mark
To: Bailey, Michael; Anderson, Ryan
Cc: Medina, Rick
Subject: FW: Sandra Day O"Connor College of Law Externship Program
Date: Wednesday, October 07, 2015 11:50:12 AM
Attachments: AG"s Spring 2016 Resume Packet.pdf

Is someone going to go through through these and see if theres any candidates for XO?

From: Gee, Kay
Sent: Wednesday, October 07, 2015 8:41 AM
To: DL-Division Chiefs; DL-Section Chiefs
Cc: DL-Office Administrators; GS-HumanResources-ResourceGroup; Welch, Leslie; Human Resources
Subject: Sandra Day O'Connor College of Law Externship Program
Importance: High

Division Chiefs, Section Chiefs and Office Administrators,

Attached is the PDF file with resumes of Sandra Day O'Connor College of Law students interested in an externship with our agency during the 2016 Spring Semester.

Instructions:

- Please contact the students directly to conduct phone or face-to-face interviews.
- Please send me your selections by **Monday, November 9th**.
- Please list the students in order of preference (first choice: Sam Smith; second choice: Sally Smith), and indicate whether you are looking for more than one extern for your section.
- ASU will get back to Human Resources by Thursday, November 19th or sooner to let us know if your offer has been accepted and the name(s) of your extern(s).
- **Please do not contact the students directly with offers**.
- Please make offers only for the Spring 2016. If you are interested in a student for any other semester, please encourage students to reapply during the appropriate application time period.
- It is important to note that the selection of an extern does not guarantee his/her acceptance.
- Students are allowed to submit externship applications to ASU after the deadline. Additional resumes may be available for your review in the second round of resumes.

We appreciate your participation in the Externship Program and the time and effort you devote to making this a great learning opportunity for students.

If you have any questions, please do not hesitate to contact me or your HR rep.

Thank you,

Kay Gee
Human Resources Section

Attorney General Mark Brnovich
1275 W. Washington, Phoenix, AZ 85007
Desk: 602-364-0680
kay.gee@azag.gov

From: Brnovich, Mark
To: Watkins, Paul; Drave, Dominic; Bailey, Michael
Subject: FW: SCOTUS GRANT!
Date: Friday, November 06, 2015 11:57:51 AM

From: The Becket Fund [mailto:hsmith=becketfund.org@mail212.atl171.mcdlv.net] **On Behalf Of** The Becket Fund
Sent: Friday, November 06, 2015 11:57 AM
To: Brnovich, Mark
Subject: SCOTUS GRANT!

The Becket Fund for Religious Liberty
November 2015

The U.S. Supreme Court just granted certiorari in **all 7 HHS non-profit mandate cases**, including both of our clients Little Sisters of the Poor and Houston Baptist University.

The Court granted cert only on those questions presented dealing with RFRA, excluding the constitutional claim that the Little Sisters' petition presented.

The cases will be consolidated for oral argument.

Here is the link to the order:
http://www.supremecourt.gov/orders/courtorders/110615zr_j4ek.pdf

And here is the text of the order:

CERTIORARI GRANTED
14-1418 ZUBIK, DAVID A. ET AL. V. BURWELL, SEC. OF H&HS, ET AL.
14-1453 PRIESTS FOR LIFE, ET AL. V. DEPT. OF H&HS, ET AL.
14-1505 ROMAN CATHOLIC ARCHBISHOP V. BURWELL, SEC. OF

H&HS, ET AL.
15-35 E. TX BAPTIST UNIV., ET AL. V. BURWELL, SEC. OF H&HS
15-105 LITTLE SISTERS, ET AL. V. BURWELL, SEC. OF H&HS, ET AL.
15-119 SOUTHERN NAZARENE UNIV., ET AL. V. BURWELL, SEC. OF H&HS, ET AL.
15-191 GENEVA COLLEGE V. BURWELL, SEC. OF H&HS, ET AL.

The petition for a writ of certiorari in No. 14-1418 is granted limited to Question 1 presented by the petition. The motion of Association of American Physicians & Surgeons, et al. for leave to file a brief as amici curiae and the petition for a writ of certiorari in No. 14-1453 are granted. The petitions for writs of certiorari in Nos. 14-1505, 15-35, 15-119, and 15-191 are granted. The petition for a writ of certiorari in No. 15-105 is granted limited to Questions 1 and 2 presented by the petition. The cases are consolidated.

Best regards,

Hannah C. Smith
Senior Counsel &
Editor, Becket Lawyers Network

From: Brnovich, Mark
To: Pierce, Amilyn
Cc: Anderson, Ryan
Subject: FW: Support America's Clean Power Plan and the health of our children
Date: Thursday, November 05, 2015 3:57:12 PM

-----Original Message-----
From: [redacted]@gmail.com [mailto:[redacted]@gmail.com]
Sent: Thursday, November 05, 2015 3:50 PM
To: Brnovich, Mark
Subject: Support America's Clean Power Plan and the health of our children

Attorney General Brnovich

I am a parent concerned about children's health and air pollution.

I am writing to ask that you side with families – not with polluters – and support America's Clean Power Plan.

Air pollution can trigger asthma attacks, interfere with lung development, and increase adverse birth outcomes. Air pollution can also change our climate and trigger extreme weather events.

To protect our families, we must significantly reduce carbon pollution from the largest source, existing power plants.

Fossil fuel-fired power plants are the largest source of greenhouse gas emissions in the United States, accounting for almost 40 percent of the country's carbon pollution. There is enormous potential for the power sector to reduce pollution by shifting to clean sources of energy – with immense benefits for the health of our families and communities, for creating jobs and strengthening the American economy, and for safeguarding our children's future. EPA projects that the Clean Power Plan will have total climate and public health benefits of up to $54 billion per year by 2030 – benefits that include saving up to 3,500 lives and avoiding 90,000 childhood asthma attacks each year.

EPA's authority – and responsibility – to regulate carbon pollution under the Clean Air Act is well-established. The Supreme Court has affirmed EPA's authority to regulate greenhouse gases under the Clean Air Act three times since 2007.

Please, support America's Clean Power Plan.

Sincerely,

John Hinton
[redacted]
Phoenix Arizona [redacted]

From:	Brnovich, Mark
To:	Anderson, Ryan
Subject:	FW: The Smoke-Free Arizona Act"s Important 20-Foot Rule is not being enforced. And, the troubling question is, Why?
Date:	Friday, October 23, 2015 1:35:55 PM
Attachments:	Let"s put an end to the smoke-in-your-face.pdf Who"s responsible for enforcing the Smoke-Free Arizona Act.pdf

This was in Mark's inbox, Mike suggested I send it to you.

Beth

From: Louis Carabillo [mailto:[redacted]@gmail.com]
Sent: Friday, October 23, 2015 1:05 AM
To: Brnovich, Mark
Cc: PHILIP J CARPENTER; Char Day
Subject: The Smoke-Free Arizona Act's important 20-Foot Rule is not being enforced. And, the troubling question is, Why?

TO: The Honorable Mark Brnovich, Arizona Attorney General

Dear Sir:

As are other responsible Citizens across our State, who have volunteered the time and effort to report Violations of the Smoke-Free Arizona Act's 20-Foot Rule (no smoking within 20 feet of business entrances), to no avail (Please see attached PDF files, below: ***Let's put an end to the smoke-in-your-face experiences at our State's business entrances***; ***Who's responsible for enforcing the Smoke-Free Arizona Act***), I'm totally discouraged.

We're now eight years into the Act. Can the Arizona Attorney General's Office investigate this matter of concern, affecting the health and well-being of thousands of Arizonans, daily? Your attention is appreciated. Thank you.

Respectfully,

Louis T. Carabillo, Jr.

Gmail by Google

Louis Carabillo <[redacted]@gmail.com>

Who's responsible for enforcing the Smoke-Free Arizona Act, in Yavapai County?

Louis Carabillo <[redacted]@gmail.com> Sat, Oct 17, 2015 at 1:20 AM
To: cara.christ@azdhs.gov, stephen.tullos@yavapai.us
Cc: PHILIP J CARPENTER <pcarperter04@msn.com>, david_schapira@tempe.gov, Eric Thomas <eric.thomas@azdhs.gov>, harmony.duport@azdhs.gov, brigitte.dufour@azdhs.gov, smortenson@lungs.org, alyss.jensby@cancer.org, eableser@azleg.gov, kyee@azleg.gov, hcarter@azleg.gov, ahale@azleg.gov, jmendez@azleg.gov, jnorgaard@azleg.gov, brobson@azleg.gov, asherwood@azleg.gov, sallen@azleg.gov, bbarton@azleg.gov, kfrench@azsos.gov, dscarpinato@az.gov, randy.lovely@arizonarepublic.com, nicole.carroll@arizonarepublic.com, Cherrill Crosby <cherrill.crosby@arizonarepublic.com>, "Sayers, Justin" <jsayers@arizonarepublic.com>, Annie Meredith <annie.meredith@mohavecounty.us>, barbburk5@msn.com, jharris@azasthma.org, jspitz@tucson.com, kevin.dale@asu.edu, rlayton@prescottaz.com, jhutchinson@verdenews.com, Char Day <char.day@no-smoke.org>, cynthia.hallett@no-smoke.org, ombuds@azoca.gov

TO: Cara M. Christ, M.D., Director, Arizona Department of Health Services;
Stephen Tullos, Director, Yavapai County Community Health Services.

RE: The Smoke-Free Arizona Act — *Enforcement of the Law*

Dear Dr. Christ, Mr. Tullos:

I'd like to think there's a sign on the Directors' desks that reads, ***"The buck stops here!"***

From ***The Smoke-Free Arizona Act Annual Report - 2015*** (http://www.azdhs.gov/documents/preparedness/epidemiology-disease-control/smoke-free-arizona/reports/sfa-annual-report-2015.pdf):
Page 3, ***Under the Act,*** *"the Proprietor of a public place or a place of employment is responsible for: Prohibiting anyone, such as employees, vendors, visitors, and customers from smoking within 20 feet of all entrances . . ."*
Page 6, ***Enforcement of the Law,*** *". . . For the remaining six counties, Cochise, Gila, Maricopa, Pinal, Santa Cruz, and Yavapai, ADHS provides assistance for enforcement. This means that once a pattern of noncompliance is documented, or there is evidence of willful violation of the Act, the county health department refers the case to ADHS for enforcement. The enforcement procedures are explained in Section 5.0 of this report."*
Page 24, ***5.0 Enforcement,*** *". . . The ADHS Smoke-Free Arizona Program is responsible for enforcement in the remaining six counties, including Cochise, Gila, Maricopa, Pinal, Santa Cruz, and Yavapai. . . . If a proprietor of an establishment does not correct violations as requested, demonstrates willful violations, or a pattern of noncompliance with the Act, he or she is subject to enforcement action and may receive a Notice of Violation ('NOV') or an assessment of civil penalty fines between $100 and $500 for each violation. If injunctive relief is requested, the Superior Court may impose appropriate injunctive relief and civil penalty fines up to $5,000 per violation."*
Achieving Compliance through Legal Proceedings, *"Enforcement actions take place when educational efforts fail to result in compliance with the Smoke-Free Arizona Act in a timely manner. . . ."*

And, when the Smoke-Free Arizona sections of the Arizona Department of Health Services and Yavapai County Community Health Services fail to get their act together, on the important matter of "Enforcement actions": (Please see PDF file, below, ***Let's put an end to the smoke-in-your-face experiences at our State's business entrances***)

Dr. Christ, Mr. Tullos, on behalf of our Cottonwood Community, your combined attention to this matter of concern is appreciated. Thank you.

Respectfully,

Louis T. Carabillo, Jr.

Let's put an end to the smoke-in-your-face.pdf
433K

Gmail by Google

Louis Carabillo <[redacted]@gmail.com>

Let's put an end to the smoke-in-your-face experiences at our State's business entrances

Louis Carabillo <[redacted]n@gmail.com> Thu, Oct 15, 2015 at 10:40 PM
To: Eric Thomas <eric.thomas@azdhs.gov>
Cc: PHILIP J CARPENTER <pcarperter04@msn.com>, david_schapira@tempe.gov, cara.christ@azdhs.gov, harmony.duport@azdhs.gov, brigitte.dufour@azdhs.gov, smortenson@lungs.org, alyss.jensby@cancer.org, eableser@azleg.gov, kyee@azleg.gov, hcarter@azleg.gov, ahale@azleg.gov, jmendez@azleg.gov, jnorgaard@azleg.gov, brobson@azleg.gov, asherwood@azleg.gov, sallen@azleg.gov, bbarton@azleg.gov, randy.lovely@arizonarepublic.com, nicole.carroll@arizonarepublic.com, Cherrill Crosby <cherrill.crosby@arizonarepublic.com>, "Sayers, Justin" <jsayers@arizonarepublic.com>, dscarpinato@az.gov, ombuds@azoca.gov, kevin.dale@asu.edu, Annie Meredith <annie.meredith@mohavecounty.us>, barbburk5@msn.com, jharris@azasthma.org, jspitz@tucson.com, kfrench@azsos.gov, Char Day <char.day@no-smoke.org>, cynthia.hallett@no-smoke.org

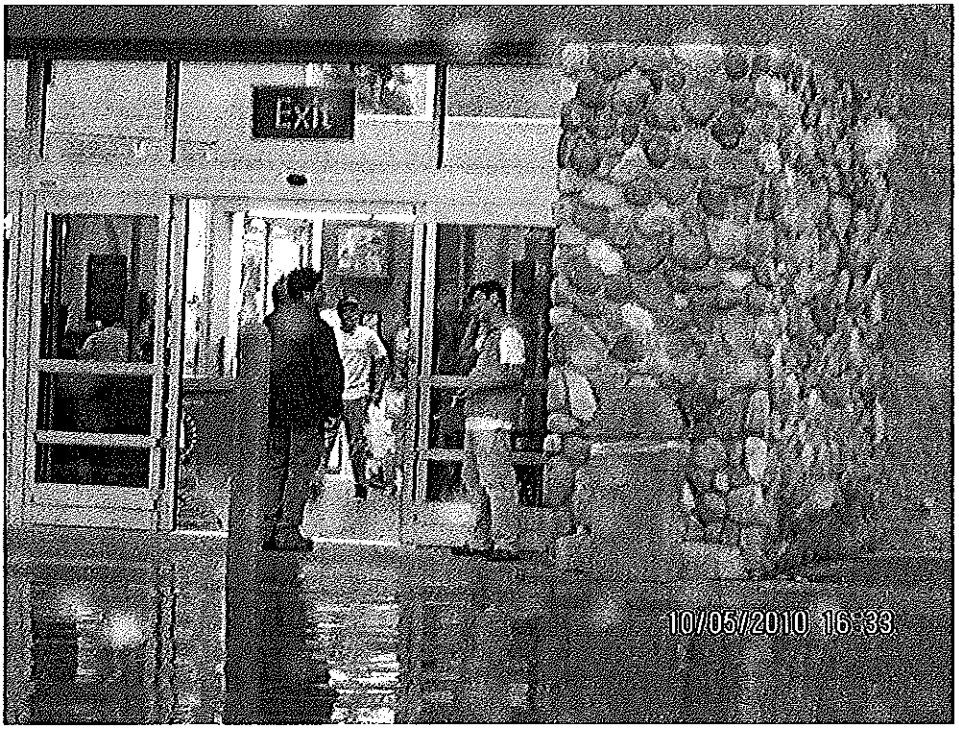
TO: Eric Thomas, Program Manager, Smoke-Free Arizona

Dear Mr. Thomas:

In my August 28, 2015 email-appeal to the Smoke-Free Arizona Program Manager (Please see PDF file, below, ***A call for equal enforcement (read: protection), as provided under A.R.S 36-601.01***), I cited an excellent example of proper enforcement of the Smoke-Free Arizona Act, along with clarification of "Enclosed Area" to include a 20-feet no-smoking envelope outside business entrances. Indeed, in ***The Smoke-Free Arizona Act Annual Report - 2015*** (http://www.azdhs.gov/documents/preparedness/epidemiology-disease-control/smoke-free-arizona/reports/sfa-annual-report-2015.pdf), prepared, undersigned by the Smoke-Free Arizona Program Manager, it states, "*Under the Act, the Proprietor of a public place or a place of employment is responsible for: Prohibiting anyone . . . from smoking within 20 feet of all entrances . . . They [the Proprietor] may receive a Notice of Violation (NOV) or an assessment of civil penalty fines between $100 and $500 for each violation. . . . Enforcement actions take place when educational efforts fail to result in compliance with the Smoke-Free Arizona Act in a timely manner. . . .During the eighth year after the Law went into effect [May 1, 2014 thru April 30, 2015], a total of* ***1,278 complaints*** *alleging violations of the Smoke-Free Arizona Act were filed statewide.* ***Most of the complaints were regarding people smoking outside within 20 feet of an entrance. . . . One NOV was issued to a proprietor repeatedly allowing smoking within 20 feet of his main front entrance."***

Re the statement, ***"Enforcement actions take place when educational efforts fail to result in compliance with the Smoke-Free Arizona Act in a timely manner."***

Consider the following situation documented, shared with Smoke-Free Arizona, for the past five (5) years —



(Cottonwood Wal-Mart Supercenter south Main Entranceway)

(Cottonwood Wal-Mart Supercenter north Main Entranceway)

(Cottonwood Wal-Mart Supercenter, south Main Entranceway)

(Cottonwood Wal-Mart Supercenter south Main Entranceway)

(Cottonwood Wal-Mart Supercenter north Main Entranceway)

As noted in these Pages, The Arizona Department of Health Services - Office of Administrative Counsel and Rules reports that there have been no Notices of Violations (NOVs), nor any assessments of civil penalty fines filed against the Cottonwood Wal-Mart Supercenter, from August, 2010 thru September 30, 2015.

Mr. Thomas, I'm very concerned. In this void of enforcement action, apathy is taking hold across our State — we're back to 2007. I urge the Smoke-Free Arizona Program Manager get on with the important job of enforcement — and not leave it for his successor. Thank you.

Respectfully,

Louis T. Carabillo, Jr.

A call for equal enforcement.pdf
160K

From: Brnovich, Mark
To: Medina, Rick; Bailey, Michael
Subject: FW: University of Arizona Rogers College of Law – Sonoran Career Fair (Year)
Date: Thursday, November 05, 2015 11:33:06 AM
Attachments: image001.png

From: Gee, Kay
Sent: Thursday, November 05, 2015 11:32 AM
To: DL-Division Chiefs; DL-Division OAs; DL-Section Chiefs; DL-Office Administrators
Cc: Human Resources; Welch, Leslie
Subject: University of Arizona Rogers College of Law – Sonoran Career Fair (Year)
Importance: High

Good afternoon,

I am facilitating the Attorney General's Office registration and participation in the University of Arizona Rogers College of Law–Sonoran Career Fair 2016. This career event is devoted exclusively to government and public interest employers. Our Office will have the opportunity to promote our agency by conducting on–site interviews and providing information for Summer 2016 internships.

The Attorney General's Office will be registering again this year as a single employer, and will be represented by Human Resources with an Information Table at the event. We hope you will take advantage of the opportunity to promote your Section by conducting formal interviews.

In order to meet the necessary deadlines please provide us with the following information by **11/13/2015**.

- Participation interest:
  - Will your Section attend the event? Yes/No
  - Cannot attend the event, but wish to accept student applications? Yes/No
  - Please include the name of the attorney(s) who will be representing each section.

- Available opportunities:
  - Number of internship opportunities in your Section and locations, e.g. Tucson, Phoenix, Mesa.
  - Who will you be interviewing, e.g., 1Ls and/or 2Ls.
  - Application materials your section wishes to see, and hiring criteria (if any).

- Career Fair information:

15th Annual Sonoran Desert Public Sector Career Fair
Date: Friday, February 26, 2016
Time: 1:00 p.m. to 5:00 p.m.
Arrive early! We'll have an assortment of sandwiches from Baggins available in the CDO Suite beginning at 11:30 am.
Location: University of Arizona College of Law, Cracchiolo Law Library, 1201 East Speedway Boulevard, Tucson, Arizona 85721

If you have any questions, please feel free to contact us.

Thank you,

Kay Gee
Human Resources Section

Attorney General Mark Brnovich
1275 W. Washington, Phoenix, AZ 85007
Desk: 602-364-0680
kay.gee@azag.gov

From: Brnovich, Mark
To: Anderson, Ryan; Garcia, Mia
Subject: FW: US Attorneys General Meet with their Mexican Counterparts
Date: Monday, November 02, 2015 12:06:43 PM

From: Conference of Western Attorneys General [mailto:cwag@cwag.ccsend.com] **On Behalf Of** Conference of Western Attorneys General
Sent: Friday, October 30, 2015 3:04 AM
To: Christopher Whitten - SUPCRTX
Subject: US Attorneys General Meet with their Mexican Counterparts

Having trouble viewing this email? Click here

State Attorneys General from US and Mexico Meet in Mexico City

Binational Attorney General Exchange

Eight US and 25 Mexico State Attorneys General participated in a the Exchange in Mexico City, October 12-13. The inauguration featured Mexico's Federal Attorney General Arely Gomez Gonzalez, Assistant Director of the Bureau of International Narcotics and Law Enforcement Affairs-Mexico Toby Bradley, and Attorney General of Idaho and Past CWAG Chair Lawrence Wasden, welcoming the participating Attorney General, staff, and partners from other public agencies and the private sector. This series of meetings was sponsored by the CWAG Alliance Partnership under a grant from the US Department of State to enhance state-to-state Attorney General relationships between the US and Mexico.

Substantive Discussions

Criminal Justice Reform Update

Rhode Island Attorney General Peter Kilmartin introduced María de los Ángeles Fromow, head of the Technical Secretariat of the Council for the Coordination of the Implementation of the Criminal Justice System (SETEC), and Rommel Moreno Manjarrez, Head of the Unit for the Implementation of the Accusatorial Criminal Justice System of the Federal Attorney General's Office (PGR). They discussed the progress being made nationwide to meet the June 18, 2016, constitutional deadline for implementation of the oral, accusatorial criminal justice

system. Both speakers highlighted the enormity of the project and the advances being made currently, as well as the scope of work remaining, while General Kilmartin mentioned his office's ongoing support of their Mexican counterparts.

Combating Kidnapping

Patricia Bugarín Gutiérrez, National Anti-Kidnapping Coordinator, shared the advances being made by her unique agency, with as much as a 30% reduction in kidnappings over last year, while recognizing that a significant but unknown number of crimes go unreported. She commended the development of standardized protocols for handling kidnapping cases, and stressed the need for further protocols for handling the bodies of victims after their identification, or return of recovered victims to their families. Moderator Hector Balderas, Attorney General of New Mexico, guided the presentations, including comments by Derek Schmidt, Attorney General of Kansas, and Perla Ibarra Leyva, Attorney General of Baja California, discussing their experiences and challenges in combating kidnapping.

Telecommunications and Internet Privacy

With moderator Sean Reyes, Attorney General of Utah, participants heard from Horacio Pérez Ortega, the PGR's General Director of Legislative and Regulatory Analysis, Cynthia Coffman, Attorney General of Colorado, and Carlos Zamarripa, Attorney General of Guanajuato, on topics related to law enforcement access to telecommunications data, and crimes involving violations of privacy via internet.

Illegal Gambling Enforcement

Moderator Mark Brnovich, Attorney General of Arizona, led a discussion with experts in illegal gambling from the private sector as well as Mark Calles, Special Agent Supervisor, Gaming Employee Certification Unit, Arizona Department of Gaming, and Juan Garza, Special Agent, Intelligence Unit, Arizona Department of Gaming. The panel featured discussions on the US Attorneys General's Offices' participation in enforcing laws against illegal gaming, and investigative strategies and successes that the states have seen

as a result of public-private partnerships in this arena.

Plea Bargaining

Maricopa County (Arizona) Superior Court Judge, Hon. Susan Brnovich, shared her perspectives on the importance of the pre-trial resolution of criminal cases, including by restitution agreements between the victim and the accused, approved by the prosecutor or judge, and plea bargaining with supervision to ensure the effective safeguarding of the rights of the victim as well as compliance with a detailed plan for payment of restitution.

Supreme Court of Justice of the Nation

The visiting US delegation was invited by long-time friend of CWAG, Supreme Court Justice Eduardo Medina Mora Icaza, to visit his chambers and tour the Courthouse. Medina Mora is the former Attorney General of the Republic of Mexico, Ambassador of Mexico to Great Britain, and Ambassador of Mexico to the United States of America.

US Participants

- Hector Balderas, New Mexico Attorney General
- Mark Brnovich, Arizona Attorney General
- Cynthia Coffman, Colorado Attorney General
- Peter Kilmartin, Rhode Island Attorney General
- Sean Reyes, Utah Attorney General
- Derek Schmidt, Kansas Attorney General
- Lawrence Wasden, Idaho Attorney General
- Greg Zoeller, Indiana Attorney General
- John Freudenberg, Criminal Bureau Chief, Representing the Nebraska Attorney General
- Nicholas Trutanich, First Assistant Attorney General, Representing the Nevada Attorney General

- Corey O'Brien, Criminal Prosecution Section Chief, Nebraska Attorney General's Office
- Staci Schneider, Chief Deputy, Indiana Attorney General's Office
- Scott Turner, Deputy Attorney General of the Criminal Justice Section, Colorado Attorney General's Office

Parker Douglas, Chief of Staff, Utah Attorney General's Office
- Steve Wilhoft, Assistant Attorney General, Kansas Attorney General's Office
- Matthew Baca, Special Assistant, New Mexico Attorney General's Office
- Ryan Anderson, Director of Communications, Arizona Attorney General's Office

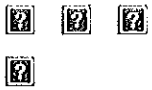
Mexico Participants

- Perla Ibarra Leyva, Baja California Attorney General
- Erasmo Palemón Alamilla Villeda, Baja California Sur Attorney General
- Juan Manuel Herrera Campos, Campeche Attorney General
- Raciel López Salazar, Chiapas Attorney General
- Jorge Enrique González Nicolás, Chihuahua Attorney General
- Homero Ramos Gloria, Coahuila Attorney General
- Carlos Zamarripa Aguirre, Guanajuato Attorney General
- Miguel Ángel Godínez Muñoz, Guerrero Attorney General
- Alejandro Straffon Ortiz, Hidalgo Attorney General
- Jesús Almaguer Ramírez,

Jalisco Attorney General
- José Martín Godoy, Michoacán Attorney General
- Jesús Gabriel López Benítez, Military Justice Attorney General
- Javier Perez Durón, Morelos Attorney General
- Roberto Carlos Flores Treviño, Nuevo León Attorney General
- Héctor Joaquín Carrillo Ruiz, Oaxaca Attorney General
- Víctor Antonio Carrancá Bourget, Puebla Attorney General
- Arsenio Durán Becerra, Querétaro Attorney General
- Carlos Arturo Álvarez Escalera, Quintana Roo Attorney General
- Federico Garza Herrera, San Luis Potosí Attorney General
- Fernando Valenzuela Pernas, Tabasco Attorney General
- Ismael Quintanilla Acosta, Tamaulipas Attorney General
- Alicia Fragoso Sánchez, Tlaxcala Attorney General
- Luis Ángel Bravo Contreras, Veracruz Attorney General
- Ariel Francisco Aldecua Kuk, Yucatán Attorney General
- Leticia Catalina Soto Acosta, Zacatecas Attorney General

Commentaries by Participating US State Attorneys General

- Derek Schmidt, Kansas Attorney General
- Sean Reyes, Utah Attorney General
- Hector Balderas, New Mexico Attorney General
- Peter Kilmartin, Rhode Island Attorney General
- Greg Zoeller, Indiana Attorney General



Forward this email

Conference of Western Attorneys General | 1300 I Street | Sacramento | CA | 95814

From:	Brnovich, Mark
To:	Bailey, Michael; Anderson, Ryan; Medina, Rick; Baer, Aaron
Subject:	Fwd: 60 Minutes Piece on Heroin
Date:	Friday, December 04, 2015 1:17:07 PM

Attorney General Mark Brnovich
Sent from my iPhone

Begin forwarded message:

From: James McPherson <jmcpherson@NAAG.ORG>
Date: December 4, 2015 at 2:45:26 PM EST
To: James McPherson <jmcpherson@NAAG.ORG>
Cc: Chris Toth <ctoth@NAAG.ORG>, Francesca Liquori <FLiquori@NAAG.ORG>, "Albert Lama" <ALama@NAAG.ORG>, Marjorie Tharp <mtharp@NAAG.ORG>, Jeffrey Hunter <jhunter@NAAG.ORG>
Subject: 60 Minutes Piece on Heroin

THIS IS BEING SENT TO ALL ATTORNEYS GENERAL, CHIEF DEPUTIES/CHIEFS OF STAFF, AND EXECUTIVE ASSISTANTS

Generals,

At the recent Fall Meeting, Attorney General Bondi provided a Committee Update for the Substance Abuse Committee. During her update, she referenced a recent 60 Minutes piece on the subject of Heroin and specifically the interview of Attorney General DeWine in that report. She asked me to provide you the link to that report:

Written Transcript:
http://www.cbsnews.com/news/heroin-in-the-heartland-60-minutes/

Video Link:
http://www.cbsnews.com/videos/heroin-in-the-heartland/

V/R

Jim

James E. McPherson
Executive Director
National Association of Attorneys General
2030 M Street, NW, Washington, DC 20036
202.326.6260

Cell: 202[redacted]

From:	Brnovich, Mark
To:	Lopez, John; Bailey, Michael
Subject:	Fwd: Additional Brief
Date:	Tuesday, December 08, 2015 10:17:29 PM
Attachments:	State s Response to Petition for Special Action in Simpson case.PDF ATT00001.htm

Attorney General Mark Brnovich
Sent from my iPhone

Begin forwarded message:

From: "Cabou, Jean-Jacques \"J\" (Perkins Coie)" <JCabou@perkinscoie.com>
Date: December 8, 2015 at 5:35:55 PM MST
To: "Mark.brnovich@azag.gov" <Mark.brnovich@azag.gov>
Subject: Additional Brief

Mr. Brnovich:

Although it is not required by A.R.S. § 12-1841(B), out of an abundance of caution we are providing you with a copy of the state's response in *Simpson v. Miller* (CA-SA 15-0292). This document, along with the others sent in our previous email and those physically delivered to you, constitutes the full briefing record in the Court of Appeals.

Marie van Olffen| Perkins Coie LLP
☎: 602.351.8144
✉: mvanolffen@perkinscoie.com

From: van Olffen, Marie (Perkins Coie) **On Behalf Of** Cabou, Jean-Jacques \ (JCabou@perkinscoie.com)
Sent: Tuesday, December 08, 2015 2:11 PM
To: 'Mark.brnovich@azag.gov'
Subject: Notice of Claim of Unconstitutionality

Mr. Brnovich:

In November 2015, two special actions were filed in the Arizona Court of Appeals in *Simpson v. Miller* (CA-SA 15-0292), and *Martinez v. Steinle* (CA-SA 15-0295). Both petitions challenge the constitutionality of Arizona Constitution Article 2 § 22(A)(1) and A.R.S. §§ 13-3961(A)(3), (4). On December 8th the Court of Appeals consolidated the cases. The Superior Court's orders and the pending petitions for special action are attached to this email.

Pursuant to the Court of Appeals' December 8th Order, we are hereby providing you

with a Notice of Claim of Unconstitutionality (also attached). A process server will deliver physical copies of these documents to your office later today.

Thank you.

Marie van Olffen | Perkins Coie LLP

Legal Secretary

2901 N. Central Avenue

Suite 2000

Phoenix, AZ 85012-2788

☎: 602.351.8144

✉: mvanolffen@perkinscoie.com

WILLIAM G. MONTGOMERY
MARICOPA COUNTY ATTORNEY
David R. Cole
Deputy County Attorney
State Bar No. 004643
State Bar Firm No. 0032000
301 West Jefferson Street, Suite 210
Phoenix, AZ 85003
Telephone: (602) 506-7422
mcaoexec@mcao.maricopa.gov
Attorneys for Real Party in Interest

IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

JASON DONALD SIMPSON, aka JASON DONALD SIMPSON, SR.,

Petitioner,

v.

THE HONORABLE PHEMONIA MILLER, a Commissioner of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA,

Respondent Commissioner,

THE STATE OF ARIZONA,

Real Party in Interest.

Court of Appeals
No. 1 CA-SA 15-0292

Maricopa County
Superior Court
No. CR2015-134762-001

STATE'S RESPONSE TO PETITION FOR SPECIAL ACTION

Real Party in Interest, the State of Arizona, asks this Court to decline jurisdiction of the Petition for Special Action ("Petition") or to deny the relief

requested. Special action relief is not warranted because Respondent did not abuse her discretion when she denied Petitioner's Motion for Immediate Release.[1]

SUBMITTED this 2nd day of December, 2015.

WILLIAM G. MONTGOMERY
MARICOPA COUNTY ATTORNEY

By /s/
David R. Cole
Deputy County Attorney

I. Standard of Review

In reviewing a trial court's order within the context of a special action, this Court must find that the trial judge abused his discretion, or exceeded his jurisdiction or legal authority before granting relief. *Twin City Fire Ins. Co. v. Burke*, 204 Ariz. 251, 253, ¶ 10, 63 P.3d at 284; Ariz. R. P. Spec. Act. 3. This Court must defer to the trial court with respect to any factual findings explicitly or implicitly made, and affirm them as long as they are supported by reasonable evidence. *Twin City Fire Ins. Co.*, 204 Ariz. at 254, ¶ 10, 63 P.3d at 285.

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[1] The full caption is "Defendant's Motion for Immediate Release or, in the Alternative, Defendant's Motion for Bail Hearing with an Individualized Evaluation as Mandated by the U.S. and Arizona Constitutions." Petitioner filed the Motion on September 4, 2015, and attached it as Exhibit 2 to his Petition.

II. Issues

1. Should this Court accept jurisdiction of the Petition?

2. Has Petitioner overcome the strong presumption of constitutionality?

3. Did the trial court abuse its discretion when it denied Petitioner's request to deem the matter of bail submitted on the record?

4. Did the trial court abuse its discretion when it denied Petitioner's Motion for Immediate Release?

III. Statement of Material Facts/Procedural Background

On August 4, 2015, a grand jury charged Petitioner with 33 counts of sex-related crimes, including two counts of Sexual Conduct with a Minor.[2] The charges were based on evidence that, on or between June 1 and July 27, 2015, Petitioner directed two 13-year-old girls to penetrate one another's vagina with a silver dildo while he watched and masturbated. Before instructing the girls to penetrate one another, he gave them brownies laced with marijuana, waited until the girls felt the effects of the marijuana, asked the girls "what they wanted to do for money," retrieved vibrators and a red strap-on dildo, and asked the girls to compliment the size of his penis. Afterwards, Petitioner paid the girls $100.00 apiece and instructed them not to tell anyone what had happened.

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[2] These charges, which are reflected in Counts 23 and 24 of the Indictment, are the focus of the Petition for because these charges make Petitioner ineligible for bail. *See* A.R.S. § 13-3961(A)(3).

IV. Argument

Before addressing Petitioner's claims, the State would bring several matters to the Court's attention. First, Petitioner urges that both A.R.S. § 13-3961(A)(3) and Art. II, § 22(A)(1) of the Arizona Constitution are unconstitutional; the former because it violates the United States Constitution and the Arizona Constitution, and the latter because it violates the United States Constitution. Second, Petitioner does not dispute the basic proposition that there is no absolute right to bail under the United States Constitution or Arizona law. *State ex rel Romley v. Rayes*, 206 Ariz. 58, 61, ¶ 9, 75 P.3d 148, 151 (App. 2003).[3] Third, several claims urged by Petitioner (e.g., that the State's investigation into Petitioner's conduct was "brief" and failed to take into account "contradictory evidence," and that the trial court did not render its ruling in timely fashion) have nothing to do with the constitutionality of the challenged provisions. With regard to these claims, there is even less justification for this Court to intervene than there is in connection with the constitutionality claims. Fourth, Petitioner's assertion that the State relied on an "unusual theory" when it charged Petitioner as an accomplice should fall on deaf

---

[3] It should be noted that, in *Rayes*, this Court was dealing with challenges to the same subsection of A.R.S. § 13-3961(A)(3) and the same provision of the Arizona Constitution that Petitioner is challenging here.

ears.[4] Assuming, without conceding, that this theory is utilized infrequently, a review of the operative statutes, particularly A.R.S. §§ 13-301, -302, and -1405, leaves little doubt that Counts 23 and 24 were properly charged. Fifth, and last, because Petitioner brings a facial challenge, he is not entitled to relief unless he can establish that no set of circumstances exists under which the challenged provisions can be deemed valid. *See, e.g., United States v. Salerno*, 481 U.S. 739, 745 (1987); *Planned Parenthood of Southern Arizona v. Lawall*, 180 F.3d 1022, 1025 (9th Cir. 1999); *Hernandez v. Lynch*, 216 Ariz. 469, 472, ¶ 8, 167 P.3d 1264, 1267 (App. 2007).

Special Action Jurisdiction

This Court's exercise of special action jurisdiction is highly discretionary. *Haas v. Colosi*, 202 Ariz. 56, 57, ¶ 2, 40 P.3d 1249, 1250 (App. 2002). *See also* Article 6, §§ 5 and 9 of the Constitution of Arizona, A.R.S. §§ 12-2021 *et seq.*, and Rules 1, 3, 4, and 7, Arizona Rules of Procedure for Special Actions. Acceptance of special action jurisdiction is more likely "in cases involving a matter of first impression, statewide significance, or pure questions of law." *State ex rel. Pennartz v. Olcavage*, 200 Ariz. 582, 585, ¶ 8, 30 P.3d 649, 652 (App. 2001).

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[4] *See* Petition at 8.

Petitioner urges this Court to accept jurisdiction on several grounds. Two of those grounds are not persuasive within the context of this case. The first is that the issues presented have "statewide importance." Petitioner asserts, but makes no effort to prove, that out-of-control Arizona trial courts routinely deny bail to persons who should be granted bail and, as a result, Arizona jails are populated largely by persons who are being detained illegally. As with other legal talismans, mere incantation of the term "statewide importance" means nothing in the absence of supporting evidence.[5] The second unpersuasive ground is that there is an unresolved conflict between cases decided by this Court and the Ninth Circuit Court of Appeals. As the State will demonstrate later in this Response, no conflict exists, and another ostensible justification for intervention by this Court evaporates.

Strong Presumption of Constitutionality

Although Petitioner does not acknowledge it, it has long been the law in Arizona that legislative enactments enjoy a strong presumption of constitutionality, and that the burden to overcome the presumption rests squarely on the shoulders of the challenger. Both this Court and the Arizona Supreme Court have so held on numerous occasions. *See, e.g., State ex rel. Collins v. Superior Court of Maricopa*

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[5] *See State v. Ault*, 150 Ariz. 459, 463, 724 P.2d 545, 549 (1986), where the court so held in connection with the term "exigent circumstances."

County, 150 Ariz. 295, 296, 723 P.2d 644, 645 (1986); *Black & White Taxicab Co. v. Standard Oil Co.,* 25 Ariz. 381, 389, 218 P. 139 (1925)[6]; and *State v. McDonald,* 191 Ariz. 118, 120, ¶ 11, 952 P.2d 1188, 1190 (App. 1998) (citing *State v. Tocco,* 156 Ariz. 116, 119, 750 P.2d 874, 877 (1988)). The predictable, and required, result of a challenger's failure to overcome this strong presumption is rejection of his claim.

The State's Failure to Respond in the Trial Court

Petitioner urges that the trial court abused its discretion in failing to heed the last sentence of Rule 35.1(a), Ariz. R. Crim. P.: "If no response is filed, the motion shall be deemed submitted on the record before the court." In spite of the mandatory wording, the trial court acted within its discretion when it proceeded with the hearing held September 24, 2015. Petitioner fails to take into account Rule 35.4, which allows a trial court to waive any requirement set forth in Rule 35. In addition, case law supports the principle that, within the context of motion practice in criminal cases, trial courts retain discretion whether to preclude a non-compliant party from offering proof. *See State v. Colvin,* 231 Ariz. 269, 271-72, ¶

[6] In this case, the court went so far as to say that a party who challenges a statute on grounds of unconstitutionality must prove his claim beyond a reasonable doubt. 25 Ariz. at 389-90.

6-7, 293 P.3d 545, 547-48 (App. 2013); *State v. Vincent*, 147 Ariz. 6, 8-9, 708 P.2d 97, 99-100 (App. 1985).[7]

Application of *Lopez-Valenzuela*

The linchpin of Petitioner's argument is *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772 (9th Cir. 2014). His reliance is misplaced. The issue in *Lopez-Valenzuela* was whether A.R.S. § 13-3961(A)(5) and Art. II, § 22(A)(4) violated the defendant's substantive due process right. Neither of those provisions is challenged here because neither has anything to do with Petitioner's ineligibility for bail. The constitutional provision challenged by Lopez-Valenzuela was passed by the Arizona legislature in 2005 and appeared on the 2006 ballot as Proposition 100[8]. Petitioner challenges a different constitutional provision that arose out of Proposition 103[9], which was overwhelmingly approved by Arizona voters in 2002. The Ninth Circuit's analysis relates to an entirely different and highly emotionally-charged topic: illegal immigrants and their eligibility for bail. One cannot simply

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[7] Although these cases address Rule 16.1(c), Ariz. R. Crim. P., their analyses apply with equal force to Rule 35.1 because both rules appear to require "preclusion" of the non-compliant party's claim. Considered in their totality, Rule 1.2, Rule 35.4, and the cited cases provide ample evidence that preclusion is not favored, and that trial courts retain discretion to permit a party to proceed in spite of its failure to comply.

[8] *See* Exhibit 1.

[9] *See* Exhibit 2.

superimpose that analysis upon constitutional and statutory provisions that deal with a fundamentally different subject matter. Recognizing that basic truth, Petitioner contends that the *Lopez-Valenzuela* Court "strongly suggested that . . . a categorical approach to pretrial detention is never appropriate for a non-capital offense." (*See* Petition at 14.) The Court did no such thing; in fact, it characterized the question whether "a categorical denial of bail for noncapital offenses could ever withstand heightened scrutiny" as an "open" one. 770 F.3d at 785. It further noted that " . . . irrebuttable presumptions are disfavored." *Id.* Because the questions that are before this Court were not before the Ninth Circuit, there is no conflict, reconcilable or otherwise, between *Lopez-Valenzuela* and *Simpson v. Owens*, 207 Ariz. 261, 85 P.3d 478 (App. 2004).[10]

Petitioner points out that opinions issued by courts in other jurisdictions have been decided in a manner that is consistent with *Lopez-Valenzuela*. Petitioner does not suggest that this Court is bound by any of these cases, but believes they have persuasive value. Whatever value these cases may have, none is sufficient to overcome the strong presumption of constitutionality enjoyed by legislative enactments in Arizona. State cases decided on the basis of state constitutions other than the Arizona Constitution are of no assistance to Petitioner. It must also be

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[10] On information and belief, Petitioner and the "Simpson" of *Simpson v. Owens* are one and the same person.

kept it mind that the challenged provisions are exceedingly specific and narrow in terms of the nature of the criminal activity involved: sexual conduct (defined in precise terms by A.R.S. §§ 13-1405(A) and -1401(1) and (3)) with a minor who is under fifteen years of age. The challenged provisions do not apply to all persons charged with any sex crime committed against persons of any age.

Petitioner goes on to claim that, in view of *Lopez-Valenzuela*, the challenged provisions are "unconstitutionally punitive."[11] Having implicitly conceded that he cannot show an express legislative intent to inflict punishment, all Petitioner has left to argue is that the Court can infer such legislative intent from the record. Rather than provide the Court with evidence from the record that might justify drawing such an inference, Petitioner simply relies on *Lopez-Valenzuela*. For the reasons set forth above, the Ninth Circuit's explication of this issue has minimal significance for the present case. *See* 770 F.3d at 789-91. Petitioner has failed to show that the challenged provisions are unconstitutionally punitive.

Recidivism Studies

As support for his claim that there is no evidence to "support § 13-3961(A)(3)'s categorical assumption that no conditions of release can protect the

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[11] *See* Petition at 24-25.

public from individuals charged with sexual conduct with a minor,"[12] Petitioner cites several recidivism studies that he believes actually prove the converse (i.e., that the recidivism rates for sex offenders who victimize children are actually lower than for those who are convicted of other crimes). There is no doubt that many recidivism studies, including those cited by Petitioner, have been conducted over the years. The degree to which these studies inform the Court concerning the issues before it, however, is subject to substantial doubt. While it is safe to say that concerns about recidivism played some role in the debate over Proposition 103, it was only one factor. Among other factors unrelated to recidivism are concerns about (1) harm to current victims, and (2) difficulties involved in keeping alleged offenders and victims who live in the same household apart. Comparing recidivism rates for sex offenders to those for other kinds of offenders is highly problematic because so many sex crimes go unreported, resulting in what one study calls the "Underestimating Recidivism" phenomenon. Tim Bynum, Madeline Carter, Scott Matson & Charles Onley, *Recidivism of Sex Offenders,* CENTER FOR SEX OFFENDER MANAGEMENT, A PROJECT OF THE OFFICE OF JUSTICE PROGRAMS, U.S. DEPARTMENT OF JUSTICE (May 2001), http://csom.org/pubs/recidsexof.html. In sum, although the State does not regard

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[12] *See* Petition at 16-17.

the studies cited by Petitioner as irrelevant to the issues before the Court, it counsels against according them substantial weight.

Timeliness of Trial Court Ruling

While conceding that Arizona law does not require the trial court to issue a bail ruling within a particular time frame, Petitioner urges that the ruling in this case was untimely under *Simpson v. Owens, supra*. Although this assertion is unrelated to the constitutionality claims, brief comment is warranted. Although 43 days may seem like a long time for a matter to remain under advisement, *Simpson* does not address that issue. *Simpson* says that bail *hearings* "should take place as soon as is practicable[.]"[13] In the absence of an allegation that Respondent violated a specific rule, there is simply no basis for granting relief on this claim.

V. Conclusion

Petitioner was afforded the hearing to which he was entitled by law. Respondent did not abuse her discretion in denying Petitioner's Motion for Immediate Release. The State submits that the Court should either (1) decline jurisdiction, or (2) accept jurisdiction and deny relief.

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[13] 207 Ariz. at 278, 85 P.3d at 495.

Submitted December 2, 2015.

WILLIAM G. MONTGOMERY
MARICOPA COUNTY ATTORNEY

BY /s/
David R. Cole
Deputy County Attorney

EXHIBIT 1

2006 Ballot Proposition Guide
Issued by the Arizona Secretary of State's Office

PROPOSITION 100
OFFICIAL TITLE
HOUSE CONCURRENT RESOLUTION 2028
PROPOSING AN AMENDMENT TO THE CONSTITUTION OF ARIZONA; AMENDING ARTICLE II, SECTION 22, CONSTITUTION OF ARIZONA; RELATING TO BAILABLE OFFENSES.
TEXT OF PROPOSED AMENDMENT
Be it resolved by the House of Representatives of the State of Arizona, the Senate concurring:
1. Article II, section 22, Constitution of Arizona, is proposed to be amended as follows if approved by the voters and on proclamation of the Governor:
22. Bailable offenses
Section 22. A. All persons charged with crime shall be bailable by sufficient sureties, except for:
1. FOR capital offenses, sexual assault, sexual conduct with a minor under fifteen years of age or molestation of a child under fifteen years of age when the proof is evident or the presumption great.
2. FOR felony offenses committed when the person charged is already admitted to bail on a separate felony charge and where the proof is evident or the presumption great as to the present charge.
3. FOR felony offenses if the person charged poses a substantial danger to any other person or the community, if no conditions of release which may be imposed will reasonably assure the safety of the other person or the community and if the proof is evident or the presumption great as to the present charge.
4. FOR SERIOUS FELONY OFFENSES AS PRESCRIBED BY THE LEGISLATURE IF THE PERSON CHARGED HAS ENTERED OR REMAINED IN THE UNITED STATES ILLEGALLY AND IF THE PROOF IS EVIDENT OR THE PRESUMPTION GREAT AS TO THE PRESENT CHARGE.
B. The purposes of bail and any conditions of release that are set by a judicial officer include:
1. Assuring the appearance of the accused.
2. Protecting against the intimidation of witnesses.
3. Protecting the safety of the victim, any other person or the community.
2. The Secretary of State shall submit this proposition
to the voters at the next general election as provided by article XXI, Constitution of Arizona.
Analysis by Legislative Council
The Arizona Constitution provides that all persons who are charged with a crime are eligible for bail, subject to certain exceptions. Bail is not allowed for any person who is charged with a crime if the court finds proof that the person committed the crime is evident or the presumption that the person committed the crime is great and the charged crime is one of the following:
1. A capital offense (an offense punishable by death), sexual assault, sexual conduct with a minor under fifteen years of age or molestation of a child under fifteen years of age.
2. A felony offense committed when the person charged is already admitted to bail on a separate felony charge.
3. A felony offense if the person charged poses a substantial danger to any other person or the community and no condition of release will reasonably assure the safety of the other person or community.
Proposition 100 would amend the Arizona Constitution to additionally prohibit bail for any person who is charged with a serious felony offense (as determined by the Legislature) if the person charged entered or remained in the United States illegally and the court finds proof that the person committed the crime is evident or the presumption that the person committed the crime is great.

In 2006, the Legislature enacted legislation to specify that class 1, 2, 3 and 4 felony offenses would constitute the "serious felony" offenses for which a person who has entered or remained in the United States illegally shall be denied bail. That legislation does not become effective unless Proposition 100 is enacted.

ARGUMENTS "FOR" PROPOSITION 100

Ballot argument FOR Proposition 100 (Bailable offenses) Illegal aliens that commit a crime are an extremely difficult challenge for law enforcement and growing threat to our citizens. Large, well-organized gangs of illegal aliens have flooded many neighborhoods with violence to the point where Arizona now has the highest crime rate in the nation. With few real ties to the community and often completely undocumented by state agencies, many illegal aliens can easily escape prosecution for law breaking simply because they are so difficult to locate. HCR 2028 would deny bail to illegal aliens when there is convincing evidence that they've committed a serious felony, keeping dangerous thugs in jail rather than releasing them onto the streets. Allowing an illegal immigrant to post bail simply gives them time to slip across the border and evade punishment for their crimes. By voting yes for this initiative, we keep more violent criminals in jail, make our homes and communities safer, and send a powerful message to illegal aliens that their crimes will not go unpunished.
The Honorable Russell Pearce, Arizona House of Representatives, Mesa
Paid for by "Russell Pearce 2004"

Illegal immigrants accused of committing serious felonies in Arizona should not be allowed to make bail and flee the country before standing trial for their crimes. That's why I helped draft and strongly support this proposition, which would amend our state constitution to prohibit bail for such offenders. Far too many illegal immigrants accused of serious crimes have jumped bail and slipped across the border in order to avoid justice in an Arizona courtroom. When and if they do come back to the United States, too often it's not to appear in court, but to commit more crimes. One example is Oscar Martinez-Garcia. Indicted in 1998 on drug and weapons charges, he posted bail and was released to federal authorities, who then deported him before he could be tried. He returned to Phoenix illegally and was driving a vehicle when Phoenix Police Officer Marc Atkinson pulled him over. One of the passengers in the vehicle shot and killed Officer Atkinson. Martinez-Garcia was convicted of first-degree murder for his participation in this cold-blooded killing, but that won't bring back this fallen officer. Other examples of illegal immigrants who made bail and avoided prosecution for serious crimes include accused child predators, armed robbers, drug dealers and other accused criminals. The victims of these crimes deserve justice. Thanks to an amendment approved overwhelmingly by voters in 2002, the Arizona Constitution now denies bail to defendants accused of rape and child molestation. This proposition similarly would deny bail to illegal immigrants who pose a clear danger to society and who too often use our border as an escape route. Our state constitution was not intended to "bail out" illegal immigration. I urge you to vote yes to end this abuse of our criminal justice system.
Andrew Thomas, Maricopa County Attorney, Phoenix

The Arizona Farm Bureau supports proposition 100. Bail is a judgment that the party is neither a danger to society nor a risk of flight from prosecution. We ask you: When is an undocumented person, who is accused of a serious crime, not a flight risk? If a person has no legal right to be in this country and commits a serious crime for which they must answer, we do not think bail is a prudent choice. Comprehensive immigration reform would reduce the criminal element coming into this country. Securing the border coupled with a temporary worker program and identifying the millions of those illegally in this country, would do much to stem the tide of criminal activity.
Kevin Rogers, President, Arizona Farm Bureau, Mesa
Jim W. Klinker, Chief Administrative Officer, Arizona Farm Bureau, Mesa
Paid for by "Arizona Farm Bureau"

I fully support the actions of the State Legislature that placed this measure on the ballot. The citizens of Arizona must be assured that all persons who commit violent criminal acts against society face our system of justice. It is a matter of undeniable fact that a large number of these wanted fugitives from justice are illegal aliens who have fled to their native country as a means of avoiding prosecution and conviction for their crimes. In many of these cases the prosecuting attorneys have asked the court to retain custody of these fugitives because of the flight risk only to have judges ignore that risk and set bail. This must not be allowed to continue. I commit to you that, as your Governor, I will apply all legal measures to protect and defend Arizonans from the illegal invasion. This Ballot Measure addresses one area that needs to be resolved in this fight to secure our borders and reduce the level of crime in our neighborhoods. It is embarrassing to have our state lead the nation in crime. Unfortunately, the current governor has vetoed ten separate bills sent to her desk by the legislature that were written to protect you from illegal immigration. We can do better and I ask you to vote YES on this Ballot Proposition so the citizens of Arizona can have confidence that our criminal justice system works as intended. **Paid for by Goldwater for Governor Committee.**
Don Goldwater, Goldwater for Governor, Laveen

Arguments "AGAINST" Proposition 100
Proposition 100 would deny the constitutional right to post bail to people accused of most felony offenses based on nothing more than their inability to prove current immigration status, and not the actual danger they pose to the community. It is wrong. VOTE NO on Prop 100 because: 1. This proposition will cost taxpayers an extra $2,100 per month for each person who is held and denied bail. 2. Our jails are already overcrowded and cost taxpayers millions every year. Arizona cannot afford to hold low-risk persons simply due to their national origin. 3. Bail is a cherished constitutional right. People accused of crimes have not necessarily committed the crimes they are accused of and have the right to post bail. 4. This proposition puts people who overstay a tourist visa or cross the border in the same category as serial murderers. 5. People who pose an actual danger to society are already held without bail under the current law. 6. Prop 100 will do nothing to increase public safety. More reasons to VOTE NO on Prop 100: Under current law, judges set bail to assure appearance at court proceedings and protect public safety. The more serious the crime, the higher the bail that is set. Certain offenses, such as capital murder, are not eligible for bail because they are considered very serious. In contrast, Prop 100 penalizes individuals who are not a danger and who have families and close community ties. Prop 100 would also create a sub-class of people within the justice system based solely on race or national origin, and unnecessarily penalize people who pose little or no risk to the community. This proposition would do nothing more than institutionalize bias and discrimination in the justice system, at taxpayer expense. VOTE NO on Prop 100.
Jim Fullin, Tucson
Matt Green, Tucson
Margot Veranes, Tucson
Paid for by "Margot I. Veranes"

BALLOT FORMAT
PROPOSED AMENDMENT TO THE CONSTITUTION BY THE LEGISLATURE
OFFICIAL TITLE
HOUSE CONCURRENT RESOLUTION 2028
PROPOSING AN AMENDMENT TO THE CONSTITUTION OF ARIZONA; AMENDING ARTICLE II, SECTION 22, CONSTITUTION OF ARIZONA; RELATING TO BAILABLE OFFENSES.
DESCRIPTIVE TITLE
ADDS TO THE LIST OF NON-BAILABLE OFFENSES SERIOUS FELONY OFFENSES PRESCRIBED BY THE LEGISLATURE IF THE PERSON CHARGED HAS ENTERED OR

REMAINED IN THE UNITED STATES ILLEGALLY AND IF THE PROOF IS EVIDENT OR THE PRESUMPTION GREAT AS TO THE PRESENT CHARGE.
A "yes" vote shall have the effect of denying bail to persons charged with serious felonies as defined by law if the person has entered or remained in the United States illegally. YES
A "no" vote shall have the effect of continuing to allow bail to persons charged with serious felony offenses who enter or remain in the United States illegally, unless the person is charged with an offense for which bail is not permitted under current law. NO

The Ballot Format displayed in HTML reflects only the text of the Ballot Proposition and does not reflect how it will appear on the General Election Ballot. Spelling, grammar, and punctuation were reproduced as submitted in the "for" and "against" arguments. This text only version of the proposition guide may not include striking, underlining, emphasis and bolding of words in the proposition language, or in "for" or "against" arguments.

Next Proposition

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JANICE K. BREWER
Arizona Secretary of State

Disclaimer

EXHIBIT 2

ARIZONA

PROPOSITION 103

OFFICIAL TITLE

SENATE CONCURRENT RESOLUTION 1011

PROPOSING AN AMENDMENT TO THE CONSTITUTION OF ARIZONA; AMENDING ARTICLE II, SECTION 22, CONSTITUTION OF ARIZONA; RELATING TO BAILABLE OFFENSES.

TEXT OF THE PROPOSED AMENDMENT

Be it resolved by the Senate of the State of Arizona, the House of Representatives concurring:

1. Article II, section 22, Constitution of Arizona, is proposed to be amended as follows if approved by the voters and on proclamation of the Governor:

22. Bailable offenses

Section 22. A. All persons charged with crime shall be bailable by sufficient sureties, except for:

1. Capital offenses, SEXUAL ASSAULT, SEXUAL CONDUCT WITH A MINOR UNDER FIFTEEN YEARS OF AGE OR MOLESTATION OF A CHILD UNDER FIFTEEN YEARS OF AGE when the proof is evident or the presumption great.

2. Felony offenses, committed when the person charged is already admitted to bail on a separate felony charge and where the proof is evident or the presumption great as to the present charge.

3. Felony offenses if the person charged poses a substantial danger to any other person or the community, if no conditions of release which may be imposed will reasonably assure the safety of the other person or the community and if the proof is evident or the presumption great as to the present charge.

B. THE PURPOSES OF BAIL AND ANY CONDITIONS OF RELEASE THAT ARE SET BY A JUDICIAL OFFICER INCLUDE:

1. ASSURING THE APPEARANCE OF THE ACCUSED.

2. PROTECTING AGAINST THE INTIMIDATION OF WITNESSES.

3. PROTECTING THE SAFETY OF THE VICTIM, ANY OTHER PERSON OR THE COMMUNITY.

2. The Secretary of State shall submit this proposition to the voters at the next general election as provided by article XXI, Constitution of Arizona.

ANALYSIS BY LEGISLATIVE COUNCIL

The Arizona Constitution provides that all persons who are charged with a crime are eligible for bail, subject to certain exceptions. Bail is not allowed for any person who is charged with a crime if the court finds proof that the person committed the crime is evident or the presumption that the person committed the crime is great and the charged crime is: (1) a capital offense (an offense punishable by death), (2) a felony offense committed when the person charged is already admitted to bail on a separate felony charge or (3) a felony offense if the person charged poses a substantial danger to any other person or the community and no condition of release will reasonably assure the safety of the other person or community.

Proposition 103 would amend the Arizona Constitution to additionally prohibit bail for any person who is charged with a crime if the court finds proof that the person committed the crime is evident or the presumption that the person committed the crime is great and the charged crime is: (1) sexual assault, (2) sexual conduct with a minor under fifteen years of age or (3) molestation of a child under fifteen years of age.

Proposition 103 would also amend the Constitution to specify that the purposes of bail and any conditions of release that are set by a judicial officer include assuring the appearance of the accused, protecting against the intimidation of witnesses and protecting the safety of the victim, any other person or the community.

ARGUMENTS "FOR" PROPOSITION 103

Last year, the US Supreme Court ruled that sexual predators can be held even after their criminal sentence if they still pose a danger to the community. Now, when sexual predators are caught, they know they could be facing lifetime incarceration.

Slick defense lawyers have been able to reduce million dollar bonds, allowing predators back on the street for just a few hundred dollars. A sexual predator who knows he is guilty, facing life behind bars, has no incentive to ever return. It has happened time and again.

The Constitution currently allows judges to hold murderers without bond "when the proof is evident or the presumption is great." Using this high standard, false accusations or circumstantial evidence cannot be used to deny bail. With Proposition 103, we will treat sexual predators who destroy lives the same way we treat those who take them away.

Here's how it would work if Proposition 103 passes: When a sexual predator is arrested, a special hearing may be requested by prosecutors to present evidence (i.e. DNA is found where it should not be found, photographic or video evidence). If the judge decides that "the proof is evident or the presumption is great", persons charged with the following crimes would be ineligible for bail: sexual assault (rape), sexual conduct (intercourse) with a minor under 15 years old, or molestation of a child under 15.

Proposition 103 also gives better tools to judges to set bail conditions beyond just money. Judges will be able to set any conditions of release to protect the community, the victim or their family, or protect against the intimidation of witnesses.

Visit www.YesOnBailReform.org for more information.

Please vote YES on Proposition 103 to help keep dangerous sexual predators off our streets.

Senator Dean Martin, Sponsor of Legislation, Phoenix

Arizona has an opportunity with Proposition 103 to enhance its laws and be a greater protector of the innocent. Proposition 103 will give the proper weight to the crime of rape and child molestation.

There is a tremendous problem in our country with sexual assault on children and adults and our state is no exception. Southern Arizona Center Against Sexual Assault reports that one in every three girls and one in every six boys will be sexually abused before the age of eighteen.

We have learned a great deal in recent years about these types of offenders and we need to begin to have our laws reflect what we now know. A behavioral analysis done by a 27-year veteran FBI Special Agent, who dealt with sexual predators, reveals that 33% of sexual predators who are released on bail will commit a new sex offense, commit another crime or otherwise violate their terms of release.

Many studies now tell us that these types of offenders have a long-term persistent pattern of behavior. They make ritual or need-driven decisions that often overwhelm their sense of community restraint and certainly their willingness to adhere to bail requirements. Proposition 103 will help seal the crack in the justice system and can prevent the worst sexual predators from jumping bail or even simply walking our neighborhoods while they await trial.

Spelling, grammar, and punctuation were reproduced as submitted in the "for" and "against" arguments.

Proposition 103 also saves money in our criminal justice system. It only costs $45 per day to incarcerate a prisoner. Proposition 103 accelerates the trial schedule, saving money on attorneys, judges and court costs. This monetary savings is above and beyond the untold savings of mental anguish to victims and their families and provides peace of mind that we will ALL be safer.

Please Vote Yes on Proposition 103.

Julie Lind, Tempe

Vote Yes on Proposition 103, Bailable Offenses

Nothing undermines public confidence in our criminal justice system more severely than reports about violent crimes committed by offenders who have been arrested for an earlier crime and then released back into the community. When this happens, it is an inexcusable failure of the justice system. The studies confirm the high recidivism rates among rapists and child molesters. This amendment is therefore a critically needed reform if we are to protect the rights and safety of crime victims. The United States Supreme Court has provided that the United States Constitution does not prohibit courts from considering the safety of victims in making pretrial detention decisions. The time has long passed for Arizona to conform its constitution in this way. On behalf of crime victims and law-abiding citizens throughout Arizona, I urge you to vote yes on this important proposition.

Mr. Steve Twist, Victim's Advocate, Phoenix

My name is Chris Cottrell, I am 13 years old, and I am the "Chris" of "Chris' Law," now Proposition 103. This issue has touched my family, and I want to do whatever I can to prevent others from going through the same suffering.

Last year I wrote a bill in a student legislature regarding bail reform for sexual predators. As part of the student legislature, I met with Senator Dean Martin. Senator Martin agreed that this was a very important issue and we spent last summer working with legal experts, prosecutors, and victims' organizations drafting a version which Senator Martin introduced during the 2002 Legislative Session.

We worked very hard on the bill, which became known as Chris' Law. We met with individual legislators, and told them how innocent people were being hurt because of loopholes in our bail system. We testified before committees in the Senate and the House of Representatives, which both passed Chris' Law.

Because "Chris' Law" is a constitutional amendment, it must also be approved by the voters.

Proposition 103 amends the Arizona Constitution to treat bail for rapists and child molesters the same way we treat bail for accused murderers.

Many people have asked me what they can do to help stop sexual predators in our neighborhoods.

I tell them to vote YES on Prop 103.

It's one thing that you can do to help prevent more families from being hurt by sexual predators.

Chris Cottrell, Phoenix

Paid for by Susan Cottrell

Former Congressman and gubernatorial candidate Matt Salmon strongly supports Prop. 103. As a Congressman, Matt Salmon wrote "Aimee's Law" which helps keep convicted murderers, rapists, and child predators behind bars and out of our neighborhoods. Matt believes that the system is too focused on the rights of the criminal to the detriment of safe streets and the rights of victims. Judges often set low bail that allows potentially dangerous suspects to go free pending trial. It is long past time that we amend the Arizona Constitution so that bail for rapists and child molesters can be treated like bail for murderers. Recent history proves the need for Prop. 103:

- Last January, bail was set at $26,000 for a person charged with Indecent Exposure, Sexual Conduct with a Minor, and Child Molestation. Reports by those present at the Madison Street Jail Courtroom said "bail was low because the Judge was in a good mood that night."
- In December, a Maricopa County Superior Court Judge lowered a suspect's bail from $2.5 million to $100,000. The suspect, who had allegedly raped an 11 year-old boy, did not show up for trial.
- That same month, the director of a church-based teen group was charged with having illicit sex with at least three minors. The suspect was charged with 15 counts of sexual conduct with a minor and one count of furnishing obscene materials to a minor. He was freed on a $21,240 bond.
- In November, after a 19-month search by Tucson police to locate a suspect charged with breaking into the apartment of an 11 year-old girl and raping her, Pima County Justice Pro Tem Walter Weber set bail at just $5,500.

I hope that you will join former Congressman Matt Salmon in voting yes on this important Proposition.

James B. Morse Jr., Policy Director for Salmon for Governor, Tempe

Paid for by Andrew E. Chasin

ARGUMENTS "AGAINST" PROPOSITION 103

The Secretary of State did not receive any arguments "against" Proposition 103.

BALLOT FORMAT

PROPOSITION 103

PROPOSED AMENDMENT TO THE CONSTITUTION BY THE LEGISLATURE

OFFICIAL TITLE SENATE CONCURRENT RESOLUTION 1011 PROPOSING AN AMENDMENT TO THE CONSTITUTION OF ARIZONA; AMENDING ARTICLE II, SECTION 22, CONSTITUTION OF ARIZONA; RELATING TO BAILABLE OFFENSES.
DESCRIPTIVE TITLE ADDS SEXUAL ASSAULT, SEXUAL CONDUCT WITH MINOR UNDER AGE 15 AND MOLESTATION OF CHILD UNDER AGE 15 TO LIST OF NON-BAILABLE OFFENSES; STATES PURPOSE OF BAIL RELEASE CONDITIONS IS TO ASSURE APPEARANCE OF ACCUSED, PROTECT AGAINST WITNESS INTIMIDATION AND PROTECT SAFETY OF VICTIM AND OTHERS IN COMMUNITY.

PROPOSITION 103

A "yes" vote shall have the effect of providing that sexual assault, sexual conduct with a minor under age 15 and molestation of a child under age 15 are non-bailable offenses.	YES☐
A "no" vote shall have the effect that these offenses will not be added to the list of offenses for which bail is not available.	NO☐

From:	Brnovich, Mark
To:	Bailey, Michael; Welch, Leslie
Subject:	Fwd: Affordable Care Act - Memorandum
Date:	Tuesday, December 22, 2015 4:19:40 PM
Attachments:	acaa.pdf ATT00001.htm

Attorney General Mark Brnovich
Sent from my iPhone

Begin forwarded message:

From: Marie Isaacson <Marie.Isaacson@azdoa.gov>
Date: December 22, 2015 at 2:15:48 PM MST
To: "Dr. April Osborn" <aosborn@azhighered.gov>, "agodwin@azra.state.az.us" <agodwin@azra.state.az.us>, "Alberto C. Gutier" <AGutier@azgohs.gov>, Alisha Woodring <Alisha.Woodring@azbota.gov>, "atobin@azdfi.gov" <atobin@azdfi.gov>, "ATOBIN@AZINSURANCE.GOV" <ATOBIN@AZINSURANCE.GOV>, "CABRERA.MISAEL@AZDEQ.GOV" <CABRERA.MISAEL@AZDEQ.GOV>, "cara.christ@azdhs.gov" <cara.christ@azdhs.gov>, Chairman SBOE <chairman@sboe.state.az.us>, Charles Brown <Charles.Brown@ptboard.az.gov>, Cindy Olvey <Cindy.Olvey@psychboard.az.gov>, Charles Ryan <cryan@azcorrections.gov>, Donna Aune <IMCEAEX-_O=AZ+20ORGANIZATION_OU=EXCHANGE+20ADMINISTRATIVE+20GROUP+20+28FYDIBOHF23SPDLT+29_CN=RECIPIENTS_CN=Donna+20Aune69a@namprd09.prod.outlook.com>, "dbergin@azgaming.gov" <dbergin@azgaming.gov>, "ddavenport@azauditor.gov" <ddavenport@azauditor.gov>, Debra Blake <Debra.Blake@dfbs.az.gov>, "Debra Rudd" <drudd@azdfi.gov>, "diane.douglas@azed.gov" <diane.douglas@azed.gov>, Lori Scott <director@asbdo.state.az.us>, "djohnson@tourism.az.gov" <djohnson@tourism.az.gov>, "dmmarkley@azdjc.gov" <dmmarkley@azdjc.gov>, "dnoriega@azdhs.gov" <dnoriega@azdhs.gov>, "david.bryant@azdor.gov" <david.bryant@azdor.gov>, David Tenney <DTenney@azruco.gov>, "dweis@azoca.gov" <dweis@azoca.gov>, Elaine Huguniin <elaine.huguniin@azdentalboard.us>, Elizabeth Ortiz <Elizabeth.Ortiz@apaac.az.gov>, "fmistead@azdps.gov" <fmistead@azdps.gov>, "frederick.zumbo@aata.az.gov" <frederick.zumbo@aata.az.gov>, Gail Anthony <Gail.Anthony@azmd.gov>, "ghanchett@azoah.com" <ghanchett@azoah.com>, "gmckay@azdes.gov" <gmckay@azdes.gov>, Gilbert Orrantia <gorrantia@azdohs.gov>, "jclark@lb.az.us" <jclark@lb.az.us>, "JeffD@aztreasury.gov" <JeffD@aztreasury.gov>, Jenna Jones <Jenna.Jones@azdo.gov>, "jfleetham@azroc.gov" <jfleetham@azroc.gov>, Joe Hart <JHart@asmi.az.gov>, "jjerich@azcc.gov" <jjerich@azcc.gov>, John Cocca <John.Cocca@azliquor.gov>, John Confer <John@rb.az.gov>, "John Blackburn, Jr." <jdblackburn@azcjc.gov>, Joey Ridenour <jridenour@azbn.gov>, "jsmout@psprs.com" <jsmout@psprs.com>, "JUSTIN.BOHALL@AZCHIROBOARD.US" <JUSTIN.BOHALL@AZCHIROBOARD.US>, "kara.dimas@azica.gov" <kara.dimas@azica.gov>, Kevin Donnellan <Kevin.Donnellan@azdoa.gov>, Kristine Firethunder <kfirethunder@az.gov>, Kamlesh Gandhi <KGandhi@azpharmacy.gov>, "laurie.barcelona@personnel.state.az.us" <laurie.barcelona@personnel.state.az.us>, Lee Allison <lee.allison@azgs.az.gov>, Larry Voyles <lvoyles@azgfd.gov>, Margaret Whelan <Margaret.Whelan@optometry.az.gov>, "mark.brnovich@azag.gov" <mark.brnovich@azag.gov>, "marv.lamer@asdb.az.gov" <marv.lamer@asdb.az.gov>, "maryjane.jones@azbarberboard.gov" <maryjane.jones@azbarberboard.gov>, Matthew Scheller <Matthew.Scheller@fingerprint.az.gov>, Melissa Cornelius <Melissa.Cornelius@azbtr.gov>, "michael.t.mcguire14.mil@mail.mil" <michael.t.mcguire14.mil@mail.mil>, Michael Traflor <michael.traflor@azhousing.gov>, "mkman@azda.gov" <mkman@azda.gov>, Monica Petersen <mpetersen@azaccountancy.gov>, Nav Streams <Nav.Streams@ansac.az.gov>, Paul Matson <paul.m@azasrs.gov>, "petegonzalez@azacpunctureboard.us" <petegonzalez@azacpunctureboard.us>, "PWILLIAMS@AZSFB.GOV" <PWILLIAMS@AZSFB.GOV>, Ray Bladine <RBladine@azredistricting.org>, Robert Booker <rbooker@azarts.gov>, "rcastas@azracing.gov" <rcastas@azracing.gov>, "rudy.thomas@funeralbd.state.az.us" <rudy.thomas@funeralbd.state.az.us>, Ryan Edmonson <Ryan.Edmonson@podiatry.az.gov>, "s.collins@acdhh.org" <s.collins@acdhh.org>, "sanw@commerce.com" <sanw@commerce.com>, "shlack@azstateparks.gov" <shlack@azstateparks.gov>, "sleyvas@azltf.gov" <sleyvas@azltf.gov>, "sosadmin@azsos.gov" <sosadmin@azsos.gov>, Sandra Sutton <ssutton@azwifa.gov>, Susie Myers <Susie.Myers@azdoa.gov>, Terry Adriance <TAdriance@azboec.gov>, "tboule@azlottery.gov" <tboule@azlottery.gov>, "tburschatzke@azwater.gov" <tburschatzke@azwater.gov>, Ted Ihrman <Ted.Ihrman@azph.gov>, Teri Stanfill <Teri.Stanfill@azppse.gov>, "thomas.collins@azcleanelections.gov" <thomas.collins@azcleanelections.gov>, "tjeffries@azdes.gov" <tjeffries@azdes.gov>, Tobi Zavala <tobi.zavala@azbbhe.us>, Tom Betlach <tom.betlach@azahcccs.gov>, "victoria.whitmore@vetbd.state.az.us" <victoria.whitmore@vetbd.state.az.us>, Wanell Costello <wanell.costello@azstatefair.com>, Whitney Chapa <Whitney.Chapa@asbcs.az.gov>, Anne Woosley <woosley@azhs.gov>, "wwright@azdvs.gov" <wwright@azdvs.gov>, Craig Brown <Craig.Brown@azdoa.gov>, John Halikowski <jhalikowski@azdot.gov>, Judy Lowe <jlowe@azre.gov>, "Debra Rudd" <drudd@azdfi.gov>
Cc: Elizabeth Thorson <Elizabeth.Thorson@azdoa.gov>, Clark Partridge <Clark.Partridge@azdoa.gov>, Michael Smarik <Michael.Smarik@azdoa.gov>, Colleen J Mcmanus <cmcmanus@azcorrections.gov>, Fredrick N Burk <fburk@azdes.gov>, Tracy Starling <tstarling@azdor.gov>, Chris Weakland <weakland.chris@azdeq.gov>, Roxanne Robles <roxanne.robles@azahcccs.gov>, Barbara Bratcher <BBratcher@azdes.gov>, Jan Plank <Jan.Plank@azdoa.gov>, Alishva Jeremiah <AJeremiah@azdjc.gov>, Stu Wilbur <Stu.Wilbur@azdoa.gov>
Subject: Affordable Care Act - Memorandum

Please see attached memorandum regarding the State's responsibilities related to the Affordable Care Act and training for agency staff.

Thank you,

Marie Isaacson
Benefits Director, State of Arizona
ADOA – Benefits Services Division
100 North 15th Avenue, Suite 103, Phoenix, AZ 85007
p: 602-542-7367 | m: 602[redacted] | marie.isaacson@azdoa.gov | https://benefitsolutions.az.gov/

How am I doing? Please take a few moments to answer a few questions.
https://www.surveymonkey.com/r/MyDCBenefits

Douglas A. Ducey
Governor

Craig Brown
Director

ARIZONA DEPARTMENT OF ADMINISTRATION

BENEFIT SERVICES DIVISION
100 NORTH FIFTEENTH AVENUE • SUITE 103
PHOENIX, ARIZONA 85007
(602) 542-5008

MEMORANDUM

TO: **Agency Directors**

FROM: **Marie Isaacson, Director**

DATE: **December 22, 2015**

RE: **Affordable Care Act**

The federal Patient Protection and Affordable Care Act (ACA) requires the State of Arizona to offer group health plan coverage to their full-time employees (and their dependent children up to age 26). Failure to do so will lead to a penalty known as the "Employer Shared Responsibility Payment (ESRP)."

There are two types of ESRP penalties under the ACA known as "Pay or Play Penalties." One penalty is assessed for failure to offer health coverage to full-time employees. If the State does not properly offer health coverage to just one employee, the penalty would exceed $76,000,000, because it is assessed against all covered employees not just those not offered benefits (e.g. $2,000 per active employee – 2,000 X 38,000 employees). This penalty is also known as the "sledgehammer" penalty.

The second penalty is assessed for failure to offer coverage that is of minimum value and affordable. This penalty is $3,000 for each employee who obtains health coverage on the Marketplace Exchange and receives an exchange subsidy for insurance.
The Arizona Department of Administration (ADOA) is responsible for reporting this information to the IRS and our employees by preparing and filing new 1094/1095 IRS forms, which are due in early 2016.

In order to ensure ACA compliance and its complex reporting requirements, HRIS employee data integrity including, but not limited to hours worked, paid leave and FMLA leave hours is now more critical than ever before. If the proper hours of service are not accurately tracked in HRIS, it can cause an employee to be incorrectly classified under ACA, causing incorrect reports to be filed with the IRS and potentially triggering the penalties outlined above. ADOA is currently reviewing data consistency across all agencies using HRIS, ensuring key data fields affecting ACA compliance are utilized appropriately.

It is imperative that agencies understand key ACA components in order to properly identify eligible employees. In order to achieve consistent HRIS data integrity, ADOA will provide ACA training to all HR and Benefit liaisons in January 2016. This training is required to ensure that all agencies are in compliance with the law to avoid any penalties.

More information regarding this training will be provided to your Chief Human Resources Officer or Shared Service Representative, Benefit and Payroll Liaisons. We appreciate your support in encouraging staff to attend. Together we can mitigate the State's risk of future penalties.

c: Elizabeth Thorson, Human Resources Director
Clark Partridge, State Comptroller
Michael Smarik, Deputy State Comptroller
Agency Chief Human Resources Officers
Agency Benefit Liaisons
Agency Payroll Liaison

From:	Brnovich, Mark
To:	Bailey, Michael; Welch, Leslie
Subject:	Fwd: AG15005 Criminal Complaint Intake & Management System PIJ Approval
Date:	Friday, December 04, 2015 9:14:55 PM
Attachments:	image001.jpg ATT00001.htm AG15002 PIJ-FINAL 151204.pdf ATT00002.htm

Attorney General Mark Brnovich
Sent from my iPhone

Begin forwarded message:

From: Strategic Oversight <Strategic_Oversight@azdoa.gov>
Date: December 4, 2015 at 4:41:01 PM MST
To: "mark.brnovich@azag.gov" <mark.brnovich@azag.gov>, "donald.conrad@azag.gov" <donald.conrad@azag.gov>, John Abretske <john.abretske@azag.gov>, Angela Alonso <angela.alonso@azag.gov>, "jerry.connolly@azag.gov" <jerry.connolly@azag.gov>, "mary.applebee@azag.gov" <mary.applebee@azag.gov>, "dan.woods@azag.gov" <dan.woods@azag.gov>, "mark.perkovich@azag.gov" <mark.perkovich@azag.gov>, "cindy.palmer@azag.gov" <cindy.palmer@azag.gov>, Leslie Welch <Leslie.Welch@azag.gov>
Cc: Rebecca Perrera <RPerrera@azleg.gov>, "colvey (colvey@az.gov)" <colvey@az.gov>, Barbara M Corella <Barbara.Corella@azdoa.gov>, JR Sloan <JR.Sloan@azdoa.gov>, James Dean <James.Dean@azdoa.gov>, Morgan Reed <Morgan.Reed@azdoa.gov>
Subject: AG15005 Criminal Complaint Intake & Management System PIJ Approval

Attorney General Brnovich,

In response to the Project Investment Justification (PIJ) for the **"Criminal Complaint Intake & Management System"** project, a meeting with the Attorney General's Office was held on 12/04/15 to consider your project to acquire a new investigative case management system solution.

The PIJ implies funding is available from Non-Appropriated Funds in the amount of $234.1 thousand for development costs, and $203.9 thousand for projected operations costs, for a total five-year life cycle cost of $438.0 thousand for the project, which is shown below.

All Figures in Thousands ($000)						
Cost Description	*2016*	*2017*	*2018*	*2019*	*2020*	*Total*
Development Costs	234.1	0.0	0.0	0.0	0.0	234.1
Operational Costs	0.0	48.7	50.2	51.7	53.3	203.9
Total Project Costs	234.1	48.7	50.2	51.7	53.3	438.0

Criminal Complaint Intake & Management System	
Agency Requesting The Project:	
Attorney General's Office	
Business Unit Requesting The Project:	
Special Investigations Section	
Sponsor Of the Project:	
Donald Conrad	
Sponsor Title:	
Criminal Division Chief	
Sponsor Phone Number:	**Extension:**
(602) 542-8495	
Sponsor Email Address:	
donald.conrad@azag.gov	

Has a Project Request been completed for this PIJ?	Y

What is the operational issue or business need that the Agency is trying to solve?
The Special Investigations Section (SIS) currently receives, prioritizes, assigns, tracks, completes, and archives incoming criminal complaints using multiple software programs, paper files, and manual workflows, which is not sufficient to properly manage the 100+ current cases and 30-110 new complaints it receives each week. SIS leadership cannot effectively manage its investigative resources nor quickly make informed decisions on how to triage and evaluate incoming complaints without a new system designed specifically for managing investigations.

How will solving this issue or addressing this need benefit the State or the Agency?
The proposed solution will provide the AGO an effective tool for triaging and evaluating in coming criminal complaints. In addition, the new computer system will provide a means to effectively manage SIS investigative resources by assigning and tracking investigative tasks.

Describe the proposed solution to this business need:
The AGO received pre-PIJ approval to release an RFP to acquire a complaint tracking system for SIS. Bids have been evaluated and we are ready to make an award upon PIJ approval. The new system will be web-based and run on the existing AGO server infrastructure as new virtual servers. All data will be stored in an AGO data center.

Has the existing technology environment, into which the proposed solution will be implemented, been documented?	Y

Indicate where that documentation can be found, or provide the information under separate cover before the meeting, otherwise describe below:
AGO eDocs system, doc #2579006, entitled Current Network Config.

Have the business requirements been gathered, along with any technology requirements that have been identified?	Y

Are you submitting this as a Pre-PIJ in order to issue a Request for Proposal (RFP) to evaluate options and select a solution that meets the project requirements?	N

Will you be completing an assessment phase, i.e., an evaluation by a vendor, third party or your agency, of the current state, needs, and desired future state, in order to determine the cost, effort, approach (RFP or otherwise) and/or feasibility of a project before submitting the full PIJ?	Y

Describe the reason for completing the assessment and the expected deliverable(s) below:
We have already documented our requirement and released an RFP. We received and evaluated several bids. The RFP was released as part of complying with AZ State procurement policies and regulations. The RFP was also released to find out what alternatives existed in the market place that satisfy our functional requirements. The bids were reviewed by a team of AGO staff that included CIO, ISO, CPO, procurement analyst, and business unit managers. The bids were reviewed for the contractors expertise, ability to satisfy functional requirements, implementation plan, and overall system cost. The best four bidders were invited to the AGO to demonstrate their product to the evaluation team and several key members of the staff who will ultimately use the system.

Provide the estimated start and finish date for conducting the RFP solicitation/assessment phase:			
Estimated Start	05/06/15	Estimated Finish	11/03/15

Provide a projected start and finish date for implementing the final solution.			
Estimated Start	12/01/15	Estimated Finish	10/01/16

Based on research to date, provide a high-level estimate or range of costs to implement the final solution below:
$410,000.00

Does the project fall into one of the following categories: - hardware technology refresh/expansion, e.g., replacement/more laptops, radios, peripherals, etc.? - software version refresh/additional licenses, e.g., MS Office 2013 replacing 2010, extra software licenses needed for additional PCs?	N

Is the proposed procurement the result of an RFP solicitation process?	Y
Is this project referenced in your agency's Strategic IT Plan?	Y
Does your agency have a formal project methodology in place?	Y

Describe the make-up and roles/responsibilities of the project team, e.g. participants, sponsors, stakeholders, etc. below:
Assistant ISS Director – Act as the State technical project manager, conducting regular monthly status meetings and reporting the project status to ASET. ISS Software Staff – Create databases, compose reports, and provide technical advice as needed to the management and business staff of the AGO. Assistant Chief Special Agent – Coordinate all project activities with SIS staff. Facilitate contractor access to business staff, data, and processes as needed. SIS Staff – Participate in business process flow discovery meetings, implement new business process, attend system training, and adopt the new system for complaint management. Contractor – Facilitate and document business process flow discovery meetings. Develop and recommend business process flow changes. Develop a criminal complaint in-take system that satisfies the document project requirements. Train SIS staff on system use.

Will a PM be assigned to manage the project, regardless of whether internal or vendor provided?	Y

If the PM is credentialed, e.g., PMP, CPM, etc., please provide certification information below:
No PM certifications, 17 years experience.

Is a project plan available that reflects the estimated start date and end date of the project, and the supporting milestones for the project?	Y
Has a test/pilot phase been incorporated?	Y
Have steps needed to roll-out to all impacted parties been incorporated, e.g. communications, planned outages, deployment plan?	Y
Will the implementation require any physical infrastructure improvements, e.g., building reconstruction, major re-wiring, etc.?	N
Are there any known resource availability conflicts that could impact the project?	N
Does your schedule have dependencies on any other projects or procurements?	N
Will the implementation involve major end user view or functionality changes?	Y

Will the proposed solution result in a change to a public-facing application or system?	Y
Is a detailed project budget reflecting all of the up-front/startup costs to implement the project available, e.g., hardware, initial software licenses, training, taxes, P&OS, etc.?	Y
Have the ongoing support costs for sustaining the proposed solution over a 5-year lifecycle, once the project is complete, been determined, e.g., ongoing vendor hosting costs, annual maintenance and support not acquired upfront, etc.?	Y
Have all required funding sources for the project and ongoing support costs been identified?	Y
Will the funding for this project expire on a specific date, regardless of project timelines?	N
Will the funding allocated for this project include any contingency, in the event of cost over-runs or potential changes in scope?	Y
Please indicate whether a statewide enterprise solution will be used or select the primary reason for not choosing an enterprise solution:	
No Statewide Enterprise Solution Available	
Will the technology and all required services be acquired off existing State contract(s)?	N
Will any software be acquired through the current State value-added reseller contract?	Y
Describe how the software was selected below:	
The software being purchased is for the necessary increase in licenses for the Microsoft SQL Server to house the new solution, as well as the RSA SecurID tokens and software being utilized for security.	
Does the project involve any technology that is new and/or unfamiliar to your agency, e.g., software tool never used before, virtualized server environment?	N
Does your agency have experience with the vendor (if known)?	Y
Does the vendor (if known) have professional experience with similar projects?	Y
Does the project involve any coordination across multiple vendors?	N
Does this project require multiple system interfaces, e.g., APIs, data exchange with other external application systems/agencies or other internal systems/divisions?	N

Have any compatibility issues been identified between the proposed solution and the existing environment, e.g., upgrade to server needed before new COTS solution can be installed?	N
Will a migration/conversion step be required, i.e., data extract, transformation and load?	N
Is this replacing an existing solution?	N

Describe how the agency determined the quantities reflected in the PIJ, e.g., number of hours of P&OS, disk capacity required, etc. for the proposed solution?
P&OS was estimated at 2 man years (4160 hrs.) which roughly equates to about 2 weeks of effort for every staff member in SIS and ISS for training and testing. There was no specific calculation performed to determine the required amount of disk space. The AGO has a virtualized SAN environment with approximately 150TB of total space. The SAN data storage space can be allocated as needed for the servers that require it. While we do not know exactly how much space the new system would use, we can attempt to extrapolate how much space it will use based upon the disk space utilized by the AGO enterprise case and document systems. The existing AGO enterprise case and document management systems have been in use for approximately 8 years. In that time, the AGO case management system database has used 140GB of disk space. The existing AGO document management system database is currently uses 60GB. Finally, the AGO document management file store currently uses 2.8TB. Total space used by the AGO enterprise case and document management systems is 3TB (3,000GB.) The AGO case and document management systems service 1100 staff. This equates to 2.73GB of data per user. We expect to have 50 users on the new SIS complaint system for total estimated disk usage of 137GB.

Does the proposed solution and associated costs reflect any assumptions regarding projected growth, e.g., more users over time, increases in the amount of data to be stored over 5 years?	Y
Does the proposed solution and associated costs include failover and disaster recovery contingencies?	Y
Will the vendor need to configure the proposed solution for use by your agency?	Y
Are the costs associated with that configuration included in the PIJ financials?	Y
Will any application development or customization of the proposed solution be required for the agency to use the product in the current/planned technology environment, e.g., a COTS application that will require custom programming, an agency application that will be entirely custom developed?	Y

Describe who will be customizing the solution below:
The vendor will be responsible for configuring, deploying, and training.

Do the resources that will be customizing the application have experience with the technology platform being used, e.g., .NET, Java, Drupal?	Y

Please select the application development methodology that will be used:
Application development methodology not disclosed by leading bidder.

Provide an estimate of the amount of customized development required, e.g., 25% for a COTS application, 100% for pure custom development, and describe how that estimate was determined below:
The proposed system will satisfy 35 of the 38 functional requirements without customization, only configuration. The 3 remaining functional requirement require custom development. 3/38=.0789 or 7.9% customization required.

Are any/all Professional & Outside Services costs associated with the customized development included in the PIJ financials?	Y
Have you determined that this project is in compliance with all applicable statutes, regulations, policies, standards, and procedures, including those for network, security, platform, software/application, and/or data/information found at https://aset.az.gov/resources/psp?	Y
Are there other high risk project items not identified?	N
Will the proposed solution be vendor-hosted?	N
Will the proposed solution be hosted on-premise in a state agency?	Y

Please select from the following in-house options:
Agency's Data Center

Describe the rationale for selecting an in-house option below:
The AGO has an existing data center and a DR site which is currently supporting 17 computer systems. The AGO data center has sufficient server infrastructure to support the new system without upgrades.

Will any data be transmitted into or out of the agency's in-house environment or the State Data Center?	Y
Will any PII, PHI, or other Protected Information as defined in the 8110 Statewide Data Classification Policy be transmitted, stored, or processed with this project?	Y

Describe below what security infrastructure/controls are/will be put in place to safeguard this data:
The system is web-based and will use SSL for data transmissions. Web screen referrals will include authentication tokens to ensure sessions are not hijacked. Remote access will utilize RSA key fobs and require dual factor authentication. All data will be stored on AGO in-house servers in a secured data center.

Summary of PIJ Financials	
Total of Development Cost:	$234,085
Total of Operational Cost:	$203,890
Total Costs:	$437,975

Project Cost - Itemized

Item	Description	Category	Development (Implementation) or Operational (Ongoing)	Fiscal Year Spend	Qty or Hours	Unit Cost	Extended Cost	Enter Tax Rate if Applicable (Generally 8.3% for PHX)	Tax	Total Cost
1	Consulting Services	Prof & Outside Services	Development	1	1	$5,000	$5,000		$0	$5,000
2	Customization Services	Prof & Outside Services	Development	1	1	$30,000	$30,000		$0	$30,000
3	Software Licensing	License & Maint Fees	Development	1	100	$1,500	$150,000	8.30%	$12,450	$162,450
4	Train the trainer services	Prof & Outside Services	Development	1	2	$2,000	$4,000		$0	$4,000
5	Training Services	Prof & Outside Services	Development	1	4	$4,000	$16,000		$0	$16,000
6	System Maintenance, year 1	License & Maint Fees	Operational	2	1	$45,000	$45,000	8.30%	$3,735	$48,735
7	System Maintenance, year 2	License & Maint Fees	Operational	3	1	$46,350	$46,350	8.30%	$3,847	$50,197
8	System Maintenance, year 3	License & Maint Fees	Operational	4	1	$47,741	$47,741	8.30%	$3,963	$51,704
9	System Maintenance, year 4	License & Maint Fees	Operational	5	1	$49,173	$49,173	8.30%	$4,081	$53,254
10	SQL Server licenses	License & Maint Fees	Development	1	4	$2,340	$9,360	8.30%	$777	$10,137
11	RSA Auth Mgr	License & Maint Fees	Development	1	50	$67	$3,350	8.30%	$278	$3,628
12	RSA Enchanced Support	License & Maint Fees	Development	1	350	$2	$700	8.30%	$58	$758
13	RSA SecureID Tokens	Software	Development	1	50	$39	$1,950	8.30%	$162	$2,112
14		[--Select--]	[--Select--]	[--Select--]						
15		[--Select--]	[--Select--]	[--Select--]						
16		[--Select--]	[--Select--]	[--Select--]						
17		[--Select--]	[--Select--]	[--Select--]						
								Total Development Cost		$234,085
								Total Operational Cost		$203,890
								Total Itemization of Costs:		$437,975

Summary of Funding Sources			
Fund Type	% of Project	$ of Project (Available)	$ of Project (To Be Requested)
Base Budget			
APF			
Other Appropriated			
Federal			
Other Non-Appropriated	100.00%	$437,974.79	

PU Development & Operational Cost Summary

Description	Type	Year 1	Year 2	Year 3	Year 4	Year 5	Extended Cost
Professional & Outside Services	Development	$55,000	$0	$0	$0	$0	$55,000
	Operational	$0	$0	$0	$0	$0	$0
Hardware	Development	$0	$0	$0	$0	$0	$0
	Operational	$0	$0	$0	$0	$0	$0
Software	Development	$2,112	$0	$0	$0	$0	$2,112
	Operational	$0	$0	$0	$0	$0	$0
Communications	Development	$0	$0	$0	$0	$0	$0
	Operational	$0	$0	$0	$0	$0	$0
Facilities	Development	$0	$0	$0	$0	$0	$0
	Operational	$0	$0	$0	$0	$0	$0
Licensing & Maintenance Fees	Development	$176,973	$0	$0	$0	$0	$176,973
	Operational	$0	$48,735	$50,197	$51,704	$53,254	$203,890
Other	Development	$0	$0	$0	$0	$0	$0
	Operational	$0	$0	$0	$0	$0	$0
	Development Cost:	$234,085	$0	$0	$0	$0	$234,085
	Operational Cost:	$0	$48,735	$50,197	$51,704	$53,254	$203,890
	Total Cost:						$437,975

Areas of Impact

1 **Application Systems**

	Application Enhancements
X	Internal Use Web Application
	Mobile Application Development
	Arizona Enterprise Solution Platform (AESP) based Application
	New Application Development
	az.gov Web Portal Application
	Other: (Please specify below)

2 **Database Systems**

	Data Warehouse/Mart
	Database Consolidation/Migration/Extract Transform and Load Data
X	Database Products and Tools:
	Oracle
	MySQL
	DB2
X	MS SQL Server
	Other: (Please specify below)

3 **Software**

X	COTS Application Customization
X	COTS Application Acquisition
	Mainframe Systems Software
	Open Source
	PC/LAN Systems Software
	Virtualization
	Other: (Please specify below)

4 **Hardware**

	LAN/WAN Infrastructure
	Mainframe Infrastructure
	Storage Area Network Devices
	Public Safety Radios, Systems
	PC Purchases, Peripherals
	Tape Libraries/Silos
	UPS Devices
	Other: (Please specify below)

5 **Hosted Solution (Cloud Implementation)**

- [ ] State Data Center
- [ ] Commercially Hosted:
  - [ ] Amazon (AWS) GovCloud
  - [ ] Century Link - I/O Data Center
  - [ ] AWS (non-government) cloud
  - [ ] Microsoft Azure
- [ ] Vendor Hosted
- [ ] Other: (Please explain below)

6 **Security**

- [ ] Encryption
- [ ] Security Appliances:
  - [ ] Firewall
  - [ ] Intrusion Detection System (IDS)
  - [ ] Intrusion Prevention System (IPS)
- [ ] SecurityControls/Systems - Other: (Please specify below)
- [ ] Physical Controls (Badging Systems, Iris Scanners, Other: (Please specify below)
- [ ] Other: (Please specify below)

7 **Telecommunications**

- [ ] Network Communications Infrastructure
- [ ] Telephone Upgrade-Business-Specific
- [ ] Cabling
- [ ] Wireless Access Points
- [ ] Telephony Upgrade-EIC Solution
- [ ] Trenching
- [ ] Videoconferencing
- [ ] Other: (Please specify below)

8 **Enterprise Solutions**

	Business Intelligence System
	E-Signatures
	Geographic Information Systems
	Other Imaging - Photos, Fingerprints, etc.
X	Document Management/Imaging
	eLicensing
	Management Systems - Financial, Grants, Asset
	Disaster Recovery/Business Continuity
	Other: (Please specify below)

9 **Contract Services/Procurement**

	Contracted Project Management
X	Contractor Support Services
X	Install/Configuration Contract Services
	State Contract
	Vendor provided
X	Procurement (RFP, IFB, DPR, etc.)
	Other: (Please specify below)

Meeting Invite Checklist

Role	Name	Email Address	Date Reviewed
Agency Project Sponsor	Donald Conrad	donald.conrad@azag.gov	
Agency Chief Information Officer (CIO) (or designee)	John Abretske	john.abretske@azag.gov	
Agency Information Security Officer (ISO) (or designee)	Angela Alonso	angela.alonso@azag.gov	
Joint Legislative Budget Committee (JLBC) representative			
Office of Strategic Planning & Budgeting (OSPB) representative			
ADOA-ASET Strategic Program Manager	James Dean	james.dean@azdoa.gov	
ADOA-ASET Security, Privacy & Risk (ASET-SPR) representative			
Agency CPO or State Procurement Office (SPO) representative	Jerry Connolly	jerry.connolly@azag.gov	
Agency CFO or Finance representative (if different from CPO)	Mary Applebee	mary.applebee@azag.gov	
Others to Invite (if applicable):			
Business Unit Project Manager	Dan Woods	dan.woods@azag.gov	
Chief Agent	Mark Perkovich	mark.perkovich@azag.gov	
Senior procurment specialist	Cindy Palmer	cindy.palmer@azag.gov	
Director of Operations	Leslie Welch	leslie.welch@azag.gov	
ADOA-ASET Strategic Oversight Finance Analyst	Veronica Garcia	Veronica.Garcia@azdoa.gov	

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✓	Has the value of the IT project to the public and the State been identified?
✓	Does the proposed solution address the stated problem or situation?
✓	Has the budget unit demonstrated competency to carry out the project successfully?
✓	Have all applicable questions in the PIJ been addressed?
✓	Have the Areas of Impact associated with the project been identified?
✓	Is sufficient sponsorship and support by budget unit leadership evidenced in the meeting?
✓	Has the compatibility of the proposed solution with other budget unit solutions been addressed?
✓	Has a reasonable Project Plan been provided?
✓	Has the compliance of the proposed solution with all applicable statewide standards been confirmed?
✓	Have any potential risks or issues associated with the project or the proposed solution been identified and appropriately addressed to minimize unintended consequences?
✓	Have the cost estimates for the project been vetted for accuracy?
✓	Have the PIJ Financials been completed?
✓	Have any/all of the following startup costs to implement the project been included under Development in the financial tables, if applicable - tax; shipping; upfront maintenance and support; professional services (P&OS); ancillary software to run on equipment; ancillary hardware to install equipment, e.g., cables; other associated costs, e.g., training, travel, documentation, etc.?
✓	Have any/all of the following ongoing/5-year support costs, once the project is implemented, been included under Operational in the financial tables, if applicable - ongoing vendor hosting costs, including any projected increase over time; annual maintenance and support not acquired upfront; extended costs after warranty expiration; P&OS commitments beyond implementation?
✓	Have you confirmed that no Full Time Employee (FTE) related costs have been included in the project costs?
✓	Have quotes been provided for all itemized costs in the PIJ, e.g., professional services, hardware, software, licensing, etc.?
✓	Do the quotes match the itemized list and only reflect those items and costs (within 5%) associated with this project?
	If not, describe below how the costs in the PIJ differ from the quotes, e.g., if quantities are different, costs are comprised of portions of multiple quotes provided, etc.:

If any of the above are not complete, the PIJ cannot be approved at this time.....

PIJ Disposition

✓	Approved
	Approved with conditions
	Not Approved

Strategic Program Manager Analysis

This project was reviewed during a collaborative meeting with the AGO office. The original Pre-PIJ was approved by ASET on 05/06/15 to move forward and issue an RFP. AGO has completed the solicitation process, selected a vendor, and is ready to award. All costs have been reviewed and verified, and are slightly less than the original estimate. the AGO has completed their due diligence to ensure that state security policies will be followed during the implementation of the web based solution, and plan to implement additional security measures including dual factor authentication for any personnel using the system while in the field. There are no outstanding issues or concerns regarding approval of the project at this time. Approved via Delegated Authority.

Authorized Approver:	James Dean	Approval Date:	12/4/2015

Condition (If Applicable)

N/A

This notification is the Arizona Strategic Enterprise Technology Office's **Approval** of the technology project.

You may proceed to secure additional approvals as required from the Joint Legislative Budget Committee, the Office of Strategic Planning and Budgeting, and the State Procurement Office.

Thank you,

Strategic Oversight

ADOA – Arizona Strategic Enterprise Technology (ASET) Office | State of Arizona

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How am I doing? Please take a moment to answer a few questions.

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