



BEFORE A HEARING OFFICER

IN THE MATTER OF A MEMBER OF THE  
STATE BAR OF ARIZONA,

) File No. 97-1909

KENNETH J. PEASLEY,  
Bar No. 004114

HEARING OFFICER'S REPORT  
AND RECOMMENDATION

RESPONDENT.

PROCEDURAL HISTORY

September 9, 1997

Complaint against Respondent filed with State Bar by defense attorney Richard Lougee.

March 3, 1998

State Bar forwarded Complaint to Respondent for response. State Bar investigation started.

May 21, 1999

Probable Cause Order filed by the Probable Cause Panelist.

May 11, 2000

Complaint filed with the Disciplinary Clerk (This was the first and only Complaint filed. Throughout the pleadings, Respondent inaccurately refers to this as "Complaint II").

May 15, 2000

Notice of Assignment of Case to Hearing Officer 9F Miller.

May 24, 2000

Attorney Stuehringer accepts service on behalf of Respondent.

June 13, 2000

Respondent's Motion to Extend Time to Answer.

Respondent's Motion to Dismiss Due to Prosecutorial Vindictiveness.

June 15, 2000

Respondent's Notice of Transfer of Case from Hearing Officer Miller and request for appointment of three-person hearing committee.

June 23, 2000

Notice of Reassignment of Case from Hearing Officer Miller to Hearing Officer 9I Whitley.

June 27, 2000

Notice of Recusal by Hearing Officer Whitley.

1 July 5, 2000  
Notice of Assignment of Case to Hearing Officer 9G Drake.

2  
3 August 15, 2000  
State Bar's Motion to Determine Counsel.

4 August 16, 2000  
Order denying Respondent's Motion to Dismiss for Prosecutorial Misconduct.

5  
6 September 5, 2000  
Respondent's Answer.

7 September 7, 2000  
Notice of Assignment of Settlement Officer Haydon 9E to conduct Settlement  
8 Conference.

9 September 21, 2000  
Respondent's Motion for Reconsideration Re: Prosecutorial Vindictiveness.

10  
11 October 17, 2000  
Hearing on Respondent's Motion for Reconsideration of Ruling on Motion to Dismiss  
for Prosecutorial Vindictiveness and Hearing on State Bar's Motion to Determine  
12 Counsel (Transcribed)

13 December 26, 2000  
Notice of conclusion of Settlement Conference by Hearing Officer Haydon. No  
14 settlement was reached.

15 December 29, 2000  
Notice setting Hearing for February 20, 2001.

16  
17 January 9, 2001  
Respondent's Motion to Continue Hearing Date of February 20, 2001.

18 January 16, 2001  
Order

19 1. Deny Respondent's Motion for Reconsideration of Denial of Motion to  
Dismiss for Prosecutorial Vindictiveness.

20 2. Regarding State Bar's Motion to Determine Counsel, ordered that Mr.  
21 Stuehringer is not disqualified from representing Respondent and  
ordered that he cannot be deposed nor called as a witness.

22  
23 January 18, 2001  
Status Conference (Transcribed)

24 January 22, 2001  
Respondent's Motion to Compel Discovery of FBI materials held by State Bar.

25

1 January 26, 2001  
2 Order granting Respondent's Motion to Continue Hearing and Notice of Hearing  
3 resetting Hearing for April 16, 2001.

3 March 1, 2001  
4 Order granting Respondent's Motion to Compel production of FBI materials.

4 March 13, 2001  
5 Order after Prehearing Conference on March 12, 2001 regarding subpoenas and  
6 character witness list.

6 March 29, 2001  
7 Order by William L. Rubin, Chair of Disciplinary Commission, granting Respondent's  
8 Motion to Continue and resetting the hearing for June 18, 2001.

8 April 27, 2001  
9 Respondent's Petition to Arizona Supreme Court for Special Action on issue of  
10 Prosecutorial Vindictiveness.

10 May 26, 2001  
11 Order setting dates for Motions. (Not shown on Clerk's Docket Sheet.)

11 May 30, 2001  
12 Supreme Court declines jurisdiction on Respondent's Petition for Special Action.

12 June 8, 2001  
13 Notice setting Hearing for June 18-22, 2001.

13 June 11, 2001  
14 Order Denying Respondent's request to preclude testimony of attorney David  
15 Lipartito.

14 June 18, 2001  
16 Hearing, Transcript Vol. I  
17 State Bar Opening Statement, pages 21-62  
18 Respondent's Opening Statement, pages 63-83  
19 State Bar witness Richard Lougee, pages 91-251

19 June 19, 2001  
20 Hearing, Transcript Vol. II  
21 Hearing adjourned for the day because both attorneys were ill, pages 255-  
22 258.

21 June 20, 2001  
23 Hearing, Transcript Vol. III  
24 Hearing on issue whether Detective Godoy should be called as a witness,  
25 pages 268-290.

1 Continue testimony of Mr. Lougee, pages 290-368.

2 State Bar witness David Lipartito direct examination only, pages 372-394

3 State Bar witness attorney Barry Baker Sipe, pages 395-548.

4 June 21, 2001  
Hearing , Vol. IV

5 State Bar witness attorney Wanda Day, pages 565-705

6 State Bar witness attorney Harriette Levitt, pages 710-842

7 June 22, 2001  
Hearing, Vol. V

8 Respondent's character witness Judge Bernini, pages 866-881

9 Respondent's character witness Judge Collins, pages 883-890

10 Respondent's character witness Judge Velasco, pages 891-899

11 Respondent's character witness attorney Michael Bloom, pages 901-931

12 State Bar witness attorney Carla Ryan, pages 931-960

13 June 28, 2001  
Notice setting continued hearing on July 12, 2001 and August 8, 2001.

14 July 12, 2001  
State Bar witness Eric Larsen

15

16 Hearing on pending legal matters.

17 July 16, 2001  
Order permitting parties to submit additional memos on pending legal matters.

18

19 July 20, 2001  
Respondent's memo in support of Motion to Strike Testimony of David Lipartito, or  
in the alternative, request for directive to defend.

20

21 July 20, 2001  
State Bar responds to Motion to Strike Testimony of David Lipartito.

22 August 3, 2001  
Order on Pending Matters

23 1. Grant Respondent's Motion to Strike Testimony of David Lipartito.

24 2. Grant Respondent's Motion to Admit Transcripts of Testimony of  
Detective Godoy in underlying murder trial and before State Grand  
25 Jury.

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3. Grant Respondent's Motion to submit character evidence of Alfred S. Donau, III by deposition.

August 7, 2001  
Arizona Supreme Court Order denying State Bar's request for Interlocutory Stay.  
The Court later denied State Bar's Petition for Review on the Motion to Determine Counsel.

August 8, 2001  
Hearing Vol. VI  
State Bar calls Respondent to testify, pages 978-1184.

August 9, 2001  
Hearing Vol. VII  
Continued testimony of Respondent, pages 1195-1454.

August 10, 2001  
Hearing Vol. VIII  
Continued testimony of Respondent pages 1464-1613.  
State Bar witness Eric Larsen, pages 1615-1619.

August 15, 2001  
Notice continuing hearing for further testimony August 29, 2001.

August 29, 2001  
Hearing Vol. IX  
Continued testimony of Mr. Larsen, pages 1707-1783.  
Respondent's witness Teresa Miller, pages 1841-1863.

August 30, 2001  
Hearing Vol. X  
State Bar Closing Statement pages 1923-1982.  
Respondent's Closing Statement pages 1982-2056.  
State Bar Rebuttal Statement pages 2056-2076.

September 5, 2001  
Order requesting Proposed Findings and Conclusions by October 22, 2001.

November 6, 2001  
Respondent's Motion to Reopen Case for further cross examination of Harriette Levitt.

November 6, 2001  
State Bar's Proposed Findings and Conclusions of Law.

1 November 8, 2001  
Respondent's Proposed Findings and Conclusions of Law.

2  
3 December 7, 2001  
Order granting Motion to Re-open, setting hearing for December 14, 2001.

4 December 19, 2001  
Hearing Vol. XI  
5 Continued Cross-examination of State Bar witness Harriette Levitt, pages  
6 2094-2146.

7 February 8, 2002  
Matter submitted.

8  
9 **FINDINGS OF FACT**

10 1. Respondent is a member of the State Bar of Arizona, having been admitted  
11 to the practice of law on April 26, 1975. He first worked in the Pima County Public  
12 Defender's office. In January 1978, he began working in the Pima County Attorney's office.  
13 He has worked there ever since. Prior to the El Grande murder trials, he had had  
14 approximately 250 felony trials, 140 of which were homicide trials. Approximately 60 of the  
15 trials were capital cases in which the State sought the death penalty.

16 2. On January 24, 1992, three people were murdered during a robbery at the El  
17 Grande Market in Tucson, Arizona.

18 3. Ultimately, three individuals were arrested and charged with these murders:  
19 Martin Fong, aka "ChaChi"; Andre Minnitt; and Christopher McCrimmon.

20 4. Fong's trial commenced October 14, 1993 before Judge Buchanan. He was  
21 convicted.

22 5. A joint trial for McCrimmon and Minnitt commenced November 8, 1993  
23 before Judge Buchanan. Both were convicted, but the convictions were reversed on appeal  
24 for reasons unrelated to the issues in this disciplinary case.

25 6. Minnitt's retrial commenced August 20, 1997 before Judge Nichols. The trial  
resulted in a hung jury.

1           7.       McCrimmon's retrial commenced August 27, 1997 before Judge Nichols.  
2 McCrimmon was found not guilty.

3           8.       Anticipating a third trial would be held for Minnitt, his counsel in 1998 filed a  
4 Motion to Dismiss. It was denied.

5           9.       Minnitt's third trial commenced April, 1999. He was convicted.

6           10.      Respondent handled all these matters except the third trial of Minnitt. The  
7 lead Tucson Police Department detective was Joseph Godoy. At the time of the El Grande  
8 murders, Detective Godoy had been with the Tucson Police Department approximately 12  
9 years. He had worked as a uniformed officer, on the assault detail, and had been a  
10 homicide detective for several years before El Grande. Detective Godoy is very smart and  
11 clever; knows his cases; knows how to answer questions; and knows how to anticipate  
12 what a defense attorney is going to do on a case. (Transcript of Disciplinary Hearing,  
13 hereafter "T" page 717.)

14                   Detective Godoy and Respondent first met when they worked together on a  
15 case approximately 10 years before El Grande. According to Respondent, they became  
16 friends almost immediately. Their families socialized to a limited extent outside work.  
17 Respondent received an appointment as a special Tucson City Magistrate to conduct the  
18 wedding of Detective Godoy and his wife.

19                   Throughout the investigation of the murders and prior to any charges being  
20 filed, Respondent consulted with Detective Godoy on multiple occasions concerning the  
21 case. (Respondent's answer paragraph 1.)

22           11.      Central to the State's case in all trials except Fong's was the credibility of  
23 one Keith Woods. He was a convicted felon and was in prison at the time of the murders.  
24 Woods was released from prison on parole on August 21, 1992. On August 30, 1992,  
25 Woods was stopped by police for cocaine possession. This jeopardized his parole status.  
Woods was not involved in the El Grande murders, but was called as a witness to testify

1 that, after Woods' release from prison, Minnitt and McCrimmon had confessed their  
2 involvement to him and that they had implicated Martin Fong. Woods had been associates  
3 of McCrimmon and Minnitt in the past. Since there was no physical evidence found at the  
4 crime scene implicating McCrimmon and Minnitt, Woods' testimony was critical. Woods was  
5 also highly impeachable. He had multiple felony convictions; he was a drug addict; and he  
6 had made a deal with Godoy to testify in the El Grande cases and the State in turn would  
7 give him consideration on his own legal difficulties.

8           Detective Godoy interviewed Woods on September 8, 1992. The first part of  
9 the conversation was not recorded; the part regarding the purported confession was  
10 recorded. Prior to the interview, Detective Godoy had learned certain facts about the case  
11 and had identified Fong, Minnitt, and McCrimmon as suspects. Upon questioning by  
12 Respondent at the trials, Detective Godoy testified he did not, in fact, have such information  
13 at the time of the Woods interview, and, arguably, therefore could not have fed this  
14 information to Woods before the recording began.

15           The central issue in this disciplinary case, therefore, is whether Respondent  
16 elicited the admittedly false testimony knowing at the time that it was false.

17           12.    Subsequent to the El Grande murders, an attempted robbery/shootout  
18 occurred on August 26, 1992 at Mariano's Pizzeria in Tucson. Detective Godoy was not the  
19 detective on this case, but the names of all three El Grande suspects arose in the Mariano  
20 investigation.

21           13.    Detective Godoy authored two investigative reports that demonstrate what  
22 he knew prior to the Woods interview September 8, 1992. State Bar Exhibit 8 is Detective  
23 Godoy's report dated September 9, 1992 in the Mariano Case No. 92-08260652. State Bar  
24 Exhibit 10 is Detective Godoy's report dated September 15, 1992 in the El Grande Case  
25 No. 92-06240661. These reports are inconsistent in some respects, but, along with other

1 evidence, indicate that, before the Woods' interview September 8, 1992, Detective Godoy  
2 had the following information:

3 a) On August 31, 1992, Godoy himself had received information directly  
4 from an anonymous source that a Martin Soto was involved. On the same day, Godoy  
5 asked Mr. Gee, owner of El Grande, if Martin Soto had been an employee. Mr. Gee did not  
6 recognize the name Martin Soto, but said a Martin Fong had been an employee. Godoy  
7 researched the criminal history of Martin Fong, and determined that Martin Fong and Martin  
8 Soto were the same person. State Bar Exhibit 8. (Godoy's September 9, 1992 report.)

9 b) Also on August 31, 1992, Detective Zimmerling told Godoy that one  
10 of his informants implicated "ChaChi" and Christopher McCrimmon in the El Grande  
11 murders. Godoy determines that McCrimmon had a criminal history. State Bar Exhibit 8.

12 c) On September 2, 1992 Godoy assisted Detective Fuller, the detective  
13 in the Mariano's case, in arresting both McCrimmon and Minnitt in the Mariano's case.  
14 Godoy then personally interviewed both of them about El Grande. McCrimmon admitted  
15 knowing Fong. State Bar Exhibit 8.

16 d) A Tucson Police Department "Fingerprint Comparison Report" was  
17 made September 1, 1992. It list McCrimmon as "subject one" and Minnitt as "subject two."  
18 The report indicates McCrimmon's fingerprints were found on a car near the El Grande  
19 Market.

20 e) Godoy himself has conceded the three defendants were suspects  
21 prior to the Woods' interview:

22 While the reports speak for themselves, they do show that  
23 prior to September 8, 1992, Martin Soto-Fong, Christopher  
24 McCrimmon, and Andre Minnitt were all possible suspects in  
25 the case based on the anonymous information. Affidavit of  
Joseph Godoy dated May 1, 1998, State Bar Exhibit 38, Item  
6.



1           17.     Prior to the trials, defense lawyers for McCrimmon and Minnitt were given  
2 copies of Godoy's reports setting out what information Godoy had before interviewing Keith  
3 Woods September 8, 1992.

4           18.     Respondent was not charged with any violations arising from his conduct in  
5 the Fong case, the first defendant to go to trial. Nevertheless, the following findings are  
6 made:

7                   a)     Keith Woods did not testify in the Fong trial. (There is no contention  
8 Fong confessed to Woods. Rather, McCrimmon and Minnitt allegedly confessed to Woods  
9 and implicated Fong. To have allowed Woods to testify about that implication would have  
10 been hearsay and would have denied Fong his right to confront witnesses against him.)

11                   b)     The defense strategy in the Fong trial was to show that Detective  
12 Godoy had focused his investigation on Fong because Fong was a former employee of El  
13 Grande. The defense attacked the credibility of Detective Godoy, not that of Keith Woods.

14                   c)     The key evidence against Fong was that his fingerprints were found  
15 at the scene.

16                   d)     Respondent asked Godoy when he first met with Mr. Gee, owner of  
17 El Grande. Godoy answered it was the first week of September, when "Mr. Fong became a  
18 focus of the case." Fong trial transcript, State Bar Exhibit 1A, Tab 5 page 88.

19           19.     Godoy was interviewed by defense attorneys prior to the Fong trial.  
20 Respondent sat in or parts of the interview and read the transcript of it before the Fong trial,  
21 including parts where Godoy discussed what information he had regarding the three  
22 suspects prior to the Woods' interview. (T. page 1330; Respondent's Exhibit 38, page 86;  
23 State Bar Exhibits 14 and 15.)

24           20.     At the trials in El Grande, Godoy sat with Respondent at counsel table. This  
25 was done so Godoy could assist Respondent during the trial. (T. page 987.)



1           25.    On direct examination Respondent asked Godoy: "Sir, when was the first  
2 time you became aware personally that a former employee may have been involved in the  
3 El Grande homicide?" Detective Godoy answered: "When I spoke with Keith Woods on  
4 September 8, 1992." Detective Godoy's testimony was false.

5           26.    On redirect examination, Respondent asked Godoy if, at some point after  
6 talking to Keith Woods, Godoy contacted the Gee family to ascertain whether certain  
7 employees had worked at El Grande in the past. Godoy answered "Yes." Tab 16 page 146.  
8 This was false. Godoy spoke to Mr. Gee before the Woods' interview.

9           27.    At a bench conference, Respondent stated that, up to the time of the Woods'  
10 interview, Godoy was not looking at any of those three people (McCrimmon, Minnitt, Fong).  
11 Tab 13, page 148. This was not true.

12           28.    On redirect examination of Godoy, Respondent asked ". . . essentially the  
13 information that you begin working with when Mr. McCrimmon and Mr. Minnitt and Martin  
14 Fong became suspects would have been after the time that you talked to Keith Woods in  
15 this case?" Godoy answered "Yes." Tab 16, page 205. This was false.

16           29.    On redirect examination, Respondent asked Godoy "When was the first time  
17 you became aware personally that a former employee may have been involved in the El  
18 Grande homicide?" Godoy answered "When I spoke with Keith Woods on September the  
19 8<sup>th</sup> of 1992." This was false.

20           30.    In his closing statement, Respondent argued that Godoy didn't even know  
21 until after he talked to Keith Woods in the first week of September that one of the three  
22 participants in the case was a former employee of El Grande Market. This was false.

23                    Unlike the Fong trial, the focus in the joint trial was on the credibility of Keith  
24 Woods, and not on the credibility of Detective Godoy and his reports. Defense attorney  
25 Baker Sipe's position was that his client Minnitt had made a false confession to Woods, that  
Woods had testified to rumor and guess work based on third-hand information, and that

1 what Minnitt had said was false bravado. Defense attorney Levitt, on behalf of McCrimmon,  
2 argued that Woods had vague information from female friends of McCrimmon and his  
3 testimony was the result of a rumor mill. Indeed, defense counsel had been furnished  
4 copies of Godoy's reports. Yet, they did not use the reports to impeach Godoy's testimony  
5 about what he knew prior to the Woods' interview.

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7 **COUNT TWO (MINNITT RETRIAL)**

8 31. The convictions of McCrimmon and Minnitt in the joint trial were reversed on  
9 appeal for reasons unrelated to this disciplinary matter. The cases were then severed.  
10 Minnitt's retrial commenced before Judge Nichols August 28, 1997. Attorneys Eric Larsen  
11 and Wanda Day represented Minnitt. The retrial ended in a mistrial, due to a hung jury.

12 32. In a hearing on Motion in Limine held July 31, 1998, before Minnitt's second  
13 retrial, Respondent was asked whether he had reviewed Godoy's reports prior to the first  
14 Minnitt retrial. He answered "I am sure, at some point, I would have. At least I believe I  
15 would have." Respondent also stated he had met with Godoy prior to the first Minnitt retrial  
16 in August 1997. (State Bar Exhibit 1E, Tab 33, page 115.)

17 33. Godoy admitted during his Grand Jury testimony on June 25, 1999 that the  
18 testimony he gave in the Minnitt retrial about not having the names prior to his interview  
19 with Keith Woods was false. Respondent's Exhibit 37, pages 25-26. He also admitted to the  
20 Grand Jury that he knew the answers were false at the time he gave them. (Respondent  
21 Exhibit 37, pages 45-46.)

22 34. Respondent admitted in his Grand Jury testimony on June 25, 1999 that  
23 Detective Godoy's testimony in the Minnitt retrial about not having the names prior to the  
24 Woods' interview was false. (Respondent's Exhibit 38, pages 76; 97.)

25 35. On direct examination of Detective Godoy, Respondent asked Godoy  
whether at the time he interviewed Woods September 8, 1992 he had come up with the  
names Chris McCrimmon, Andre Minnitt, ChaChi, Martin Fong, on Martin Soto Fong.

1 Detective Godoy answered "No." This was false. Respondent then asked whether the first  
2 time Godoy heard any of those three names would have been with the conversation with  
3 Woods on September 8, 1992. Godoy answered "Yes." This was false. (State Bar Exhibit  
4 1-C, Tab 25, pages 9-10.

5 36. Respondent asked Godoy:

6 And up until that time Keith Woods gave you those three  
7 names and you were able to track back to this Martin Soto  
8 Fong, had you ever submitted prints from any of these  
9 individuals to the identification sections and have them  
10 compared to the prints you managed to give?

11 Godoy answered "No." State Bar Exhibit 1-C, Tab 25, page 11. This was  
12 false. Godoy had submitted a number of prints for examination. In a report dated  
13 September 1, 1992, the examiner determined the prints of McCrimmon were on a car  
14 abandoned near the crime scene. (State Bar Exhibit 3.)

15 37. On redirect examination of Godoy, Respondent asked:

16 When was it that you actually got to where it was that you  
17 learned that Chris McCrimmon and Andre Minnitt were  
18 potential suspects in this case? Would that have been after  
19 the conversation with Keith Woods?

20 Godoy answered "Yes." Tab 25, page 32. This was false.

21 38. At a bench conference on August 26, 1997 Respondent marked for  
22 identification Godoy's report of September 15, 1992. The State Bar argues that at that point  
23 Respondent had in his hands a report that discusses what Godoy knew before September  
24 8, 1992. Respondent argues the fact he made it part of the record, indicates he was not  
25 trying to hide anything.

It is Judge Nichols' opinion, however, that:

23 It was clear from the bench conference [August 26, 1997] that  
24 if Mr. Peasley had forgotten about Godoy's contact with the  
25 suspects on September 2, that that should have jogged his  
memory and he would have at that time said, Wait a minute.  
Yeah. (Respondent's Exhibit 47, deposition of Judge Nichols  
taken November 6, 2000 page 80.)

1 Judge Nichols continued:

2 As I mentioned a moment ago, it would appear to be enough  
3 of a reminder to Mr. Peasley that Detective Godoy had that  
4 September 2 contact, that he would have taken steps at that  
5 time to correct the court's misapprehension of the case. I was  
6 clearly making erroneous rulings based on Mr. Peasley's  
7 avowals, and I thought his memory should have been  
8 refreshed by Mr. Larsen's remarks at the bench. (Page 81)

6 39. Judge Nichols made findings about Respondent's conduct in the Minnitt  
7 retrial. The findings are found in Respondent's Exhibit 47, deposition of Judge Nichols  
8 taken November 6, 2000. Tab 4 of the deposition is a Minute Entry dated July 31, 1998.  
9 After the hung jury in the Minnitt retrial, in anticipation that there would be a second retrial,  
10 Minnitt's counsel Larsen filed a Motion to Dismiss on grounds of prosecutorial misconduct  
11 and double jeopardy. The Court denied the motion, but made the following findings:

12 THE COURT FINDS that there was misconduct on the part  
13 of the prosecution by asking questions that resulted in  
14 inaccurate information being given to the jury, and by using  
15 this misinformation to his advantage in his closing argument.

14 THE COURT FINDS that this misinformation was in fact  
15 helpful to the State's case.

16 THE COURT FINDS that the prosecution had several  
17 sources of information at its disposal that could have  
18 corrected this misinformation and which should have  
19 prevented its dissemination to the jury.

18 THEREFORE, THE COURT FINDS that the conduct is not  
19 merely a result of legal error, negligence, or mistake or  
20 insignificant impropriety since Detective Godoy and Mr.  
21 Peasley had discussed and litigated this very issue in two  
22 other trials and other court hearings prior to the August trial  
23 of Andre Minnitt. The Court cannot find that this conduct was  
24 engaged in with the intent to further an improper purpose.

22 HOWEVER, THE COURT FINDS that the conduct was  
23 engaged in with an indifference to a significant danger of a  
24 mistrial or reversal.  
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46. McCrimmon was acquitted.

**COUNT FOUR (MINNITT POST-TRIAL MOTION FOR DEPOSITION)**

47. In anticipation of a second Minnitt retrial, his counsel filed a Motion to take the deposition of Detective Godoy. In his written response to the motion (State Bar Exhibit 28), Respondent states:

The defendant complains that Detective Godoy misled the jury in State v. McCrimmon. This is absolutely false.

...

Now, after the answer was explained in the McCrimmon trial [that is, that Godoy gave false answers in earlier trials to avoid mistrials], counsel wants to take a contrary position and assert that Detective Godoy misled the jury. This is unfair and untrue. Detective Godoy did exactly what he needed to do in order to avoid prejudicing the rights of Mr. Minnitt and further avoid the declaration of a mistrial.

**COUNT FIVE (MINNITT POST-TRIAL MOTION TO DISMISS)**

48. After the Minnitt retrial resulted in a hung jury, in anticipation of a third trial, Minnitt's counsel Larsen filed a motion on January 27, 1998 to dismiss, alleging prosecutorial misconduct by Respondent and double jeopardy. In his response to the motion, Respondent stated:

The defendant's motion is based upon a series of questions asked by the undersigned counsel [Respondent] and answered by Detective Godoy of the Tucson Police Department. In short, Godoy was asked whether or not he had come up with the names of several individuals, including the defendant Minnitt, prior to his conversations with Keith Woods. The statement of Keith Woods was given on September 8, 1992. The defendant Minnitt argues that these answers were untrue and that undersigned counsel was guilty of misconduct for asking Godoy, in a subsequent trial to explain the reason for the negative responses given under oath previously. In fact, with respect to the defendant Minnitt, the answers of Detective Godoy were true and accurate in every respect.

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The Motion to Dismiss was denied.

49. On May 12, 1997, after receiving from the State Bar a copy of defense attorney Lougee's complaint against Respondent, Respondent filed a "Motion to Clarify." Respondent stated that the motion was "Submitted in order to clarify earlier pleadings." Respondent stated "This clarification is intended to make clear that the State is not professing that Minnitt was not a "suspect" prior to the conversations with Keith Woods."

**CONCLUSIONS OF LAW**

The State Bar has the burden of proving the allegations in the Complaint. Rule 54(d), Rules of the Supreme Court. The standard by which the burden must be proved is by "clear and convincing evidence." Rule 54(c). This standard requires more evidence than a preponderance, the standard in most civil cases, but less evidence than proof beyond a reasonable doubt, the standard in criminal cases.

By clear and convincing evidence, the Hearing Officer finds as follows:

**Count One (Joint Trial)**

Respondent violated:

1. ER3.3(a)(4) (Offer evidence a lawyer knows to be false and failure to take reasonable remedial measures once the lawyer knows of the falsity.)
2. ER4.1(a) (Make false statement of fact to a third person) Respondent made false statements to the jury.
3. ER8.4(c) (Engage in conduct involving dishonesty or deceit.)
4. ER8.4(d) (Engage in conduct that is prejudicial to the administration of justice.)

Violations of the other ERs and Rules alleged in the Complaint were not found.

1 By all accounts, Respondent at the time of the El Grande trials, was a very  
2 experienced, highly qualified, extremely prepared, very aggressive, and highly-decorated  
3 prosecutor.

4 Prior to the Fong trial, he read Godoy's reports and discussed the case with Godoy.  
5 His conduct in questioning in the Fong trial demonstrated he knew the significance of what  
6 information Godoy had before the Woods' interview.

7 In the joint trial, which followed the Fong verdict by less than two weeks,  
8 Respondent again demonstrated he knew the significance of the timing of Godoy's  
9 information in the Woods' interview.

10 Respondent argues he should be absolved because Godoy's reports showing what  
11 Godoy knew prior to the Woods' interview were given to defense counsel, and they did not  
12 exploit the discrepancies between Godoy's reports and his testimony. Defense counsel in  
13 the joint trial chose to attack the credibility of Woods and reliability of his testimony rather  
14 than impeach Godoy with his reports that contradicted his testimony. Whether this was  
15 conscious trial strategy or serious oversight by defense attorneys, it does not absolve  
16 Respondent of his ethical obligations.

17 Detective Godoy tried to explain in the McCrimmon retrial that the reason he gave  
18 the answers he did in the joint trial was because he thought that, if he answered truthfully,  
19 he would be disclosing confidential sources and would cause a mistrial. This is  
20 unpersuasive. Even if it were the case, Respondent should have known better. Many of his  
21 questions regarding the timing of Godoy's information and the Woods' interview were  
22 precise and pointed and called for yes or no answers.

23 **Count Two (Minnitt Retrial)**

24 Respondent violated:

25 1. ER3.3(a)(4) (Offer evidence a lawyer knows to be false and failure to  
take reasonable remedial measures once the lawyer knows of the falsity.)

1                   2.     ER4.1(a) (Make false statement of fact to a third person) Respondent  
2 made false statements to the jury.

3                   3.     ER8.4(c) (Engage in conduct involving dishonesty or deceit.)

4                   4.     ER8.4(d) (Engage in conduct that is prejudicial to the administration  
5 of justice.)

6                   Violations of the other ERs and Rules alleged in the Complaint were not found.

7                   The Minnitt retrial started nearly four years after the joint trial. The issues were the  
8 same. Respondent asked Godoy questions about the timing of his information in the  
9 Woods' interview, and Godoy again answered falsely.

10 **Count Three (McCrimmon Retrial)**

11                   No violations are found. The Hearing Officer recommends Count Three be  
12 dismissed.

13                   By the time of the McCrimmon retrial, the cat was out of the bag. Defense attorney  
14 Lougee successfully exploited the inconsistency between Godoy's reports and his  
15 testimony in prior trials. Respondent's arguments that the system was at fault and Godoy  
16 answered the only way he could may have been fallacious, but they were not unethical.

17 **Count Four (Minnitt Post-trial Motions)**

18                   No violations are found. The Hearing Officer recommends Count Four be dismissed.

19                   Again, Respondent was trying to rehabilitate Godoy's testimony and argue from the  
20 record as it existed. The State Bar did not even address this Count in its closing statement.  
21

22 **Count Five (Minnitt Post-trial Motion to Dismiss)**

23                   No violations are found. The Hearing Officer recommends Count Four be dismissed.

24                   Again, Respondent was trying to rehabilitate Godoy's testimony and argue from the  
25 record as it existed. The State Bar did not even address this Count in its closing statement.

1 The Hearing Officer finds the following mitigating circumstances under Standard  
2 9.32:

- 3 a) Absence of a prior disciplinary record
- 4 e) Cooperative attitude toward disciplinary proceedings
- 5 g) Character or reputation. Testifying at hearing to Respondent's good  
6 character and were Superior Court Judge Deborah Bernini, United States District Court  
7 Judge Rainer Collins, United States Magistrate Judge Bernardo Velasco, criminal defense  
8 attorneys Michael Piccarreta and Alfred "Skip" Donau, the last two by deposition.

9 In addition, letters were submitted on Respondent's behalf by  
10 Superior Court Judge Lina Rodriguez, retired Superior Court Judge Robert Buchanan,  
11 Superior Court Judge John Davis, Superior Court Commissioner Sharon Douglas, retired  
12 Superior Court Judge Margaret Houghton, and Superior Court Judge Cindy Jorgenson. (At  
13 the time she wrote the letter, Judge Jorgenson was on the Superior Court. She has since  
14 been appointed to United States District Court.)

15 Also considered were letters on Respondent's behalf from defense  
16 attorney Howard Kashman, Deputy Pima County Attorneys Rick Unklesbay, Jane Westby,  
17 and David White. Also considered was a letter from Pima County Attorney Barbara LaWall.

18 This character evidence in support of Respondent is a significant  
19 mitigating factor as it comes from respected members of the judiciary, respected and  
20 experienced criminal defense attorneys, and Respondent's colleagues.

- 21 h) Physical or mental disability or impairment. This mitigation  
22 circumstance applies only to the Minnitt and McCrimmon retrials in August 1997. It does not  
23 apply to the initial joint trial of McCrimmon and Minnitt in November 1993. In early summer  
24 1997, Respondent began experiencing medical problems. He had vision problems, pain on

25 law can be an aggravating factor, when combined with the absence of any prior discipline, it  
may be considered a mitigating factor. *Matter of Marce*, 177 Ariz. 25, 867 P.2d 845 (1993).

1 his left side, periodic vertigo, and difficulties in focusing and concentration. Respondent  
2 sought medical care first at Thomas-Davis Medical Clinic and then at St. Joseph's Hospital.  
3 On September 13, 1997 the medical records in evidence confirm Respondent had these  
4 complaints. Respondent testified at hearing that he had experience these symptoms for a  
5 few months, but the level of intensity had peaked in the few weeks prior to his hospital visit.

6 Defense attorney Larsen testified that, earlier in the year 1997, he noticed  
7 Respondent was trying too many cases and felt that kind of caseload would inevitably take  
8 its toll. Larsen further testified that Respondent sought a continuance for a few days  
9 because of health reasons before the commencement of the Minnitt retrial August 20, 1997.  
10 This request was denied. Similarly, defense attorney Lougee testified that, prior to the  
11 commencement of the McCrimmon retrial on August 27, 1997, Respondent asked for a  
12 couple days off due to his health. The request was denied.

13 Judge Nichols, who presided at the retrials, testified at deposition that  
14 Respondent requested a continuance because he was not feeling well due to vertigo,  
15 dizziness, and difficulties with vision. Judge Nichols also testified that Respondent's legal  
16 assistance Tracey Miller informally told him Respondent was having medical problems.

17 Attorney Michael Bloom testified about a homicide case he had with  
18 Respondent in 1997, State v. Encinas. The case went to trial three times in 1997: the first  
19 trial in March, the second in the summer, and the third in the latter part of the year. Mr.  
20 Bloom testified that Respondent was very busy, not focused on the facts of the case, and  
21 his preparation was superficial and not what would be expected in a first-degree murder  
22 case. At the third trial, Encinas was found not guilty.

23 In the disciplinary hearing, Respondent's assistant Miller testified about  
24 Respondent's medical problems during the retrials in August 1997. She also testified about  
25 Respondent's trial calendar during that year. In year 1997, Respondent had 15 felony jury

1 trials, four of which were death penalty cases. He was in trial 70 days. (Respondent's  
2 Exhibit 8.)

3 i) Delay in disciplinary proceedings. Although the underlying murders  
4 occurred in June 1992, the complaint to the State Bar regarding Respondent's conduct was  
5 made in September 1997 by Mr. Lougee. Considerations of delay should therefore start on  
6 that date. The State Bar did not forward the Complaint to Respondent for response until  
7 March 1998, nearly six months later. Respondent submitted a response to the informal  
8 Complaint. A Probable Cause Order was entered May 21, 1999. There were settlement  
9 negotiations, but the Complaint was not filed until May 11, 2000, nearly a year later. After  
10 the Complaint was filed Respondent was granted several continuances, but, given the  
11 complexity of the case, it proceeded expeditiously.

12 j) Interim rehabilitation. Respondent testified he has taken steps to  
13 reduce his caseload, reduce the number of cases he has tried, and adequately prepare. He  
14 has encouraged other attorneys in his office to do likewise so as not to make the same  
15 mistakes he made.

#### 16 PROPORTIONALITY REVIEW

17 The Arizona Supreme Court has held that discipline should be proportionate to the  
18 violation and consistent with discipline imposed in similar factual situations. In re Wines,  
19 135 Ariz. 203, 660 P.2d 454 (1983) and In re Wolfram, 174 Ariz. 49, 847 P.2d 94 (1993).  
20 The Hearing Officer finds the following cases applicable:

21 1. Matter of Wolfram, 174 Ariz. 49, 847 P.2d 94 (1993). Wolfram, a defense  
22 attorney, failed adequately to prepare for trial and was found to have committed  
23 misconduct. He was suspended for 18 months. Wolfram indicates that in criminal cases  
24 where the defendant faces a loss of liberty, the potential harm caused by ethical misconduct  
25 is given added significance, over and above that involved in civil cases. Where the harm or  
potential for harm is greater, the sanction should reflect that consideration.





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