

State of Arizona
COMMISSION ON JUDICIAL CONDUCT

Disposition of Complaint 13-074

Judge: Crane McClennen

Complainant: Mark Faull

ORDER

The complainant alleged a superior court judge exhibited unprofessional demeanor, ridiculed trial prosecutors, and made political comments from the bench.

The Arizona Constitution forbids judicial conduct that is prejudicial to the administration of justice and brings the judicial office into disrepute. *See* Article 6.1, Section 4. Rule 1.2 of the Code of Judicial Conduct requires judges to “act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary.” Rule 2.2 requires judges to “perform all duties of judicial office fairly and impartially.” Rule 2.8(B) requires judges to be “patient, dignified, and courteous” to lawyers.

After reviewing the complaint, the judge’s response, and the relevant recordings and transcripts, the commission found that, on two separate occasions, Judge McClennen made inappropriate sarcastic statements from the bench that violated the Arizona Constitution and the rules set forth above.

Accordingly, Judge Crane McClennen is hereby publicly reprimanded for his conduct as described above and pursuant to Commission Rule 17(a). The record in this case, consisting of the complaint, the judge’s response, the formal charges filed in this matter, the stipulated resolution, and this order shall be made public as required by Rule 9(a).

Dated: October 4, 2013.

FOR THE COMMISSION

Louis Frank Dominguez
Commission Chair

Copies of this order were mailed to the complainant and the judge on October 4, 2013.

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



2013-074

APR 10 2013

Maricopa County Attorney

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April 4, 2013

Commission on Judicial Conduct
1501 W. Washington Street, Suite 229
Phoenix, AZ 85007

Re: Judge Crane McClennen

It has been brought to my attention that Crane McClennen, a judge of the Maricopa County Superior Court who presides over lower court appeals, has engaged in conduct warranting a referral to the Commission on Judicial Conduct. This letter is written after a review and recommendation by the Maricopa County Attorney's Office Ethics Committee as well as a review by myself. It is our belief that Judge McClennen's conduct in these matters may have violated the Code of Judicial Conduct and should be investigated by the Commission. In the two cases summarized below, Judge McClennen exhibited unprofessional demeanor, ridiculed trial prosecutors, and made political comments from the bench.

State v. Julius, LC2011-163114

J. Michael Julius was charged with several misdemeanors for driving under the influence and was represented by Richard Coffinger. On April 6, 2012, Mr. Coffinger and a Deputy Maricopa County Attorney appeared before Judge Meg Burton-Cahill in University Lakes Justice Court. After defendant waived his right to a jury trial, the case was presented to the court as a "submission on the record" (i.e., based on police reports and intoxilyzer results). The court did not conduct the colloquy for submitting a case on the record, as required by *State v. Avila*, 127 Ariz. 21, 617 P.2d 1137 (1980), and neither attorney noted the omission. After a recess, the court found defendant guilty of extreme DUI.

At sentencing on July 12, 2012, Mr. Coffinger argued that an amended sentencing statute should be applied retroactively, so that defendant would be able to serve 9 days in jail rather than 30. Mr. Coffinger said he planned to make the matter a test case and appeal if the court imposed a 30-day sentence. The court imposed 30 days and stayed the sentence pending appeal. In his appellate memorandum, defendant argued that the trial court committed reversible error by not conducting the *Avila* colloquy and by not applying the sentencing statute retroactively. The State in its answering memorandum argued that defendant was not prejudiced by the deficient colloquy under a fundamental error analysis, and the amended DUI sentencing statute was not retroactive.

On January 28, 2013, oral argument was held before Judge McClennen (audio CD enclosed). Deputy County Attorney Andrea Kever represented the State. Mr. Coffinger began by raising the issue of what type of error occurred after an *Avila* violation. Judge McClennen stated that he assumed that Mr. Coffinger discussed with his client the options of a trial versus submitting the case, as well as defendant's rights if he went to trial. Mr. Coffinger said that he did so, but that was not a substitute for the court doing it.

MR. COFFINGER: Do I have an obligation to tell this judge who's not doing it right, "Judge, you're not doing it right"?

THE COURT: Yes.

MR. COFFINGER: That's the question.

THE COURT: Yes.

MR. COFFINGER: I don't think so.

THE COURT: Oh, so in other words. . . . [Mr. Coffinger interrupts with something about the prosecutor.] We're not talking about the prosecutor, and Ms. Kever can discuss that. About how the prosecutor sat there like a bump on a log and apparently was so oblivious to what was going on, that didn't know what was happening, probably was text messaging to find out, you know, something else. Not listening, sitting around daydreaming, or something, to let this happen. But you can get into that, Ms. Kever. Because you weren't there obviously, you have no

reason to know what happened. So you probably cannot opine on that, although I assume the prosecutor was from your office.

MS. KEVER: That is correct, Your Honor.

THE COURT: Yeah, well. [Laughs] I don't suppose you ever talk to the prosecutor and say, you know, Joe or Bob or Susan or Betty, you just blew this one. I don't suppose you talked to them, did you?

MS. KEVER: Ah, no.

THE COURT: Yes or no?

MS. KEVER: No.

THE COURT: Why not? It might be a good idea in your office when some prosecutor sits there and lets some case potentially go down the toilet. Do you call them and say, you know, you almost let this case go down the toilet, what were you doing? Did you ever think about calling the prosecutor?

MS. KEVER: Ah —

THE COURT: Yes or no?

MS. KEVER: Yes.

THE COURT: You thought about it?

MS. KEVER: Yes.

THE COURT: Did you?

MS. KEVER: No.

THE COURT: You chose not to?

MS. KEVER: Correct.

THE COURT: Why not?

MS. KEVER: Ah, because —

THE COURT: It's not my job.

MS. KEVER: It's not that it's not my job. I didn't feel that it was my place. However, there are things that are going on in this courtroom that I am going to be having a discussion with my supervisor about to take to this supervisor, because we are getting a lot of appeals out of this courtroom where the prosecutors are not present during sentencing, during fundamental things that are proceeding.

THE COURT: When you say this courtroom, you mean the justice court?

MS. KEVER: Yes, sir.

THE COURT: You're not talking about my court?

MS. KEVER: No, sir. I was talking about Meg Burton-Cahill's courtroom.

THE COURT: Alright. Well, we'll get to you.

But Mr. Coffinger, so what you're saying is, when you sit there and you see the judge fail to do what the judge is required to do, you get to sit there and say, oh boy, we got an appeal issue here. Let's just sit there and let it sit, because if I don't like what's happening, I'll raise that on appeal. I'll get this thing reversed and sent back, and who knows what will happen. Because when we get it sent back, possibly the State's witnesses will be all gone, and they won't be able to prove a case, and therefore, I'll force the State to dismiss this case, and my client gets to walk. That's a great strategy.

MR. COFFINGER: My duty is to my client. My duty is not to a lay judge who has under Arizona law entitled to serve in the office of justice of the peace, who may not be familiar, wasn't

law trained through law school, and I have my duty is to my client.

THE COURT: And you have no duty to the court? You have no ethical duty if you see an error like this happening, you have no ethical duty to say anything about it?

MR. COFFINGER: In the quantum of who is my duty to, I believe my duty is to the client. I told her it was going to be a test case —

THE COURT: I'll tell you what, Mr. Coffinger, two of these cases of yours, if I see a third one, from this point on, rest assured, I will file a complaint with the State Bar pointing out your failure to point out the mistake to the judge. Now, if you want to go ahead and not point it out, and say alright, McClennen's off-base in sending this complaint to the Bar Association, and I'll fight it out with the Bar Association, be my guest, but I will do it. You understand that?

MR. COFFINGER: I do.

(CD beginning at 10:11:55.)

Mr. Coffinger then argued the retroactivity issue. He also mentioned that the judge did not impose any financial consequences on defendant, and it was not his duty to tell her to. He said the State did not appeal that issue. The court responded, "I think the State blew it on that. . . . The prosecutor may have cost the State \$3500 under that call. . . . If that's the way Mr. Montgomery wants to run his attorneys, I'm not gonna get involved in his supervision of his attorneys." (10:27:31.) Mr. Coffinger concluded his argument.

THE COURT: So, Ms. Kever —

MS. KEVER: Your Honor, with regards to the sentencing issue that counsel just brought up, it's my understanding there was no prosecutor present at sentencing.

THE COURT: [Laughs] That's the way Mr. Montgomery likes to run his office? Boy, maybe if the voters knew that, hey,

I may be the County Attorney, but you know, my deputies don't have to be there, you know, take time out of their busy schedule to do things like represent the State at sentencing, so we'll just skip that. [Laughs]

MS. KEVER: Your Honor, there are a few other appeals filed by the State that are going to be hitting your office where again the State was not present during sentencing.

THE COURT: I'm certain you've brought that up to their supervisors.

MS. KEVER: Yes, I have. Hopefully this issue will be corrected.

THE COURT: [Laughs] Hope springs eternal.

(10:28:49.) By minute entry of March 19, 2013, the court affirmed defendant's conviction and sentence.

State v. Ho, LC2011-149247

On May 10, 2012, Muikam Ho was tried in San Tan Justice Court before Judge Sam Goodman and was convicted of misdemeanor prostitution. Dave Roscoe represented her on appeal. On March 4, 2013, he argued before Judge McClennen that defendant's due process rights had been violated, because the trial judge asked her to sign a "right to appeal" form before she was tried and convicted, and her interpreter had not been sworn in (audio CD enclosed).

After Mr. Roscoe concluded his argument, Ms. Kever argued that defendant had not been prejudiced at trial, and defendant's trial counsel had not objected to the procedure. Judge McClennen asked what the trial prosecutor was doing when that happened and surmised that the prosecutor "was in LaLa Land." While paging through the transcript, Judge McClennen said he could not determine the identity of the prosecutor. Judge McClennen continued:

I was thinking facetiously, do the prosecutors also wear a paper bag over their head during these? Because in all seriousness, I can tell you this, I'm getting tired of the sloppiness of the County Attorney's Office. It's like, well, we can go to sleep.

We can screw off. We can text mail or whatever we're doing. And we can make all sorts of mistakes that could have corrected, and we'll just leave it to somebody down the road, either our appellate department, you Ms. Kever, to try to bail us out, or it's gonna go to Judge McClennen and we'll just, you know, dump it on him. We'll make him figure out a way of cleaning up our garbage. And I can tell you this, Ms. Kever, and you can tell your people, I'm getting tired of cleaning up the County Attorney's garbage.

And this gets back to the County Attorney, William Montgomery. He's elected here, and I don't think he, well, maybe he doesn't care. Maybe it's just, hey, I'm too busy going after illegal aliens and people smoking pot. I don't worry about what happens in the lower court, because that's just a big joke anyway. And besides, we put our attorneys with least ability there, so I don't expect them to be doing anything other than just screwing up on the law, so I really don't care. If that's his attitude, then I guess you and I are gonna have to try to clean up the garbage that these people strew along these transcripts. But if he really cares about it, and if the appellate department cares about it, and if whoever is in charge of doing the lower court prosecuting cares about it, they ought to tell these people to ship, to straighten up, shape up or ship out.

(11:26:54.) Ms. Kever responded that she understood Mr. Montgomery was trying to address issues occurring in the lower courts, and he had appointed a senior prosecutor as a mentor. Ms. Kever concluded her argument, and the court took the case under advisement.

Applicable Rules

Rule 1.2. Promoting Confidence in the Judiciary

A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

Rule 2.4. External Influences on Judicial Conduct

(A) A judge shall not be swayed by partisan interests, public clamor, or fear of criticism.

Rule 2.8. Decorum, Demeanor, and Communication with Jurors

....

(B) A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity. . . .

Analysis

During oral argument in the *Julius* case, Judge McClennen was abrupt and condescending toward both appellate lawyers. He also made unfounded personal attacks on the trial prosecutor, speculating that the prosecutor “sat there like a bump on a log” and “probably was text messaging” or “daydreaming.” Judge McClennen’s tone was often sarcastic, and he laughed inappropriately.

During argument in the *Ho* case, Judge McClennen attacked the trial prosecutor as being “in LaLa Land” and joked about whether the prosecutors wore bags over their heads. He suggested that they were indifferent to mistakes and wanted to “sleep,” “screw off” and “text mail.” Judge McClennen also made sweeping allegations against the County Attorney’s Office, accusing it of “sloppiness” and producing “garbage” that he had to clean up.

In both cases, Judge McClennen impugned the integrity of Mr. Montgomery with untrue and politically motivated remarks. He created an imaginary conversation where Mr. Montgomery said the lower courts were “a big joke,” “I really don’t care” what happens there, and “I’m too busy going after illegal aliens and people smoking pot.” In each case, Judge McClennen mentioned “the voters” or the fact that Mr. Montgomery had been elected. Such comments had no relevance to the matters on appeal and gave the impression that Judge McClennen disagreed with Mr. Montgomery’s views as a politician.

Judge McClennen’s demeaning remarks to and about the lawyers and impatience during the proceedings violated Rule 2.8(B). His comments about Mr. Montgomery indicated that he was “swayed by partisan interests” in violation of Rule 2.4(A). The overall conduct failed to promote “public confidence in the independence, integrity, and impartiality of the judiciary,” as required by Rule 1.2.

A member of the public listening to Judge McClennen would not have felt assured by the sarcasm, choice of words and generally unprofessional demeanor.

Anticipating Judge McClennen's response to this complaint, proceedings in the justice courts do not always run smoothly, and mistakes are sometimes made by prosecutors, defense lawyers and justices of the peace. Less experienced lawyers often appear there, and the judges may have less legal knowledge. However, even if some criticism by Judge McClennen was warranted, his comments could not be considered constructive. Most new prosecutors are doing the best job they can with heavy case loads and do not go to court to sleep, daydream, "screw off" or text message. Judge McClennen's comments were truly insulting to the County Attorney's Office and its employees.

The incidents here are particularly disturbing, because this Commission had just reprimanded Judge McClennen on December 4, 2012, for similar conduct (Complaint 12-265). The Commission found that during an earlier oral argument before him, Judge McClennen displayed improper demeanor, made statements impugning the integrity and professional conduct of an attorney appearing before him, and in general made improper sarcastic remarks. Barely two months later, Judge McClennen subjected other attorneys to ridicule.

Therefore, I respectfully request that the Commission investigate this matter and take whatever action it deems appropriate. If you have any questions or need additional information, please feel free to contact me or Barbara Marshall, Ethics Committee Chair, at (602)506-3411.

Sincerely,

Mark C. Faull
Chief Deputy County Attorney



MAY 02 2013

Crane McClennen
Judge of the Arizona Superior Court Maricopa County
Central Court Building, Suite 4A
201 West Jefferson Street
Phoenix, Arizona 85003-2205
602-506-3901

May 2, 2013

Members of the Commission
Commission on Judicial Conduct
1501 West. Washington, Suite 229
Phoenix, Arizona 85007

Re: Case No. 13-074

Dear Members of the Commission:

This is in response to the your letter of April 15, 2013, sent in response to a complaint filed against me by Mark Faull alleging a violation of Rule 1.2 (Confidence in the Judiciary), Rule 2.4 (External Influences on Judicial Conduct), and Rule 2.8 (Decorum, Demeanor, and Communication). Thank you for allowing me until May 2, 2013, to respond. It is my position my conduct did not violate Rule 1.2, Rule 2.4, or Rule 2.8, and that my comments were protected by the First Amendment to the United States Constitution.

In his letter, Mr. Faull discussed two cases, *State v. Julius*, LC 2011-163114, and *State v. Ho*, LC 2011-149247. My comments at the oral argument in *State v. Julius* were also based on a third case, *State v. Dolinky*, LC 2011-165609. I will therefore address all three cases.

***State v. Julius*, LC 2011-163114.**

On December 3, 2011, J. Michael Julius (Defendant) was cited for driving under the influence and driving under the extreme influence, and certain civil traffic offenses. The matter was before the University Lakes Justice Court, the Hon. Meg Burton-Cahill. On April 6, 2012, Defendant's attorney, Richard D. Coffinger, advised the trial court that Defendant was going to submit the matter on stipulated evidence. (R.T. of Apr. 6, 2012, at 3.) [Exhibit A.] The State was represented by Jordyn Raimondo. (*Id.*) Judge Burton-Cahill said this was the first time she had gone through that type of procedure. (*Id.*) Mr. Coffinger presented to the trial court a Waiver of Trial by Jury document he had prepared and was signed by him, by Defendant, and by Ms. Raimondo. (*Id.* at 3-4.) Judge Burton-Cahill then signed that document. (*Id.* at 4.) Ms. Raimondo presented to the trial court the documents to which the parties had stipulated, and Judge Burton-Cahill took a recess to review those documents. (*Id.* at 4-5.) After reviewing those documents, Judge Burton-Cahill found Defendant guilty of the three DUI charges and dismissed the civil traffic offenses. (*Id.* at 5.) Judge Burton-Cahill did not advise Defendant of the constitutional rights he was waiving, as she was required to do by *State v. Avila*, 127 Ariz. 21, 617 P.2d 1137 (1980). Neither Mr. Coffinger nor Ms. Raimondo advised Judge Burton-Cahill that she had failed to do so.

Judge Burton-Cahill held the sentencing on July 12, 2012. Mr. Coffinger was present representing Defendant, but there was no Deputy County Attorney present representing the State. (R.T. of Jul. 12, 2012, at 3.) [Exhibit B.] Mr. Coffinger argued that the trial court could sentence Defendant under the new statute, but Judge Burton-Cahill sentenced Defendant under the statute in effect at the time Defendant committed the offense. (Id. at 4–5.) Judge Burton-Cahill imposed 30 days of jail, but did not otherwise orally pronounce sentence or impose any of the mandatory fines or assessments. (Id. at 5–6.) Judge Burton-Cahill later realized she had failed to impose the mandatory fines and assessments, and on September 17, 2012 (67 days later), issued the following Minute Entry [Exhibit C] in an attempt to correct that error:

Upon Court’s review of the file at Defense Counsel’s request and, having met with the parties [Ms. Raimondo and Mr. Coffinger] this date,

IT IS ORDERED. The Court, realizing that the appeal had been filed and this Court has lost jurisdiction, let it be nunc pro tunc, that the sentence that was originally given failed by Court error to include statutory financial fines and surcharges. Today, these fines (\$250 fine, 84% surcharge, \$20 probation fee, \$1000 to the Prison construction fund, \$250 DUI Abatement, \$1000 DPS Public Safety Assessment) have been included and jail costs of \$474 assessed for the 30-day sentence.

IT IS FURTHER ORDERED, the above-mentioned assessments are in addition to the original sentence of 30-day incarceration in the Maricopa County Jail and attendance at a Victim’s Impact Panel meeting.

On September 10, 2012, Mr. Coffinger filed an Appellant’s Memorandum for Defendant raising the following three issues:

1. Judge Burton-Cahill failed to advise Defendant of the rights as required by *State v. Avila*, and thus Defendant was entitled to a judgment of acquittal for the charged offenses.
2. Judge Burton-Cahill committed reversible error by not applying the new sentencing provisions.
3. Although the sentence imposed by Judge Burton-Cahill was illegal, the State waived any issue of the imposition of an illegal sentence by not filing a timely appeal or cross-appeal.

On September 20, 2012, Deputy County Attorney Andrea Kever filed Appellee’s Answering Memorandum, addressing only two of Mr. Coffinger’s issues:

1. Defendant did not object at trial to Judge Burton-Cahill’s failure to follow the procedure required by *Avila*, thus review was for fundamental error only, and Defendant had failed to allege prejudice.
2. Judge Burton-Cahill was required to apply the sentencing provisions in effect at the time Defendant committed the offenses.

Ms. Kever did not respond to Defendant’s third issue, apparently conceding the State had waived any challenge to the illegal sentence by not filing a timely appeal or cross-appeal.

This Court held oral argument on January 28, 2013, at which time Mr. Coffinger appeared for Mr. Julius and Ms. Kever appeared for the State. Mr. Coffinger began by noting there was another case pending before this Court, *State v. Benjamin Dolinky*, LC 2011–165609, where Judge Burton-Cahill had also failed to advise Defendant of the rights as required by *State v. Avila*. (R.T.

of Jan. 28, 2013, at 3–5.) [Exhibit D.] Mr. Coffinger noted the State had confessed error in *Do-linky*, and asked Ms. Kever whether the State was now going to confess error in *Julius* or whether she still wished to pursue a fundamental error analysis. (*Id.* at 3.) I told Mr. Coffinger the more pertinent question was whether I believed a fundamental error analysis was appropriate.

Mr. Coffinger then addressed the issue whether he, as an officer of the Court, had an obligation to call to the attention of Judge Burton-Cahill that she was committing error in the submission procedure. (R.T. of Jan. 28, 2013, at 6.) Mr. Coffinger expressed his opinion that he did not have such an obligation and began to discuss what he thought was the prosecutor’s obligation. (*Id.*) I told Mr. Coffinger that Ms. Kever would have the opportunity to explain why the prosecutor sat there “like a bump on the log” apparently “oblivious” to what was happening. (*Id.*) I asked Ms. Kever whether she ever talked to the trial attorneys when something like this happens to alert them that they did something wrong, and Ms. Kever said she “didn’t feel that it was my place” to do so. (*Id.* at 7.) She did say she was going to talk to her supervisor because there were a lot of appeals caused because prosecutors were not present during sentencings:

However, there are things that are going on in [Judge Burton-Cahill’s] courtroom that I am going to be having a discussion with my supervisor about to take to this supervisor because we are getting a lot of appeals out of this courtroom where the prosecutors are not present during sentencing, during fundamental things that are proceeding.

(R.T. of Jan. 28, 2013, at 8.) At that point, I was surprised to hear that the County Attorney would allow a sentencing to take place without having a deputy County Attorney present.

I then questioned Mr. Coffinger about what he characterized a “lay in wait” or “ambush.” (R.T. of Jan. 28, 2013, at 8.) I asked him whether the strategy was to allow this type of error to happen and then seek to get the conviction set aside on appeal and remanded, because it would be possible the State would no longer have its witnesses available and thus the State would have to dismiss the charges. (*Id.* at 8–9.) Mr. Coffinger acknowledged Judge Burton-Cahill had “dropped the ball” on these two cases. (*Id.* at 11.) Mr. Coffinger said, however, he believed his duty was to his client and not to the Court:

My duty is to my client, Your Honor. My duty is not to a lay judge who is under Arizona law entitled to serve in the office of justice of the peace who may not be familiar—wasn’t law trained through law school. And I have—my duty is to my client.

(R.T. of Jan. 28, 2013, at 9.) I told Mr. Coffinger I believed he had an obligation to the trial court to inform the trial court when it was committing an error that serious, that he had pending before me two cases where Judge Burton-Cahill had failed to follow the required procedure and he had failed to call to her attention the error she was making, and that if a third case came before me with his not informing the trial court of that error, I would refer the matter to the State Bar so it could say whether or not an attorney such as Mr. Coffinger had any obligation to advise the trial court of the error the trial court was making.

Mr. Coffinger then said his primary issue was whether the trial court should have been able to sentence Mr. Julius under the statute that went into effect after the date Mr. Julius had committed his offenses. (R.T. of Jan. 28, 2013, at 11.) He acknowledged the new statute was not in effect when his client committed his offenses, but contended the trial court should have been allowed to sentence under that new statute because it was “ameliorative.” (*Id.* at 12–17.)

Mr. Coffinger then noted that Judge Burton-Cahill had failed to impose on his client the mandatory fines and surcharges, which he said would have been \$3,500, and discussed whether he had an obligation to advise Judge Burton-Cahill of that failure. (R.T. of Jan. 28, 2013, at 17–18.) I stated that, unless Ms. Kever had some really good argument otherwise, the sentence imposed included no fines, and because there was no prosecutor present to inform Judge Burton-Cahill of that error, that lack of a prosecutor may have cost the State \$3,500. (*Id.* at 18.)

Ms. Kever said it was her “understanding there was no prosecutor present at sentencing.” (R.T. of Jan. 28, 2013, at 19.) I questioned why the County Attorney would allow sentencings to take place without a deputy County Attorney to attempt to correct any potential errors. (*Id.* at 19–20.) Ms. Kever stated, “There are a few other appeals filed by the State that are going to be hitting your office where again the State was not present during sentencing.” (*Id.* at 20.) I asked whether she had brought that to the attention of the supervisors involved these instances. (*Id.*) Ms. Kever said she had done so and, “Hopefully this issue will be corrected.” (*Id.*)

Ms. Kever then raised the fact the State had confessed error in the *Dolinky* case. (R.T. of Jan. 28, 2013, at 20.) I told Ms. Kever I was going to order her to respond to all four issues Mr. Coffinger had raised in *Dolinky*, as discussed below.

On March 19, 2013, I issued a Ruling affirming the judgment and sentence imposed on Mr. Julius, and concluded Mr. Julius had failed to show prejudice on the record. [Exhibit E.] On March 21, Mr. Coffinger filed a Motion asking this Court to clarify whether I had affirmed the sentence Judge Burton-Cahill imposed on July 12, 2012, wherein Judge Burton-Cahill did not impose any fines or surcharges, or the sentence on September 17, 2012, wherein Judge Burton-Cahill attempted to impose the fines or surcharges. On April 9, 2013, I issued a Minute Entry noting a trial court had only 60 days within which to correct any unlawful sentence, thus the trial court had no jurisdiction on September 17, 2012, to correct any unlawful sentence, and therefore Judge Burton-Cahill’s attempt to impose sentence on that date was a nullity.

***State v. Dolinky*, LC 2011–165609.**

On December 23, 2011, Defendant-Appellant Benjamin Dolinky (Defendant) was charged in the University Lakes Justice Court with driving under the influence and driving with drugs or metabolite in his system. The matter came before Judge Burton-Cahill on August 16, 2012. The defendant was again represented by Richard Coffinger, who advised the trial court that Defendant was going to waive his right to a jury trial. (R.T. of Aug. 16, 2012, at 3, 4.) [Exhibit F.] The State was again represented by Jordyn Raimondo. (*Id.* at 3.) This was over 4 months after Judge Burton-Cahill did the submission in *Julius*, and the same attorneys appeared before her. Mr. Coffinger told Judge Burton-Cahill the proceeding is called a submission on the record:

MR. COFFINGER: It’s called a submission on the record, Your Honor. We ask that you recall the testimony that was presented during the evidentiary hearing on this.

Our intent is to submit the matter for your decision at this time on the police reports as well as the testimony you heard at the suppression hearing, which you will recall focused on whether he was told he was under arrest for DUI. That was the focus of it. But now with the police reports, it will address other issues that weren’t the focus of that original evidentiary hearing.

(R.T. of Aug. 16, 2012, at 7.) Mr. Coffinger did not, however, explain to Judge Burton-Cahill she was required by *Avila* to advise Defendant of the constitutional rights he was waiving, and neither did Ms. Raimondo. (*Id.* at 7–9.)

Judge Burton-Cahill then took a recess to review the documents, and upon returning, found Defendant guilty, although she did not state of what she was finding Defendant guilty. (R.T. of Aug. 16, 2012, at 8–9.) Judge Burton-Cahill told Ms. Raimondo she could leave the courtroom if she wanted, but Ms. Raimondo said she was willing to stay. (*Id.* at 10.) When Judge Burton-Cahill was going through the forms, Mr. Coffinger told her this was not a guilty plea so she did not need a guilty plea proceeding form. (*Id.* at 10.) The court clerk then explained to Judge Burton-Cahill what she needed to do:

THE CLERK: —so at least do the—where he puts his fingerprint on—

THE COURT: Okay.

THE CLERK: —those charges and then (inaudible) just leave everything else as is.

THE COURT: Okay. And, you know, we have—I have no idea what the action of these forms are that we have but we do not seem to have—

THE CLERK: We don't have a submittal one.

THE COURT: It just doesn't make any sense to me. . . .

(R.T. of Aug. 16, 2012, at 10–11.) The clerk reminded Judge Burton-Cahill she needed to address the civil traffic charge, and she said she would suspend the fine for the A.R.S. § 28–701(A) charge. (*Id.* at 11–12.) Judge Burton-Cahill did not say anything else about a sentence, but the Judgment and Sentence Order signed by Judge Burton-Cahill [Exhibit G] ordered the following:

A.R.S. § 28–701(A): Fine and sentence suspended.

A.R.S. § 28–1381(A)(1): Fine = –0–

A.R.S. § 28–1381(A)(3): Fine = \$493.00.

DUI (Prison Constr. Fund) = \$500.00.

DUI (Addl. Assessment) = \$500.00.

Confined in Maricopa County Jail = 1 day.

10 days in jail (9 days suspended upon completion of certain programs.

Participate in alcohol/drug screening.

Participate in Mothers Against Drunk Driving Victim Impact Panel.

Defendant's driving privileges suspended for 12 months.

Ignition interlock for 12 months.

On November 29, 2012, Mr. Coffinger filed an Appellant's Memorandum for Defendant raising the following four issues:

1. Judge Burton-Cahill failed to advise Defendant of the rights as required by *State v. Avila*, and thus the matter should be remanded to the trial court.

2. Judge Burton-Cahill committed reversible error by denying Defendant's Motion To Suppress.

3. Judge Burton-Cahill committed reversible error by denying Defendant's Motion for Discovery Sanctions.

4. Although the sentence orally pronounced in open court by Judge Burton-Cahill did not include any fine, surcharge, or assessments, her clerk added these to the Court's judgment and sentence to conform to the mandatory minimum required by law.

On December 14, 2012, Deputy Ms. Kever filed Appellee's Answering Memorandum that was two pages long. Ms. Kever confessed error on Defendant's first issue and did not address the other three issues. As I had advised Ms. Kever during the oral argument in *Julius*, I issued a Minute Entry on February 1, 2013, ordering the State of Arizona to file a Response Memorandum by February 25, addressing all four issues raised by Defendant's attorney. On March 15, Ms. Kever filed a Supplemental Answering Memorandum addressing the first three issues raised by Defendant's attorney. On the first issue, Ms. Kever had changed her position from confessing error to arguing that Defendant had waived any *Avila* error by not objecting at trial. On March 19, Mr. Coffinger filed a Motion To Strike Appellee's Untimely Supplemental Answering Memorandum because Ms. Kever did not file it by February 25 as I had ordered. On April 26, I issued a Minute Entry informing Ms. Kever that I really did want to hear the State's position on Defendant's fourth issue, and I thus specifically ordered Ms. Kever to file a Response Memorandum by May 17, 2013, addressing that fourth issue. Because all the briefs have not yet been filed, the *Dolinky* matter is still pending before me.

***State v. Ho*, LC 2011-149247.**

On September 26, 2011, Defendant-Appellant Muikam Ho (Defendant) was charged in the San Tan Justice Court with prostitution. The matter was before the Hon. Sam Goodman, and trial began on May 10, 2012. [Exhibit H.] Defendant was represented by Paul Rybarsyk, who had identified himself to the court reporter, but the State's attorney did not identify himself or herself:

JUDGE: Case number JC2011-149247, State of Arizona vs.—is it Muikam Ho?

HO: Muikam.

. . . .

JUDGE: Okay. Thank you, ma'am. State, are you ready to proceed?

STATE: Thank you, Your Honor. State (inaudible) opening.

RYBARSYK: Likewise.

(R.T. of May 10, 2012, at 2.) Prior to that, the following had taken place:

JUDGE: Is—Ms. Ho here? Okay. All right. We can—we can go ahead and proceed into the next trial.

RYBARSYK: We need an interpreter, we have one here.

JUDGE: Okay. Yeah. We—we have one here. I—what I do need to have—have you sir, if you would bring Ms. Ho up to the front here. We have a notice of right to appeal. I need to have that notice signed prior to trial. And if—you may have already explained to her the appeal process in the justice court; she needs to come up and sign though.

RYBARSYK: Who does?

JUDGE: Your client? Ms. Ho.

RYBARSYK: She hasn't been convicted yet, why would she want an appeal?

JUDGE: Because the rules require us to inform before we proceed with the trial; the notice and the steps of a right to appeal. You know, I—I agree with you on that one, it's kind of backwards, but they're telling us that these are required prior to the hearing.

RYBARSYK: Okay. She's [the interpreter is] going to explain that you have some papers to sign, and you have the right to appeal.

JUDGE: Okay. Ma'am [the interpreter], what I need her to do is to sign here and date it and then I'm going to give her a copy. . . .

(R.T. of May 10, 2012, at 1.) Judge Goodman was apparently unaware of the following rule:

Rule 26.11. Duty of the court after pronouncing sentence.

After trial, the court shall, in pronouncing judgment and sentence:

a. Inform the defendant of his or her right to appeal from the judgment, sentence or both and advise the defendant that failure to file a timely appeal will result in the loss of the right to appeal.

. . . .

c. Hand the defendant a written notice of these rights and the procedures the defendant must follow to exercise them, receipt of which shall be shown affirmatively in the record.

Rule 26.11(a) & (c), ARIZ. R. CRIM. P. Mr. Rybarsyk thought Judge Goodman was doing something wrong, but apparently was unaware of that rule of criminal procedure. The State's attorney said nothing. After hearing the evidence and the arguments of counsel, Judge Goodman found Defendant guilty and pronounced sentence. (R.T. of May 10, 2012, at 68–69.) In pronouncing judgment and sentence, Judge Goodman did not inform Defendant of her right to appeal from the judgment and sentence and did not give Defendant a written notice of those rights, and there is nothing in the record showing Defendant received oral and written notice of those rights at that time. (*Id.* at 69.) Judge Goodman thus failed to comply with Rule 26.11(a) & (c).

On appeal, Dave Roscoe represented Defendant, and contended Judge Goodman's advising Defendant, prior to trial, of the rights she would have once she was convicted, denied her due process and negated the appearance of a fair trial. Mr. Roscoe argued to that effect at the oral argument. (R.T. of Mar. 4, 2013, at 4–12.) [Exhibit I.] Ms. Kever represented the State. When I asked Ms. Kever who was the attorney who represented the State at trial, Ms. Kever said she did not know, but Caroline Escalante was the Deputy County Attorney who had issued the criminal subpoenas. (*Id.* at 24.) Mr. Roscoe said he believed Caroline Escalante was the prosecutor, but he was not the trial attorney and thus was not present at trial. (*Id.*) I then wondered, facetiously, whether the prosecutors wore paper bags over their heads, in reference to the fact that the prosecutor in this case did not identify himself or herself on the record, and therefore remained anonymous. (*Id.* at 25.) I then told Ms. Kever I was tired of seeing these appeals where mistakes were made below that could have been corrected, but the prosecuting attorney did nothing to correct them. (*Id.* at 25–26.) I then told Ms. Kever I thought a way of reducing the number of these appeals would be for the attorneys in the appellate department to contact the trial attorney and inform that attorney of the problem created and suggest ways to have corrected the problem at the trial level.

I have not yet issued a ruling in this matter, so it is still pending before me.

Merits of the Proceedings Below: *Julius* and *Dolinky*.

The Arizona Court of Appeals has held the failure of a trial court to advise a defendant of the constitutional rights waived in a submission on the record, as is required by *Avila*, is fundamental error. *State v. Bunting*, 226 Ariz. 572, 250 P.3d 1201, ¶¶ 1, 11 (Ct. App. 2011). Thus in both *Julius* and *Dolinky*, Judge Burton-Cahill committed fundamental error by not following the procedure required by *Avila*. In both *Julius* and *Dolinky*, Judge Burton-Cahill failed to pronounce sentence orally in open court, and thus failed to comply with Rule 26.10(b) of the Arizona Rules of Criminal Procedure. In *Julius*, Judge Burton-Cahill failed to impose the mandatory statutory fines and assessments, and thus failed to comply with those statutes. In *Julius*, Judge Burton-Cahill attempted to correct her failure to impose those fines and assessments by entering a *nunc pro tunc* minute entry 67 days after the sentencing. In *Dolinky*, Judge Burton-Cahill signed the Judgment and Sentence Order after the clerk had filled in the fines, assessments, and sentence provisions Judge Burton-Cahill had failed to pronounce orally in open court.

In both *Julius* and *Dolinky*, Mr. Coffinger did not advise Judge Burton-Cahill she was committing fundamental error in not following the requirements of *Avila*, believing his duty was to his client and not to the trial court. ER 3.3(a)(2) provides, however, there is a duty to the trial court even when that action is adverse to the client:

(a) A lawyer shall not knowingly: . . . (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel

It is thus arguable that Mr. Coffinger had an ethical obligation to disclose to Judge Burton-Cahill both *Avila* and *Bunting* and ask her to follow those requirements.

In both *Julius* and *Dolinky*, Ms. Raimondo did not advise Judge Burton-Cahill she was committing fundamental error in not following the requirements of *Avila* when accepting a submission on the stipulated record. If that failure was the result of Ms. Raimondo's not knowing the requirements of *Avila*, it appears that would be a violation of ER 1.1, which requires an attorney to provide competent representation to a client. If that failure was the result of Ms. Raimondo's knowing the requirements of *Avila*, but not realizing Judge Burton-Cahill was failing to follow the requirements of *Avila*, it appears that would be a violation of ER 1.3, which requires an attorney to act with reasonable diligence and promptness in representing a client. If that failure was the result of Ms. Raimondo's heavy workload, it appears that would be a violation of ER 1.3, Comment [2], which provides a lawyer's work load must be controlled so that each matter is handled competently. Further, ER 3.8(b) provides the prosecutor in a criminal case shall make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and had been given reasonable opportunity to obtain counsel. In a submission, one of the rights of which the defendant must be advised is the right to a trial by jury where the defendant may have representation of counsel. *Avila*, 127 Ariz. at 24, 617 P.2d at 1140. It is thus arguable that Ms. Raimondo had an ethical obligation to assure that Judge Burton-Cahill advised both Mr. Julius and Mr. Dolinky of that right to counsel, if not the other rights under *Avila*.

At the sentencing in *Julius*, Ms. Raimondo was not present and thus was not available to advise Judge Burton-Cahill she had failed to impose the mandatory fines and assessments, which appears to be a violation of ER 1.1 (provide competent representation to a client). At the sentencing in *Dolinky*, Ms. Raimondo was present, but did not advise Judge Burton-Cahill she had failed to pronounce sentence orally in open court, which appears to be a violation of both ER 1.1 and ER 1.3 (act with reasonable diligence and promptness in representing a client).

Merits of the Proceedings Below: *Ho*.

Judge Goodman advised Ms. Ho, prior to trial, of the rights she would have once she was convicted, which appears to have denied Ms. Ho due process and negated the appearance of a fair trial. This may result in a reversal on appeal of Ms. Ho's conviction, with the result that the State will have the expense of a second trial. Rule 26.11(a) of the Arizona Rules of Criminal Procedure requires the trial court to so advise a defendant after the defendant has been convicted and the trial court is pronouncing judgment and sentence. If the prosecutor there was unaware of Rule 26.11(a), it appears that would be a violation of ER 1.1, which requires an attorney to provide competent representation to a client, which in this case is the State of Arizona. If the prosecutor there was aware of Rule 26.11(a), but failed to advise Judge Goodman of the requirements of that rule, it appears that would be a violation of ER 1.3, which requires an attorney to act with reasonable diligence and promptness in representing a client.

Applicable Rules.

Rule 1.2. Promoting Confidence in the Judiciary.

A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

Rule 2.4. External Influences on Judicial Conduct.

(A) A judge shall not be swayed by partisan interests, public clamor, or fear of criticism.

Rule 2.8. Decorum, Demeanor, and Communication with Jurors.

. . . .

(B) A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, court staff, court officials, and others subject to the judge's direction and control.

In *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), the United States Supreme Court held the First Amendment to the United States Constitution provides limits for which codes of judicial conduct may restrict the rights of freedom of speech of a member of the judiciary. This includes those provisions whose purpose is to preserve the impartiality and the appearance of the impartiality of the state judiciary. 536 U.S. at 775.

Analysis.

Mr. Faull contends I was abrupt and condescending to both appellate lawyers in the *Julius* case. For Mr. Coffinger, he admitted he advised Mr. Julius of the rights he was waiving by submitting the matter on the record, and admitted he chose not to alert Judge Burton-Cahill when she failed to advise Mr. Julius of the rights, as she was required to do under *Avila*. As discussed above, I believe that conduct was a violation of ER 3.3(a)(2). I thus told Mr. Coffinger I would refer the matter to the State Bar if I saw Mr. Coffinger do that again and would let the State Bar resolve whether ER 3.3(a)(2) did require Mr. Coffinger to advise the trial court when making such a fundamental error. I do not view that conduct as condescending.

For Ms. Kever, I asked her whether she ever advised the trial attorneys when she had a matter on appeal and saw the trial court make a mistake that could have been corrected. Ms. Kever said she did not believe it was her place to do so. I then suggested it might reduce the number of appeals if her office had in place a system where the appellate attorneys would so advise the trial attorneys in order to avoid such mistakes in the future. I do not view that conduct as condescending.

For the trial prosecutor in *Julius* (Ms. Raimondo), Mr. Faull contends I made unfounded personal attacks. In a case such as *Julius* (and *Dolinky*), it appears the County Attorney's Office had given her the authority to resolve a DUI case by having a submittal on the record. I would assume that would include the responsibility of seeing that the trial court followed the required procedure so there is a submittal that complies with the law as stated by the Arizona Supreme Court in *Avila*. It is clear from the record that Judge Burton-Cahill was unaware of the proper procedure she should follow in a submission. It is also clear from the record that Ms. Raimondo did not advise Judge Burton-Cahill that she was committing fundamental error. As discussed above, I can only think of three reasons why Ms. Raimondo would not advise Judge Burton-Cahill of her error: (1) Ms. Raimondo herself was unaware of the requirements of *Avila*, which would mean Ms. Raimondo was not competent to handle a submission and thus had violated ER 1.1; Ms. Raimondo was aware of the requirements of *Avila* and either (2) did not realize Judge Burton-Cahill was committing fundamental error or (3) did realize Judge Burton-Cahill was committing fundamental error and chose not to advise Judge Burton-Cahill of that error, which would mean Ms. Raimondo was not acting with reasonable diligence and promptness and therefore violated ER 1.3. I thus believe there was a valid basis of my criticism of Ms. Raimondo and so my criticism was not "unfounded."

For the trial prosecutor in *Ho*, Mr. Faull contends I made a personal attack. As discussed above, before the trial started, Judge Goodman advised Ms. Ho what she would be able to do once she was convicted of the charge. As further discussed above, that was a violation of Rule 26.11(a), which requires a trial court to wait until after the trial and a conviction before the trial court advises a defendant what their rights are now that they have been convicted. Mr. Faull does not explain why the trial prosecutor failed to advise Judge Goodman of the error he was committing. Again, I can only think of three reasons why the trial prosecutor would not advise Judge Goodman of his error: (1) The trial prosecutor was unaware of the requirements of Rule 26.11(a), which would mean the trial prosecutor was not competent to handle a trial and thus had violated ER 1.1; the trial prosecutor was aware of the requirements of Rule 26.11(a) and either (2) did not realize Judge Goodman was committing error or (3) did realize Judge Goodman was committing error and chose not to advise Judge Goodman of that error, which would mean the trial prosecutor was not acting with reasonable diligence and promptness and therefore violated ER 1.3. Again, I believe there was a valid basis of my criticism of the trial prosecutor and so my criticism was not unfounded.

Mr. Faull gives the following justification for what happened in the proceedings below in these cases:

[P]roceedings in the justice courts do not always run smoothly, and mistakes are sometimes made by prosecutors, defense lawyers and justices of the peace. Less experienced lawyers often appear there, and judges may have less legal knowledge.

I would not characterize what happened in *Julius* and *Dolinky* as a simple mistake. The whole purpose of the proceeding there was to resolve the charges by means of a submission, and if the parties are not able to accomplish that goal in a legally acceptable manner, there is really no reason to have that proceeding.

Mr. Faull contends I was impugning the integrity of the Maricopa County Attorney. In *Julius*, there was no prosecutor present at sentencing, and at oral argument, Ms. Kever advised me there were other appeals pending where the State was not present during sentencing. I am not able to understand how the Maricopa County Attorney can allow sentencings to take place when there is no prosecutor present and thus his client, the State of Arizona, is not represented by an attorney. Mr. Faull refers to my comments about “the voters” and the fact that the Maricopa County Attorney had been elected. He contends this shows I was being “swayed by partisan interests” in violation of Rule 2.4(A). The fact of the matter is that the Maricopa County Attorney is elected by the people of Maricopa County, and thus the Maricopa County Attorney is the attorney for the people of Maricopa County. Because he is their attorney, I believe they have the right to know how he is running his office. To argue otherwise is to argue that, once the people of Maricopa County have elected a county attorney, they no longer have any right to know how he is representing them.

Mr. Faull contends my conduct “failed to promote ‘public confidence in the independence, integrity, and impartiality of the judiciary’ as required by Rule 1.2.” In these matters, we had the following conduct, as discussed above.

1. A justice of the peace who did not know the required procedure for a submission.
2. A defense attorney who did know the required procedure for a submission, but did not advise the justice of the peace when she was not following the required procedure and was therefore committing fundamental error.
3. A prosecutor who either did not know the justice of the peace was not following the required procedure, or did know and failed to advise the justice of the peace of that error.
4. A justice of the peace who did not know she was to pronounce sentence in open court.
5. A justice of the peace who did not impose the mandatory fines and assessments.
6. A prosecutor who was not present at sentencing and thus was not available to advise the justice of the peace that she was not following the required sentencing procedure and was not imposing the mandatory fines and assessments.
7. A justice of the peace who, before trial even began, advised the defendant what she could do once she was convicted of the charges.
8. A prosecutor who either did not know the applicable rule of criminal procedure required the justice of the peace to advise the defendant of the appeal rights upon pronouncement of judgment and sentence, or did know that was when the justice of the peace was to advise the defendant and failed to advise the justice of the peace of that rule of procedure.

I contend the above is the type of conduct that would fail to promote public confidence in the independence, integrity, and impartiality of the judiciary and the attorneys involved. I further believe, if I had said nothing and therefore condoned all of those errors, my conduct would then fail to promote public confidence in the independence, integrity, and impartiality of the judiciary.

Finally, I believe I had a valid basis for the criticisms I made for the justices of the peace who made all the errors discussed above, and a valid basis for the criticisms I made for the attorneys who committed the potential ethical violations discussed above. As discussed in *Republican Party of Minnesota v. White* cited above, the First Amendment to the United States Constitution still grants to me the right of freedom of speech, even though I am a member of the judiciary.

I believe this addressed the concerns Mr. Faull has expressed. If you have any further questions, please let me know.

~~C:\msd\state\...~~

Exhibit A

IN THE UNIVERSITY LAKES JUSTICE COURT
COUNTY OF MARICOPA, STATE OF ARIZONA

STATE OF ARIZONA,)	
	)	LC 2011-163114-001
Plaintiff,)	
	)	TR 2011-163114
vs.)	
)	
J. MICHAEL JULIUS,)	
)	
Defendant.)	
_____)	

TRANSCRIPT OF ELECTRONICALLY RECORDED PROCEEDINGS

Chandler, Arizona
April 6, 2012

BEFORE: THE HONORABLE MEG BURTON-CAHILL

TRANSCRIBED BY:

SALLY STEARMAN
Certified Reporter
AZ Certification No. 50401

1 **APPEARANCES**

2

3 For the State of Arizona:
4 MARICOPA COUNTY ATTORNEY'S OFFICE
5 JORDAN RAIMONDO

6 For J. Michael Julius:
7 RICHARD D. COFFINGER

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1 **PROCEEDINGS**

2 THE COURT: Good morning. This is time this
3 morning -- this is the State of Arizona versus J. Michael
4 Julius; correct?

5 MR. COFFINGER: Yes, Your Honor.

6 THE COURT: And this is TR 2011-163114. And --

7 MS. RAIMONDO: Jordyn Raimondo for the State, Your
8 Honor.

9 THE COURT: Thank you.

10 MR. COFFINGER: Richard Coffinger with and for the
11 Defendant who is present in court, out of custody. I'm
12 privately retained.

13 THE COURT: Thank you.

14 And I'm going to admit this is the first time I
15 have gone through this actual proceeding. So this is a
16 pleading to the bench; correct?

17 MR. COFFINGER: Not a plea, Your Honor. It's a
18 waiver of jury trial and a submission to the Court to make a
19 determination of guilt or innocence based upon stipulated
20 evidence. And I believe the State has two exhibits to
21 admit.

22 THE COURT: Thank you.

23 MR. COFFINGER: We do not object to their
24 admission.

25 But I believe the proper procedure is to go

1 through the waiver of jury trial first and accept that, then
2 proceed with the parties' presentation of evidence.

3 THE COURT: Thank you very much, counsel.

4 And so this is what I'm seeing here today. And I
5 was reminded -- thank you very much, Ms. Raimondo for
6 signing off on this. That, of course, that the State has
7 the right to sign off or not on this procedure and you have.

8 And, Mr. Julius, I see your signature but I want a
9 verbal. This is your desire to waive your right to a jury
10 trial?

11 MR. JULIUS: Yes.

12 THE COURT: Thank you. Please be seated.

13 Okay. I'm going to join with the other signatures
14 here then. Okay. And I'm assuming we'll have copies for
15 everyone.

16 And we proceed.

17 MR. COFFINGER: Yes.

18 MS. RAIMONDO: Your Honor, at this time the State
19 would move to admit State's Exhibit 1, the police report in
20 this case; and State's Exhibit 2, the intoxilyzer records.

21 MR. COFFINGER: No objection, Your Honor.

22 THE COURT: Thank you.

23 MS. RAIMONDO: Your Honor, may I approach?

24 THE COURT: Approach.

25 Thank you.

1 MS. RAIMONDO: You're welcome.

2 MR. COFFINGER: Since these are going to be the
3 totality of the evidence the Court receives, I think it
4 might be appropriate to just take a recess, then allow you
5 to review it because you indicated you wanted to render your
6 decision today after you had a chance to review those
7 documents. And then we would submit it without argument as
8 we agreed upon yesterday.

9 THE COURT: Thank you, counsel.

10 So we will take a 15-minute recess.

11 MS. RAIMONDO: Okay.

12 MR. COFFINGER: Thank you, Your Honor.

13 THE COURT: That's the goal anyway.

14 Okay. Thank you.

15 (Recess)

16 THE COURT: Okay. We are we are back on the
17 record, the State of Arizona versus J. Michael Julius. And
18 this is TR 2011-163114.

19 And I have received the documents presented to me
20 by the State. I reviewed them carefully and actually
21 conferred with another judge. And I do find you guilty, Mr.
22 Julius, on all three of the DUI counts.

23 That said, I am going to dismiss the first two
24 counts. And sentencing which we will set out will be on the
25 extreme DUI count.

1 MR. COFFINGER: Your Honor, I have checked with
2 your clerk. We have asked for Thursday, May 24th for
3 sentencing, if that would be possible.

4 THE COURT: I'm going to ask you why so far out.

5 MR. COFFINGER: There are several reasons, Your
6 Honor. One, the Defendant is currently a student and he
7 will -- he's still completing his classes. He goes
8 through -- actually I think he graduates June 14th.

9 Is that what you found out it was?

10 MR. JULIUS: 16th.

11 MR. COFFINGER: June 16th.

12 But if we come in for sentencing, we are very
13 concerned about the legislative -- the current bills in the
14 legislature that relate to retroactive sentencing with
15 respect to the law that allows the court to impose a 9-day
16 on an extreme DUI if the Defendant has an ignition interlock
17 device installed on the car. And specifically, the bill
18 that would make that bill retroactive, that law retroactive,
19 of course, that would have a possible impact on the amount
20 of jail time the Defendant would have to serve.

21 THE COURT: But I believe the legislature most
22 likely will be out long before the end of May, is my guess.

23 MR. COFFINGER: Right. But the thing is, it
24 won't, possibly won't have an emergency clause and we are
25 concerned that it's going to be a 90-day, normal 90-day

1 effective when the legislature adjourns *sine die*, so -- and,
2 of course, the Defendant retains the right to appeal from
3 this procedure.

4 And so the actual imposition of the sentence and
5 the actual commitment orders could be postponed via that
6 mechanism. But I'm just simply asking, May 24th, that's a
7 Thursday. We will know a whole lot more about what has
8 happened in the legislature, did the law pass, did it have
9 an emergency clause, do we need to be concerned about issues
10 like effective dates.

11 THE COURT: Ms. Jordyn, what do you have to say?

12 MS. RAIMONDO: Your Honor, I'll just leave it in
13 the Court's discretion.

14 THE COURT: Ms. Raimondo, not Ms. Jordyn. I'm
15 sorry.

16 MS. RAIMONDO: That's okay.

17 THE COURT: I am sorry. I'm sitting here focusing
18 on these dates.

19 Okay. Well, you know what, you -- you've provided
20 me some reasonably good things to consider. And although I
21 would have chosen something earlier in May, I'm fine, I'm
22 fine with the 24th.

23 MR. COFFINGER: Thank you, Your Honor.

24 THE COURT: So we will do, we will do sentencing.

25 MR. COFFINGER: At 2:30 in the afternoon?

1 THE COURT: That's up to Denise.

2 THE CLERK: That's fine.

3 THE COURT: That's fine. She is good.

4 MR. COFFINGER: I always have my Rotary meeting in
5 Glendale at 12:00 noon to 1:30 and that gives me enough time
6 to get out here.

7 THE COURT: Okay, yes. And we certainly don't
8 want you to speed.

9 MR. COFFINGER: No, we don't.

10 THE COURT: That's what the judge always says.
11 You know, I'd rather have you be a little bit tardy than to
12 speed.

13 Okay. So, let's see, what -- so we got through
14 the, through this proceeding sheet; correct?

15 Okay. Good enough.

16 MR. COFFINGER: Are you talking about a guilty
17 plea proceeding to the Court?

18 THE COURT: Um-hmm.

19 MR. COFFINGER: Your Honor, there is not a guilty
20 plea. I don't believe that's correct. You just made a
21 finding, you did a waiver of trial by jury, you reviewed the
22 reports. You made your finding. We do not need a guilty
23 plea proceeding form because he didn't plead guilty.

24 THE CLERK: (Inaudible)

25 THE COURT: Right. And this we did also talk over

1 with, with one of the other judges.

2 Here we go. See, the problem is these forms
3 have --

4 MR. COFFINGER: I think when you accepted the
5 waiver of jury trial it included information about he had
6 that right and --

7 THE COURT: Right. But what -- I guess what -- I
8 guess what we want to do is go through this judgment of
9 guilt form and, and I'll put a note on it, sentencing
10 (inaudible) --

11 MR. COFFINGER: Your Honor, I think what you're
12 doing really, you made a finding.

13 THE COURT: Okay. All right.

14 MR. COFFINGER: You made a finding of guilty. And
15 you are postponing this case until May 24th to enter a
16 judgment of guilt and sentence. That's what you're going to
17 do on May 24th.

18 THE COURT: No. I think to close the book I'm
19 making a judgment of guilt today and just setting the
20 sentencing out.

21 MR. COFFINGER: Okay. Good, fine.

22 THE COURT: I mean, I know we're -- I'm real fine
23 hairs.

24 MR. COFFINGER: Yeah.

25 THE COURT: But I'm trying to --

1 MR. COFFINGER: I mean, okay. You made a finding
2 of guilty and you're entering a judgment of guilt on all
3 three of those DUIs that you've described?

4 THE COURT: On the, on the -- at sentencing only
5 on the, on the extreme.

6 MR. COFFINGER: I do think, Your Honor, to be
7 precise on the 08 charge, it's a lesser-included of the
8 extreme. So I believe the judgment should be guilty of the
9 impaired to the slightest agree, the (A)(1) charge, and
10 guilty of the extreme over a .15. The over .08 is a
11 lesser-included offense. So it would be redundant to make a
12 finding of guilty on that one also.

13 MS. RAIMONDO: And, Your Honor, defense counsel is
14 correct.

15 THE COURT: All right. Thank you.

16 And this is all on the record.

17 And so what I need from you, Mr. Julius, I
18 believe, is a right index fingerprint and we are going to
19 put sentencing -- set out to May -- what did we say?
20 May 24th.

21 Now then, what we may have to do is do a second
22 one of these that has been creatively adapted when we do the
23 sentencing because I crossed out the line sentencing because
24 we are not doing that today. Make sense?

25 MR. COFFINGER: Yes, Your Honor.

1 THE COURT: Mr. Julius, is it my understanding
2 correctly that you are studying some form of the arts?

3 MR. JULIUS: Advertising.

4 THE COURT: Very good.

5 And the right, right index fingerprint. Straight
6 down and then straight down. So don't roll it on here.
7 Just straight down. Perfect. Here is the other part
8 because I'm a mom and it makes your finger black.

9 MR. COFFINGER: The school you are attending is
10 what?

11 MR. JULIUS: Art Institute.

12 MR. COFFINGER: It's the Art Institute but it's
13 advertising.

14 THE COURT: In advertising? That's good. So it's
15 a marketable form of the arts.

16 My first degree is in fine arts. And I
17 (inaudible) the creative thinking applies far beyond what
18 most people think.

19 MR. JULIUS: Actually in our program we learn
20 everything, you know, from graphic design, photography to,
21 you know, color theory.

22 MR. COFFINGER: He has actually done -- which we
23 are going to present at time of sentencing. He was going to
24 bring his laptop and show a program that he had prepared
25 for --

1 MR. JULIUS: I did a full advertising campaign and
2 public service announcement preventing DUIs and informing
3 people on how serious they are and their extensive effects
4 that they provide and receive.

5 THE COURT: Okay, good. These are all lessons in
6 life, learning experiences.

7 So, Denise, is there anything else that I --

8 THE CLERK: (Inaudible)

9 THE COURT: Well, see --

10 THE CLERK: (Inaudible) just the extreme.

11 MR. COFFINGER: The sentencing, she is saying, is
12 on the extreme. The other would be lesser-included anyway.

13 THE CLERK: Right.

14 MR. COFFINGER: I mean, it's going to be
15 concurrent. He would get 10 days in jail with 9 suspended
16 on the impaired, but 30 days in jail --

17 THE COURT: Ms. Raimondo, would you come check my
18 work for me?

19 MS. RAIMONDO: Yeah. What we are saying is that
20 you can find him guilty of the impaired to the slightest
21 degree charge (inaudible) run concurrent.

22 MR. COFFINGER: Yes. You would be sentencing him
23 on both. I agree with that. You'll be sentencing him on
24 both the impaired to the slightest degree and the extreme
25 and simply ordering that the sentence on the impaired be run

1 concurrent with the greater sentence on the extreme.

2 MS. RAIMONDO: Yes.

3 THE COURT: Okay.

4 MR. COFFINGER: That's what going to happen on
5 May 24th. We're not doing it today.

6 THE COURT: Okay. So that's the (A)(1); correct?

7 MR. COFFINGER: Yes.

8 MS. RAIMONDO: Correct, yeah.

9 THE COURT: Okay.

10 MR. COFFINGER: Do we get a new court date from
11 you here?

12 THE CLERK: Yes.

13 THE COURT: Yes.

14 MR. COFFINGER: Okay. Great.

15 (Discussion between Judge and Clerk, inaudible)

16 THE COURT: And, Denise, do you have (inaudible)
17 have copies?

18 THE CLERK: Yes, I do, Judge.

19 THE COURT: Thank you.

20 MR. COFFINGER: Yeah, we've got copies of --

21 THE COURT: And one for us; right?

22 MR. COFFINGER: -- the waiver of trial to the
23 jury.

24 THE COURT: Okay. Ms. Raimondo, do we have
25 anything else on the record?

1 MS. RAIMONDO: No, Your Honor. Thank you.

2 THE COURT: Thank you. Then you're excused.

3 MS. RAIMONDO: Thank you.

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I, SALLY STEARMAN, do hereby certify that the foregoing 14 pages are a true and accurate transcript of electronically recorded proceedings, recorded at said time and place, all transcribed to the best of my skill and ability.

14

Dated this 14th day of January, 2013.

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SALLY STEARMAN
Certified Court Reporter
No. 50401

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Exhibit B

IN THE UNIVERSITY LAKES JUSTICE COURT
COUNTY OF MARICOPA, STATE OF ARIZONA

STATE OF ARIZONA,)	
	)	LC 2011-163114-001
Plaintiff,)	
	)	TR 2011-163114
vs.)	
)	
J. MICHAEL JULIUS,)	
)	
Defendant.)	
_____)	

TRANSCRIPT OF ELECTRONICALLY RECORDED PROCEEDINGS

Chandler, Arizona
July 12, 2012

BEFORE: THE HONORABLE MEG BURTON-CAHILL

TRANSCRIBED BY:

SALLY STEARMAN
Certified Reporter
AZ Certification No. 50401

1 **APPEARANCES**

2

3 For the State of Arizona:
4 MARICOPA COUNTY ATTORNEY'S OFFICE
5 JORDAN RAIMONDO

6 For J. Michael Julius:
7 RICHARD D. COFFINGER

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1 **PROCEEDINGS**

2 THE COURT: So, counsel.

3 MR. COFFINGER: Richard Coffinger.

4 THE COURT: Thank you.

5 MR. COFFINGER: C-o-f-f-i-n-g-e-r, with J. Julius,
6 who is in court, out of custody. I'm privately retained.

7 The Court conducted a trial based on a submission
8 on April the 6th of 2012 and you made a judgment that the
9 Defendant -- or, you've made a finding that the Defendant
10 was guilty of 1381(A)(1), DUI Impaired and the Extreme DUI.

11 And so the Defendant -- you were kind enough to
12 allow us to continue the sentencing to allow him to complete
13 his undergraduate studies at Arizona Art Institute. And we
14 were here last time with the proof of his diploma -- Art
15 Institute of Phoenix. I'm sorry, The Art Institute of
16 Phoenix.

17 As well as -- then he had the ignition interlock
18 device installed and so forth. That was one of the issues
19 of contention, whether or not because his DUI was before
20 January 1st, 2012, whether or not the Court could impose
21 the --

22 THE COURT: Right.

23 MR. COFFINGER: And then you were discussing the
24 fact that he had done the DUI presentation in the sense like
25 if he had been hired by the Governor's Office on Highway

1 Safety to --

2 THE COURT: Right. And then I even thought back
3 to the very first DUI trial. And Denise did get me the
4 information on that. You know, we went back through the
5 files and found that indeed that defendant had had a DUI
6 with .08.

7 And so I thought a lot -- long and hard about what
8 I had to do. And there are times that I feel a lot of
9 satisfaction with what I do at this bench. There are other
10 times that I feel some pain and some anguish over what I do.
11 I believe I have to be consistent.

12 MR. COFFINGER: I just wanted for the record to
13 indicate we filed a motion, a memorandum of law regarding
14 the Court -- actually, Defendant's motion for Court to
15 sentence him for his extreme DUI pursuant to the statutory
16 language in 28-1382(I) because it is procedural rather than
17 substantive.

18 And I know you have considered similar arguments
19 in the past. That's in the file. I believe that it is
20 capable of being applied retroactivity in the Court's
21 discretion in the fact that the Court has the record of the
22 installation of the ignition interlock device prior to
23 sentencing, would allow you to order him to serve 9 days in
24 jail rather than the 30 days in jail.

25 That's our position. And I realize you don't

1 believe it's retroactive and you believe you must impose the
2 30 days in jail, at least simply -- well, use this as a test
3 case to ask the superior court to give us instruction.

4 Thank you.

5 THE COURT: Okay. And I appreciate that, counsel.

6 And I actually appreciate that this is going up to
7 a higher court and we can get guidance from them. I am
8 going to sentence you to the 30 days. I do understand that
9 you plan to take this to appeal. And we will wait and see
10 what happens.

11 MR. COFFINGER: We are going to file a notice of
12 appeal today, so rather than go through all the issuance of
13 a commitment order, since we by filing a notice to appeal
14 have a right to stay any jail sentence, and actually all
15 aspects of the sentence, I'd ask you to pronounce the
16 sentence, accept the notice of appeal, and indicate that all
17 the terms of your sentence will be stayed pending the
18 superior court resolution of the appeal.

19 THE COURT: Okay. So noted.

20 I will announce the sentence, that it is 30 days,
21 not the 9 days. I will stay the sentence until we hear back
22 from the appeal.

23 MR. COFFINGER: All right.

24 THE COURT: Okay? And --

25 MR. COFFINGER: I have the notice of appeal. It

1 references both the (A)(1) guilty finding that you made and
2 the extreme.

3 THE COURT: Can we take a copy of this?

4 MR. COFFINGER: That's the original. We'd ask the
5 Court to give -- get us three copies back. One for
6 Ms. Raimondo, one for the Defendant and one for myself.

7 THE COURT: Okay. So we do have this on the
8 record. It began at 2:55. We did -- just for the record, I
9 think the presentation is really good.

10 MR. JULIUS: Thank you.

11 THE COURT: And I would like you to -- you know,
12 for the record, we have 30 days. I also want you to attend
13 one of the VIP classes and do a presentation there of the
14 work that you did.

15 I also have no problem should you want -- we will
16 see if we can't have a discussion with someone down at the
17 Department of Health, some other places that maybe we could
18 find some venues for the work because I think it's good
19 work. Okay? Okay.

20 MR. COFFINGER: Thank you, Your Honor.

21 THE COURT: So, thank you.

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I, SALLY STEARMAN, do hereby certify that the foregoing 6 pages are a true and accurate transcript of electronically recorded proceedings, recorded at said time and place, all transcribed to the best of my skill and ability.

Dated this 17th day of January, 2013.

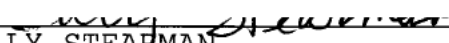

SALLY STEARMAN
Certified Court Reporter
No. 50401

Exhibit C



Maricopa County Justice Courts, Arizona

University Lakes Justice Court 201 E. Chicago St. #101, Chandler, AZ 85225 602-372-3400

STATE OF ARIZONA

CASE NUMBER: TR2011163114

vs.

Jordyn Raimondo
Deputy County Attorney

J Michael Julius
Defendant

Richard D Coffinger #003040
6838 North 58th Drive
Glendale, Arizona 85301

Attorney for Defendant

MINUTE ENTRY

Date: 9/17/2012

Upon Court's review of the file at Defense Counsel's request and, having met with the parties this date,

IT IS ORDERED, The Court, realizing that the appeal has been filed and this Court has lost jurisdiction, let it be nunc pro tunc, that the sentence that was originally given failed by Court error to include the statutory financial fines and surcharges. Today, these fines (\$250 fine, 84% surcharge, \$20 probation fee, \$1000 to the Prison Construction fund, \$250 DUI Abatement, \$1000 DPS Public Safety Assessment) have been included and jail costs of \$474 assessed for the 30-day sentence.

IT IS FURTHER ORDERED, the above-mentioned assessments are in addition to the original sentence of 30-day incarceration in the Maricopa County Jail and attendance at a Victim's Impact Panel meeting.

Please see attached Judgment and Sentence Order.

I CERTIFY that I delivered / mailed a copy of this MINUTE ENTRY to:

☒ State

☐ Defendant at the above address

☒ Defendant's attorney

Date: 9/17/12

By: mum

Clerk

Exhibit D

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,	)	LC 2011-163114
)	
Appellee,)	
)	
vs.)	
)	
J MICHAEL JULIUS,)	
)	
Appellant.)	
<hr/>)	

TRANSCRIPT OF ELECTRONICALLY RECORDED PROCEEDINGS

Phoenix, Arizona
January 28, 2013

BEFORE: THE HONORABLE CRANE McCLENNEN

TRANSCRIBED BY:

SALLY STEARMAN
Certified Reporter
AZ Certification No. 50401

1 **APPEARANCES**

2

3 For the State of Arizona:
4 ANDREA L. KEVER

5 For J Michael Julius:
6 RICHARD D. COFFINGER

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1 **PROCEEDINGS**

2 THE COURT: So we have cause number LC2011-163114,
3 in the matter of State of Arizona versus Michael Julius.

4 Representing Mr. Julius?

5 MR. COFFINGER: Richard Coffinger, Your Honor.

6 THE COURT: Representing the State?

7 MS. KEVER: Good morning, Your Honor.

8 Andrea Kever, County Attorney's Office, appearing
9 on behalf of the State.

10 THE COURT: All right. Mr. Coffinger, you may
11 proceed.

12 MR. COFFINGER: Thank you.

13 As a preliminary matter, Your Honor, I wanted to
14 inquire from Ms. Kever as to whether she still intends to
15 present the argument that notwithstanding the trial Court's
16 failure to conduct *Avila* colloquy with the Defendant prior
17 to her acceptance of the submission, whether she wishes to
18 pursue that fundamental error analysis.

19 THE COURT: Well, I don't really need to know
20 whether she does.

21 MR. COFFINGER: Okay.

22 THE COURT: Your question, more pertinent question
23 would be whether I believe a fundamental error analysis is
24 appropriate here.

25 But I had some questions of my own.

1 MR. COFFINGER: Okay. I just wanted to get that
2 issue off the table. There was a recent Court of Appeals
3 decision. And I have a copy of it. It's a published
4 decision. *Arella* (phonetic) I think is the name of the
5 case. And it says that the actual correct standard is what
6 they call structural error, and that there is a --

7 THE COURT: All right. What is that case?

8 MR. COFFINGER: I have it right here. Where did I
9 put it?

10 Here it is. I have a copy for the Court and for
11 the State.

12 MS. KEVER: Thank you.

13 MR. COFFINGER: Your Honor, if I could approach.
14 *State v* -- the important language here is -- I think it's
15 on -- it starts on page 6. It wasn't a submission but it
16 was a jury trial waiver, a trial to the court.

17 THE COURT: All right. Hold on. I'll read it so
18 don't talk.

19 Well, okay. Now here is the thing. In this case,
20 Mr. Coffinger, you represented Mr. Julius at trial --

21 MR. COFFINGER: Yes, I did.

22 THE COURT: -- below.

23 Now, so I assume before you submitted it to the
24 court you discussed his options of going to trial versus
25 submitting it?

1 MR. COFFINGER: Yes, Your Honor.

2 THE COURT: And I assume you discussed with him
3 what his rights were if he went to trial?

4 MR. COFFINGER: Yes, we did. And, of course, the
5 Avila inquiry is quite clear. My doing it isn't a
6 substitute for the judge doing it.

7 I wanted to make the point, Your Honor, that in
8 another appeal also out of the University Lakes Justice
9 Court, also where the judge was Judge Meg Burton-Cahill,
10 that's in your court, State of Arizona versus Benjamin
11 Dolinky, it's TR 2011-165609, the State filed its
12 memorandum. I have a copy of it. Wherein they said we
13 confess error. The exact same thing happened.

14 THE COURT: I know, I know.

15 MR. COFFINGER: That's two different appeals.

16 THE COURT: I know. It's two different cases.
17 But I haven't --

18 MR. COFFINGER: Two different approaches.

19 Let me give the Court a copy, and the prosecutor a
20 copy a Dolinky and Daws (phonetic) memorandum, (inaudible)
21 memorandum.

22 THE COURT: Which she obviously has because she
23 wrote it.

24 MR. COFFINGER: Right.

25 MS. KEVER: Yes.

1 MR. COFFINGER: But she doesn't have it in this
2 file and she probably didn't bring it today.

3 THE COURT: Right. But now the thing is --

4 MR. COFFINGER: Do I have an obligation to tell
5 this judge who is not doing it right, Judge, you are not
6 doing it right?

7 THE COURT: Yes.

8 MR. COFFINGER: That's the question.

9 THE COURT: Yes.

10 MR. COFFINGER: I don't think so.

11 THE COURT: Oh, so in other words when you --

12 MR. COFFINGER: Did the prosecutor --

13 THE COURT: We are not talking about the
14 prosecutor because -- and Ms. Kever can discuss that, about
15 how the prosecutor sat there like a bump on the log and
16 apparently was so oblivious to what is going on, didn't know
17 what was happening, probably was text-messaging to find out,
18 you know, something else, not listening, sitting around
19 daydreaming or something to let this happen.

20 But you can get into that, Ms. Kever, because you
21 weren't there and obviously you have no reason to know what
22 happened and so you probably cannot opine on that, although
23 I assume the prosecutor was from your office.

24 MS. KEVER: That is correct, Your Honor.

25 THE COURT: Yeah. Well, and I don't suppose you

1 ever talked to the prosecutor and said, you know, Jim, or
2 Bob, or Susie, or Betty, you just blew this one. I don't
3 suppose you talked to them; did you?

4 MS. KEVER: No, I --

5 THE COURT: Yes or no.

6 MS. KEVER: No.

7 THE COURT: Why not? Isn't it -- it might be a
8 good idea in your office when some prosecutor sits there and
9 lets some case potentially go down the toilet, that you call
10 them and say, you know, you almost let this case go down the
11 toilet, what were you doing? Did you ever think about
12 calling the prosecutor?

13 Yes or no.

14 MS. KEVER: Yes.

15 THE COURT: You thought about it?

16 MS. KEVER: Yes.

17 THE COURT: Did you?

18 MS. KEVER: No.

19 THE COURT: You chose not to?

20 MS. KEVER: Correct.

21 THE COURT: Why not?

22 MS. KEVER: Because --

23 THE COURT: It's not my job.

24 MS. KEVER: I didn't -- it's not that it's not my
25 job. I didn't feel that it was my place.

1 However, there are things that are going on in
2 this courtroom that I am going to be having a discussion
3 with my supervisor about to take to this supervisor because
4 we are getting a lot of appeals out of this courtroom where
5 the prosecutors are not present during sentencing, during
6 fundamental things that are proceeding.

7 THE COURT: When you say this courtroom, you mean
8 the justice court where --

9 MS. KEVER: Yes, sir.

10 THE COURT: I mean, you are not talking about my
11 courtroom?

12 MS. KEVER: No, sir. I am talking about Meg
13 Burton-Cahill's courtroom.

14 THE COURT: All right. Well, we will get to you.
15 But, Mr. Coffinger, so what you're saying is --

16 MR. COFFINGER: Lay in wait.

17 THE COURT: When you sit there --

18 MR. COFFINGER: Ambush.

19 THE COURT: -- and you see the judge fail to do
20 what the judge is required to do, you get to sit there and
21 say, oh, boy, we got an appeal issue here. Let's just sit
22 there and let it sit. Because if I don't like what is
23 happening, I'll raise that on appeal and get this thing
24 reversed and sent back. And who knows what will happen.
25 Because when we get it sent back possibly the State's

1 witnesses will be all gone and they won't be able to prove
2 their case. And therefore I'll force the State to dismiss
3 this case and my client gets to walk. That's a great
4 strategy.

5 MR. COFFINGER: My duty is to my client, Your
6 Honor. My duty is not to a lay judge who is under Arizona
7 law entitled to serve in the office of justice of peace who
8 may not be familiar -- wasn't law trained through law
9 school. And I have -- my duty is to my client.

10 THE COURT: And you have no duty to the court?
11 You have no ethical duty, if you see an error like this
12 happening you have no ethical duty to say anything about it?

13 MR. COFFINGER: In the quantum of who is my duty
14 to, I believe my duty is to the client. I told her that it
15 was going to be a test case --

16 THE COURT: I'll tell you what, Mr. Coffinger.
17 There are two of these cases of yours. If I see a third one
18 from this point on, rest assured I will file a complaint
19 with the State Bar pointing out your failure to point out
20 the mistake to the judge.

21 Now, if you want to go ahead and not point it out,
22 and say, all right, McClennen is off base of sending this
23 complaint to the Bar Association and I'll fight it out with
24 the Bar Association, be my guest.

25 MR. COFFINGER: I understand, Your Honor.

1 THE COURT: But I will do it. You understand
2 that?

3 MR. COFFINGER: I do.

4 THE COURT: All right.

5 MR. COFFINGER: Can we get on with the merits of
6 this appeal?

7 THE COURT: Yes.

8 MR. COFFINGER: So --

9 THE COURT: Because here is the thing I think,
10 that there are cases that say people are able to know things
11 other than what the judge says. Typically they learn them
12 from the attorney. Typically they learn them like, well,
13 Mr. Client, here is your choice. You could go to trial. If
14 you go to trial this is what will happen. You know, we
15 will -- the State will have to present its witnesses and
16 I'll get to cross-examine them. And, you know, here is the
17 problem, Mr. Client, you had a blood test or a breath test
18 and it gave this reading which is over the limit. So if
19 that evidence holds up you are toast. So our goal here, if
20 we go to trial, we're not going to be able to attack the
21 fact that there was that reading. We will just have to
22 attack the reading itself. We will have to attack --

23 What was it a breath or blood?

24 MR. COFFINGER: It was breath, Your Honor.

25 THE COURT: We will have attack the breathalyzer

1 machine. We will have to bring in -- we will have to go
2 hire Stoltman to come in and bring on the things about
3 partition ratios and breathing patterns and breath patterns
4 and RFI frequencies and things like that. And it will cost
5 you about this much money to get Stoltman in here. And, you
6 know, that's what we will have to do. Otherwise we will
7 just have to submit it.

8 MR. COFFINGER: We were primarily wanting to
9 address the issue of the retroactivity of 28-1381, I believe
10 it's (I). And we wanted to -- had there been a guilty plea
11 we would not have been able to raise -- file that direct
12 appeal. And that was on our primary issue that we wanted to
13 bring up and that's what I'd like to address now in the
14 remaining time that I have. Two other issues.

15 I believe, I do believe you should reverse the
16 judgment of guilt and sentence because the Defendant did not
17 have the proper, you know, *Avila* colloquy with the court.
18 She dropped the ball there. She dropped the ball on this
19 other case too. I would like to get to the real substantive
20 issue that's presented on this appeal.

21 And that is -- and I was just given this morning a
22 memorandum decision, which is not controlling, of course.
23 It's not properly cited. But it is *State of Arizona, ex rel*
24 *Bill Montgomery versus Judge Myra Harris*, and real party in
25 interest *Linton Avery Maxwell*.

1 THE COURT: Now, Mr. Coffinger, I grant you that
2 this is not an opinion. It's a decision order. It doesn't
3 even say memorandum decision. But up at the top it says,
4 it's not legal precedent, may not be cited, blah blah blah.
5 I know that.

6 MR. COFFINGER: I understand.

7 THE COURT: But, you know, my -- so what you're
8 saying is --

9 MR. COFFINGER: I want to argue the ameliorative
10 issue that is not addressed in this case, ameliorative
11 change in the law on sentencing. That's what I would like
12 to focus on. This was the procedural versus substantive
13 discussion.

14 And they came down on the side of the State in
15 this memo decision. But they do not mention the word
16 ameliorative. They do not mention the word this is a
17 reduction in the punishment that a person faces. And so I
18 have researched this issue.

19 Of course, I don't get to reply, file a reply
20 memorandum in the Superior Court like one would in the Court
21 of Appeals or Supreme Court, so I'm kind of here with cases
22 asking you to look at them.

23 But I will tell you there is one excellent case
24 that I want to start with. And that is *State of Arizona*
25 *versus Lawrence McCuin*, M-c-C-u-i-n -- I'm sorry. Wrong

1 case. *Noble, State v Noble*, April 21st, 1992.

2 And Your Honor --

3 THE COURT: I assume it has a citation --

4 MR. COFFINGER: I have the citation. It's 171
5 Ariz, page 171. And I have a copy for the Court and for the
6 prosecutor. I wanted to -- I don't know if you have a clear
7 recollection but, Your Honor, you were counsel for the State
8 of Arizona.

9 THE COURT: Now this is -- okay.

10 MR. COFFINGER: This is about sex registration.
11 Two guys convicted of crimes that required sex registration.
12 Their crimes were committed before the law was -- went into
13 effect but their sentencing occurred after the law went into
14 effect. And the court gets -- you know how Judge Feldman
15 is, very very thorough, long opinions. And he gets into the
16 *Calder v Bull* analysis and ultimately --

17 I will stop talking if you want to take a look at
18 this.

19 But ultimately you won. It came down on the side
20 of the State that it was appropriate for the trial court to
21 order these two defendants to register as sex offenders even
22 though they committed their crime before the law went into
23 effect. And the discussion of the ameliorative nature of
24 the amendment is quite good.

25 So, I have other, three other cases to give you.

1 They are all on this issue of, if the --

2 THE COURT: Well --

3 MR. COFFINGER: If the punishment gets harsher,
4 absolutely not. You cannot apply it retroactive. That
5 would be ex post facto. If the punishment gets softer you
6 can apply it because it's ameliorative and that's what has
7 happened with 28-1381(I).

8 THE COURT: All right. First, first --

9 MR. COFFINGER: The punishment got softer.

10 THE COURT: All right. First, in *Noble*, which you
11 are correct, this was one of my cases. And I didn't right
12 off remember it but there were a few that I did so I don't
13 remember all.

14 But you're saying in this one when they committed
15 the crime there was no --

16 MR. COFFINGER: Sex registration.

17 THE COURT: -- requirement to register as a sex
18 offender.

19 MR. COFFINGER: That's correct. It had not gone
20 into effect. The law had not gone into effect.

21 THE COURT: But by the time they got sentenced the
22 law got into effect.

23 MR. COFFINGER: That's correct.

24 THE COURT: And the trial court made them register
25 as sex offenders.

1 MR. COFFINGER: And Judge Feldman and the
2 majority, I think it was unanimous, the Supreme Court said,
3 it's a close case as to whether this registration is
4 punishment or whether it's to protect society and not
5 punishment. But we come down on the side of the State this
6 time and say it's ameliorative and it can be applied
7 retroactively. That's what (inaudible).

8 THE COURT: Well, it doesn't seem to be very
9 ameliorative to Mr. Noble.

10 MR. COFFINGER: No, it didn't. And, Judge, as you
11 read the first five pages of the decision by Justice Feldman
12 you think the State is going to lose. But at the very end
13 he starts talking about the benefits to law enforcement to
14 know where sex offenders are living. He concludes that it's
15 ameliorative. It's not softening the punishment but it
16 didn't make it any harsher is how they kind of resolved it.

17 THE COURT: All right. But now do you have a case
18 in your hand where it says, all right, when somebody commits
19 a crime on this particular date and the punishment is X, and
20 by the time you get to sentencing the punishment is X minus
21 something --

22 MR. COFFINGER: Yes. I do have three, I think,
23 Your Honor.

24 THE COURT: Okay.

25 MR. COFFINGER: At least they say that. Whether

1 the actual -- they say that language. They say that is the
2 controlling law. *Beltran* is one. We cited some of this,
3 Your Honor, but I always like to go back and read -- and I
4 think on *Beltran* there is -- a little discussion is on page
5 408.

6 Here is one. We have -- the language originally
7 appears in the Arizona Reports. The first case that it
8 appeared was *John Harvey Adamson's* death case. I didn't put
9 the whole thing in. But this change in the law is not ex
10 post facto. It's not prohibited if it softens rather than
11 hardens the punishment.

12 And they got that language from *Knapp*, the *Knapp*
13 case. That was in the 9th circuit.

14 And finally the one I got is a juvenile case,
15 saying basically the same thing, that is, soften the
16 punishment, it can be applied retroactively; harden it, you
17 can't. So --

18 THE COURT: Well --

19 MR. COFFINGER: So those are four cases, reported
20 Arizona appellate court cases saying that you can apply it
21 retroactively.

22 Now, the record clearly indicates that Judge Meg
23 Burton-Cahill wished she could cut the Defendant -- or the
24 Appellant some kind of a break here. This is the Appellant
25 Your Honor, who produced -- he's a communications major.

1 He's in production of advertising.

2 THE COURT: Uh-hmm.

3 MR. COFFINGER: He came in with like a complete
4 anti-DUI campaign. It was a prospective. It was just a
5 project that he had worked on in his school and he was
6 having billboards, radio announcements and TV commercials
7 and -- Thanks to Your DUI --

8 What is it called?

9 Compliments of your DUI. That was the theme.

10 So she says, well, I want to continue the
11 sentencing to see if I can figure out a way to reduce the 30
12 days for the extreme because I just don't think it's right.

13 And I told her at that time, this is going to be a
14 test case, Your Honor. We are taking this case up and we're
15 going to -- and she said initially, I don't want it to be a
16 test case.

17 Then when we came back for sentencing, she said,
18 I'm sorry, I can't reduce the 30 days. I'm going to be
19 consistent. I have never given anyone else retroactive
20 application of this. Therefore, I'm giving you the 30 days.

21 And of course, let me make sure you understand,
22 she did not impose any financial consequence. She failed to
23 impose a financial consequence.

24 Again, we could get into this dichotomy of do I
25 owe my duty to the client, to say, boy, you just avoided

1 \$3500 or so in costs or do I go, Judge, you've got to make
2 sure you impose financial obligations. I don't think so.

3 In any way event the State did not cross appeal
4 and the State did not raise that issue in their appellee's
5 memorandum, Your Honor.

6 So do I win on that issue, I hope.

7 THE COURT: On that as far as I'm concerned,
8 unless Ms. Kever wants to give me some really good argument,
9 I think the State blew it on that. And I think the
10 State just --

11 You'll get your chance.

12 MR. COFFINGER: There is one other thing --

13 THE COURT: You know, the State may have cost --
14 the prosecutor may have cost the State \$3500 into their
15 coffers but if that's the way Mr. Montgomery wants to run
16 his attorneys I'm not going to get involved in his
17 supervision of his attorneys.

18 MR. COFFINGER: I just wanted to see if in the
19 Court file. There was a nunc pro tunc entry by this judge
20 attempting to fix the problem after -- and she starts it
21 out, this is nunc pro tunc entry dated September 17, 2012.
22 I received a copy of it. I didn't know if it was in the
23 court file.

24 THE COURT: I don't know.

25 MR. COFFINGER: But it says: Upon Court's review

1 of the file at defense counsel's request and having met with
2 the parties, the State, it is ordered the Court realizing
3 that the appeal has been filed and this court has lost
4 jurisdiction, let it be nunc pro tunc that the sentence that
5 was originally given by the court -- so she tried to fix the
6 problem after the appeal was filed. We have plenty of case
7 law that says you lost jurisdiction you can't fix it.

8 So, thank you, Your Honor.

9 (Inaudible) questions?

10 THE COURT: Do you have an extra copy of that?
11 Because I don't know whether it's in --

12 MR. COFFINGER: I'm going to leave it with you,
13 Your Honor. I think I can print it.

14 I asked Ms. Kever if she had a copy. I don't
15 think she does either.

16 MS. KEVER: No.

17 THE COURT: Quite possibly (inaudible).

18 MR. COFFINGER: Thank you, Your Honor.

19 THE COURT: So Ms. Kever.

20 MS. KEVER: Your Honor, with regard to the
21 sentencing issue that counsel just brought up it's my
22 understanding there was no prosecutor present at sentencing.

23 And I just --

24 THE COURT: And that's the way Mr. Montgomery
25 likes to run his office?

1 You know, maybe if the voters knew that, hey, I'm
2 going to be the County Attorney but, you know, my deputies
3 don't have to be there. You know, it will take time out of
4 their busy schedule to do things like represent the State at
5 sentencing so we're just going to skip that.

6 MS. KEVER: There are a few other appeals filed by
7 the State that are going to be hitting your office where
8 again the State was not present during sentencing.

9 THE COURT: And I assume you've brought that up to
10 their supervisors?

11 MS. KEVER: Yes, I have. Hopefully this issue
12 will be corrected.

13 THE COURT: Hopes springs eternal.

14 MS. KEVER: And, Your Honor, with regards to the
15 issue of concession in Dolinky and --

16 THE COURT: Well, let's just put that to rest.
17 What I'm going to do is on that one, I'm going to order you
18 to respond to his other issues and I'm going to resolve
19 that. And I don't know how I'm going to rule on the failure
20 to advise under *Avila*. But you will get an order from me
21 telling you to respond to the other issues so that's that.

22 MS. KEVER: And it is a dodgy issue. And I know
23 that I do make somewhat of a dodgy argument in one case and
24 none in the other. And again, this was discussions that
25 were had with individuals in the appeals bureau. When I

1 authored this brief, this was in September. This brief was
2 in December. And in between that it was decided that we
3 would concede. But having put that to rest, I will be
4 looking forward to a minute entry from Your Honor giving me
5 the opportunity to respond to this issue.

6 With regards to the retroactive application of
7 28-1381(A)(1) -- or 28-1382(I), the State's position is it
8 is not retroactive.

9 And I did supply this Court with -- I know it is a
10 decision order. Our office is filing documents with the
11 Court of Appeals Division 1 today to have this case
12 published. Because we seem to be getting differing opinions
13 from you as opposed to Commissioner Harris regarding this
14 issue. So we are seeking some determination from that court
15 to finally put that issue to rest as well.

16 THE COURT: And you seem to be getting differing
17 opinions between Commissioner Harris and the Court of
18 Appeals on that issue.

19 MS. KEVER: Correct. And also the justice courts.
20 One justice court will say it is not retroactive and another
21 one will say it is retroactive.

22 THE COURT: All right. Okay. Anything else?

23 MS. KEVER: No, Your Honor.

24 THE COURT: Okay. Last word.

25 MR. COFFINGER: Thank you, Your Honor.

1 I would normally not want you to be paying much
2 attention to an unpublished decision order that's not
3 capable of being cited. I would not want you to do that
4 normally. But they do not discuss the ameliorative change
5 argument. And that is a whole separate argument. And I
6 would say the procedural versus substantive is, is fuzzy.
7 It's hard to say whether -- when the legislature changed the
8 law to say if the defendant shows up in court prior to
9 sentencing, as my client did, shows proof to the court that
10 the defendant has installed an ignition interlock device for
11 12 months in their car, then the court may reduce the
12 sentence to 9 days instead of 30. Is that substantive or
13 procedural? You could go either way. But it is clearly
14 ameliorative and this judge did not think she had the power
15 to apply it retroactively. And we'd ask the Court to issue
16 its opinion saying you had the power to apply it
17 retroactively. It isn't mandatory that it be applied
18 retroactively but you had the power to apply it
19 retroactively.

20 Thank you.

21 THE COURT: All right. Just so you are aware,
22 that decision order in State ex rel Montgomery vs Myra
23 Harris, Linton Avery Maxwell, the one that Ms. Kever brought
24 up today, I actually had seen that last week just in the
25 course of reviewing orders that we get from the Court of

1 Appeals so I knew about it already.

2 MR. COFFINGER: Finally, with respect to this idea
3 there has been a waiver of this other argument, I kind of
4 don't feel that it's appropriate for you to say you can have
5 some more time to address the argument about whether or not
6 you waived, you waived by not filing a cross appeal.

7 THE COURT: Are you talking about the fine?

8 MR. COFFINGER: I'm talking about issues not
9 presented. And I think the failure to cross appeal on the
10 fine, yes, that's the issue.

11 THE COURT: The fine is not an issue in this case.
12 I am not -- the fine is what it is, which apparently was 0,
13 and that's the way it's going to stand out of this court.

14 MR. COFFINGER: Since you do have that one
15 pleading on Dolinky, this not to go in this file. This is
16 on the Dolinky case. It's about the waiver of issues that
17 are not briefed in the State's answering brief. That's
18 (inaudible).

19 THE COURT: All right.

20 MR. COFFINGER: I just had filed that today, Your
21 Honor. Thank you.

22 THE COURT: All right. I will put that in the
23 Dolinky file.

24 MS. KEVER: Thank you, Your Honor.

25 THE COURT: All right. You all have a nice

1 morning.

2 MR. COFFINGER: Thank you.

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I, SALLY STEARMAN, do hereby certify that the foregoing 24 pages are a true and accurate transcript of electronically recorded proceedings, recorded at said time and place, all transcribed to the best of my skill and ability.

14

Dated this 24th day of April, 2013.

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SALLY STEARMAN
Certified Court Reporter
No. 50401

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Exhibit E

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2011-163114-001 DT

03/19/2013

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
J. Eaton
Deputy

STATE OF ARIZONA

ANDREA L KEVER

v.

J MICHAEL JULIUS (001)

RICHARD D COFFINGER

REMAND DESK-LCA-CCC
UNIVERSITY LAKES JUSTICE COURT

RECORD APPEAL RULING / REMAND

Lower Court Case Number TR 2011-163114.

Defendant-Appellant J. Michael Julius (Defendant) was convicted in the University Lakes Justice Court of driving under the influence and driving under the extreme influence. Defendant contends the trial court erred in not going through the proper submission colloquy, and contends the trial court could have imposed a different sentence. For the following reasons, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

On December 3, 2011, Defendant was cited for driving under the influence, A.R.S. § 28-1381(A)(1) & (A)(2); driving under the extreme influence, A.R.S. § 28-1382(A)(1) (0.15 or more); failure to drive in one lane, A.R.S. § 28-729(1); and no proof of insurance, A.R.S. § 28-4135(C). On April 6, 2012, Defendant's attorney advised the trial court that Defendant was going to submit the matter on stipulated evidence. (R.T. of Apr. 6, 2012, at 3.) The trial court said this was the first time it had gone through that type of procedure. (*Id.*) Defendant's attorney presented to the trial court a Waiver of Trial by Jury document he had prepared, which was signed by Defendant, Defendant's attorney, and the prosecutor. (*Id.* at 3-4.) The trial court then signed that document. (*Id.* at 4.) The prosecutor presented to the trial court the documents to which the parties had stipulated, and the trial court took a recess to review those documents. (*Id.* at 4-5.) After reviewing those documents, the trial court found Defendant guilty of the three DUI charges and dismissed the civil traffic offenses. (*Id.* at 5.) Defendant's attorney asked the trial court to set sentencing for May 24, 2012, because of the possibility the Arizona Legislature would make changes in the sentencing provisions of the DUI statutes that could be retroactive. (*Id.* at 6-7.) The trial court set the sentencing for May 24, 2012. (*Id.* at 7.) The trial court then discussed the

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

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03/19/2013

proceeding that had just taken place, and Defendant's attorney pointed out that it was not a guilty plea proceeding because Defendant had not plead guilty. (*Id.* at 8–10.) Defendant's attorney did not suggest the trial court should have done anything differently, such as addressing Defendant personally and advising him of the rights he was waiving and obtaining a knowing, voluntary, and intelligent waiver of those rights on the record. (*Id.* at 10.) Neither did the prosecutor suggest to the trial court that it had failed to do something that was required. (*Id.* at 14.)

The parties appeared on June 28, 2012, for sentencing. Defendant presented to the trial court a video in the nature of a public service announcement he had produced showing the extensive ramifications for DUI. (R.T. of Jun. 28, 2012, at 4–6.) He also produced a commercial showing the negative consequences of drinking and driving. (*Id.* at 7–9.) Defendant's attorney noted the DUI statute in effect at the time Defendant committed these offenses required him to spend 30 days in jail, and further noted the Arizona Legislature had modified the statute to require only 9 days in jail, and contended the trial court could impose sentence under this new statute. (*Id.* at 9–11.) The State contended the trial court had to impose the 30 days in jail. (*Id.* at 12.) The trial court continued the matter to July 12, 2012, so it could research the issue. (*Id.* at 12–14.)

When the parties reconvened, Defendant's attorney again argued that the trial court could sentence Defendant under the new statute. (R.T. of Jul. 12, 2012, at 4–5.) The trial court sentenced Defendant under the statute in effect at the time Defendant committed the offense. (*Id.* at 5.) On that same day, Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUES.

- A. *Has Defendant established he was prejudiced by the trial court's failure to advise him of the rights he was waiving by submitting the matter on a stipulated record.*

Defendant contends the trial court erred in failing to advise him of certain constitutional rights before it proceeded to determine his guilt solely on the basis of a submitted record, as is required by *State v. Avila*, 127 Ariz. 21, 24–25, 617 P.2d 1137, 1140–41 (1980). Defendant, however, failed to raise this issue before the trial court and therefore has forfeited appellate review, absent fundamental error. *See State v. Henderson*, 2120 Ariz. 561, 115 P.3d 601, ¶ 19 (2005). Fundamental error is limited to those rare cases that involve error going to the foundation of the defendant's case, error that takes from the defendant a right essential to the defendant's defense, and error of such magnitude that the defendant could not possibly have received a fair trial, and places the burden on the defendant to show both that error existed and that the defendant was prejudiced by the error. *State v. Soliz*, 223 Ariz. 116, 219 P.3d 1045, ¶ 11 (2009). It is particularly inappropriate to consider an issue for the first time on appeal when the issue is a fact intensive one. *State v. Rogers*, 186 Ariz. 508, 511, 924 P.2d 1027, 1030 (1996); *State v. West*, 176 Ariz. 432, 440–41, 862 P.2d 192, 200–01 (1993); *State v. Brita*, 158 Ariz. 121, 124, 761 P.2d 1025, 1028 (1988).

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

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In the present matter, the trial court erred in not going through the required colloquy before accepting Defendant's waiver of rights and submission on the stipulated record. *State v. Bunting*, 226 Ariz. 572, 250 P.3d 1201, ¶ 11 (Ct. App. 2011); see *State v. Morales*, 215 Ariz. 59, 157 P.3d 479, ¶ 10 (2007). An inadequate colloquy does not, however, automatically entitle a defendant to relief under a fundamental error analysis; in order to obtain relief, a defendant must show both error and prejudice. *State v. Young*, 230 Ariz. 265, 282 P.3d 1285, ¶ 11 (Ct. App. 2012). In order to show prejudice, a defendant must show (1) the defendant did not know of the rights being waived and (2) if the defendant had known of the rights being waived, the defendant would not have proceeded with the submission:

We conclude, however, that the defendant must, at the very least, assert on appeal that he would not have admitted the prior felony conviction had a different colloquy taken place.

Young at ¶ 11. In the present case, it is entirely possible Defendant's attorney discussed the rights he was waiving by submitting the matter, and it is further possible, even if Defendant did not know exactly the rights he was waiving, he still would have submitted the matter even if he had know of those rights. Defendant makes no claim he did not know of the rights he was waving, and makes no claim he would not have submitted the matter on the stipulated record had a different colloquy taken place. Defendant thus has failed to allege prejudice.

Defendant contends, once he has shown error in not having a proper colloquy, this Court must remand to the trial court to provide him with the opportunity to prove prejudice. See *Bunting* at ¶ 11. That is contrary, however, to the requirement that, in order to obtain relief on appeal under a fundamental error analysis, the defendant must show **both** error **and** prejudice. *Soliz* at ¶ 11. If Defendant wants to establish prejudice, he will have to file a petition for post-conviction relief where he could allege he did not know of the rights being waived, if that is in fact what happened, and further allege, if he had known of those rights, he would not have proceeded with the submission, if that is in fact what Defendant would have done.

B. *Could the trial court have sentenced Defendant under the statute that did not go into effect until after the date Defendant committed his offense.*

Defendant contends the trial court could have sentenced him under the current version of A.R.S. § 28-1382(I), which provides a trial court may suspend all but 9 days of the 30 days of jail time if the defendant installs a certified ignition interlock device. The Arizona Court of Appeals recently rejected that contention in *State ex rel. Montgomery v. Harris (Maxwell)*, No. 1 CA-SA 12-0290 (Ariz. Ct. App. Mar. 14, 2013). In resolving that case, the court held as follows. Under A.R.S. § 1-244, no statute is retroactive unless expressly declared therein, and this statute contains no expressed declaration that it would apply retroactively. *Harris (Maxwell)* at ¶ 5. Although a procedural change may be applied retroactively, this is a substantive change. *Harris (Maxwell)* at ¶ 6. The inclusion of the language "at the time of sentencing" does not indicate a legislative intent that the statute should apply retroactively. *Harris (Maxwell)* at ¶ 7. No other language in the statute indicates a legislative intent that the statute should apply retroactively.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

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Harris (Maxwell) at ¶ 8. A.R.S. § 1–246 expressly provides, when a penalty is changed, the new penalty “shall not be inflicted for a breach of the law committed before the second took effect, but the offender shall be punished under the law in force when the offense was committed,” thus the change would not apply to offenses committed before the effective date of the new statute. *Harris (Maxwell)* at ¶ 9. Thus, the trial court in the present matter was required to sentence Defendant under the statute as it existed on December 3, 2011, when Defendant committed this offense.

Defendant cites *Knapp v. Cardwell*, 667 F.2d 1253 (9th Cir. 1982), and *State v. Adamson*, 136 Ariz. 250, 665 P.2d 972 (1983), in support of his position. Those cases held Arizona could apply its revised death penalty statute to crimes committed before the effective date of the statute without violating the *ex post facto* clause of the United States Constitution because those changes were both procedural and ameliorative. *Knapp*, 667 F.2d at 1262–63; *Adamson*, 136 Ariz. at 266, 665 P.2d at 988. Thus, if the Arizona Legislature had expressly provided defendants who committed their offenses prior to the effective date of the statute must be sentenced under the new version of the statute, that would not have violated the *ex post facto* clause of the United States Constitution. But the Arizona Legislature made no such expressed provision in the new statute, and thus as discussed above, A.R.S. §§ 1–244 and 1–246 required the trial court to punish Defendant under the law in force when Defendant committed the offense.

III. CONCLUSION.

Based on the foregoing, this Court concludes Defendant failed to establish prejudice as a result of the submission colloquy and therefore has failed to establish he is entitled to relief under a fundamental error analysis, and further concludes the trial court properly sentenced Defendant under the statute as it existed at the time Defendant committed his offense.

IT IS THEREFORE ORDERED affirming the judgment and sentence of the University Lakes Justice Court.

IT IS FURTHER ORDERED remanding this matter to the University Lakes Justice Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen

THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT

031920131410•

Exhibit F

IN THE UNIVERSITY LAKES JUSTICE COURT

MARICOPA COUNTY, STATE OF ARIZONA

STATE OF ARIZONA	)	LC 2011-165609
)	
Plaintiff,	)	TR 2011165609
)	
vs.)	
)	
BENJAMIN DOLINKY,)	
)	
Defendant.)	
_____)	

TRANSCRIPT OF ELECTRONICALLY RECORDED PROCEEDINGS

Chandler, Arizona
August 16, 2012

BEFORE: THE HONORABLE MEG BURTON-CAHILL

TRANSCRIBED BY:

SALLY STEARMAN
Certified Reporter
AZ Certification No. 50401

1

2 **APPEARANCES**3 Representing the State of Arizona:
4 JORDYN RAIMONDO

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6 Representing Benjamin Dolinky:
7 RICHARD D. COFFINGER

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1 THE COURT: Uh-hmm.

2 MR. COFFINGER: This was following the Court's
3 order denying my motion for reconsideration on the
4 suppression.

5 THE COURT: Right.

6 MR. COFFINGER: The case is currently set for a
7 jury trial on August the 31st at 8:00 a.m. in this court.
8 The parties have reached an agreement for a resolution of
9 the case without trial. And that is the reason that waiver
10 of jury trial has been submitted to you.

11 But I wanted to find out whether the Court had
12 previously ruled on a motion that sort of kind of got lost
13 in our emphasis and focus on the Defendant's motion to
14 suppress the blood test results based upon the argument that
15 there wasn't a valid -- arrest for DUI so implied consent
16 wasn't properly invoked. The motion I'm referring to was a
17 motion I filed on April 26th, entitled Defendant's Motion
18 for Discovery Sanction of Preclusion of State's Witness
19 Phoenix Police Detective Kemp Layden.

20 THE COURT: And I remember that motion.

21 MR. COFFINGER: Due to the State's failure to
22 disclose his listing in their integrity file at least seven
23 days before trial. And the State filed a response. And to
24 my knowledge there just never has been a ruling by the Court
25 either granting that motion or denying that.

1 But we would ask the Court to make a ruling on
2 that motion and then we will proceed with -- we will proceed
3 accordingly depending upon what the Court's ruling is.

4 I can give you little background. There was --
5 this Phoenix police officer was working as part of a holiday
6 task force. It was an MCSO stop, an MCSO arrest for
7 possession of marijuana. They transported him to the, sort
8 of the command post. None of the MCSO DRE officers were
9 available so they requested this Phoenix police officer who
10 happened to be on the scene of the command post who was a
11 DRE, Kemp Layden, to perform a DRE on the Defendant. He
12 performed the DRE on the Defendant. He indicated his
13 findings that there was impairment and then they proceeded
14 to draw the blood.

15 What wasn't disclosed at least seven days prior to
16 trial was this -- it's about 50 pages of prior sort of
17 integrity findings that he had done things inappropriately
18 in the past.

19 And so I had filed a motion. The State filed its
20 response, attached basically the same information I had to
21 their response, and basically were arguing no harm/no foul.
22 I mean, we didn't, we didn't disclose it before but we are
23 disclosing it now and we don't think you should be able to
24 talk about it anyway. And that's the issue that we haven't
25 had a ruling on.

1 MS. RAIMONDO: And, Your Honor, from the State,
2 with respect to the integrity file from Kemp Layden, though
3 it was not initially disclosed 10 days before the first
4 trial date, that trial date was then vacated. So for those
5 reasons, Your Honor, the issue is moot because there has
6 been time to review it.

7 The remedy for this type of thing would not be
8 preclusion but rather would be something like a brief
9 continuance such that the defense counsel could be able to
10 review that information.

11 But beyond that, Your Honor, the issue is further
12 moot because as defense counsel admits from his motion he's
13 had the very information in question since 2008. So he has
14 had ample time to review this information.

15 So for those reasons, Your Honor, that was why the
16 State was asking you to deny that motion to preclude the
17 officer from testifying.

18 MR. COFFINGER: And of course, Your Honor, the
19 fact that I knew about it didn't relieve the State of its
20 obligation to disclose it in this case. And this is -- in
21 the prior cases prosecutors timely disclosed it to me. And
22 it's sort of like you tell them, hey, you didn't disclose
23 something you needed to disclose. Oh, here it is now. And
24 the court continued it on their own motion so no harm/no
25 foul.

1 I don't think it is moot. I think the discovery
2 sanction of preclusion is appropriate. But let's just say
3 it's less of the fundamental issue that we seek to raise on
4 appeal than the Court's initial granting of the motion to
5 suppress and then its subsequent reconsideration and denial
6 of the Defendant's motion to suppress. That will be our
7 primary issue on appeal. This would simply be a secondary
8 issue. But I know the trial court needs to rule on it
9 before of you lose jurisdiction by the virtue of a filing of
10 a notice of appeal.

11 THE COURT: Understood. And I am going to deny
12 this motion.

13 MR. COFFINGER: Then we are ready to proceed with
14 the Court reviewing the police reports.

15 THE COURT: Okay.

16 MR. COFFINGER: It's called a submission on the
17 record, Your Honor. We ask that you recall the testimony
18 that was presented during the evidentiary hearing on this.

19 Our intent is to submit the matter for your
20 decision at this time on the police reports as well as the
21 testimony you heard at the suppression hearing, which you
22 will recall focused on whether he was told he was under
23 arrest for DUI. That was the focus of it. But now with the
24 police reports, it will address other issues that weren't
25 the focus of that original evidentiary hearing.

1 MS. RAIMONDO: Did you give her a copy of the
2 report or did you need me to give it to her?

3 MR. COFFINGER: I need you to give it to her.

4 MS. RAIMONDO: Okay, (inaudible).

5 MR. COFFINGER: I didn't make one. I just made
6 the waiver of jury trial.

7 MS. RAIMONDO: Let me just find the blood results
8 and then (inaudible).

9 Michelle, can you make me a copy of this, please?

10 Judge, may I have two State's Exhibit stickers
11 from you, please?

12 THE COURT: Yes, you may.

13 MR. COFFINGER: I'll just go up there (inaudible).
14 Do you have the blood results in there?

15 MS. RAIMONDO: Yeah, she is (inaudible).

16 (Inaudible discussion between counsel)

17 MS. RAIMONDO: Your Honor, State's Exhibit 1 and
18 State's Exhibit 2. 1 being the police report, 2 being the
19 blood results.

20 THE COURT: Okay. I'm going to take a recess for
21 about ten minutes and then we will be back.

22 MR. COFFINGER: Thank you, Your Honor.

23 MS. RAIMONDO: Thank you.

24 THE COURT: And I will have a decision on this and
25 then we will move onto the trial with the other matter.

1 * * * * *

2 THE COURT: And we are back on the record. Please
3 be seated unless you're more comfortable --

4 MR. COFFINGER: If you're going to announce your
5 ruling I think it's appropriate. As if a jury were
6 returning its verdict, we stand for the Court's announcement
7 of its determination.

8 THE COURT: Okay. Based on the documentation and
9 reviewing the file that is before me, I am finding the
10 Defendant guilty.

11 And I believe at this point, okay, I ask the State
12 to give recommendations regarding sentencing.

13 MS. RAIMONDO: Your Honor, with respect to the
14 (A)(1) and the (A)(3) charge, the State just recommends the
15 mandatory minimums under the law and we would ask that
16 (inaudible) found run concurrent to one another.

17 THE COURT: Okay. And, counselor, do you have any
18 recommendation?

19 MR. COFFINGER: Your Honor, I concur with the
20 State's recommendation re sentence.

21 I'm going to advise the Court we intend to file a
22 notice of appeal, ask you to stay all aspects of the
23 sentence upon our filing of the notice of appeal. Don't see
24 the point of having you schedule a confinement date or
25 anything like that.

1 THE COURT: And we will do that. We will do that,
2 counsel. That is not an unexpected direction, you know. So
3 that's fine.

4 I believe in prudence with use of time and energy.
5 Okay. At this point if you will come forward.

6 And, Ms. Raimondo, unless you have something else
7 to --

8 MS. RAIMONDO: Just a bench trial.

9 THE COURT: I was just going to excuse you for a
10 few minutes while we did this. But if you wanted to stay --

11 MS. RAIMONDO: I'm willing to stay. Thank you.

12 THE COURT: Okay. Okay.

13 MR. COFFINGER: Your Honor, the Court I don't
14 think is to proceed with a guilty plea proceedings because
15 it wasn't a guilty plea. It was a trial by -- trial on the
16 record so I don't think we need a guilty plea proceeding
17 form.

18 THE COURT: This is where we --

19 (Inaudible discussion between Court and clerk)

20 THE CLERK: -- so at least do the -- where he puts
21 his fingerprint on --

22 THE COURT: Okay.

23 THE CLERK: -- those charges and then (inaudible)
24 just leave everything else as is.

25 THE COURT: Okay. And, you know, we have -- I

1 have no idea what the action of these forms are that we have
2 but we do not seem to have --

3 THE CLERK: We don't have a submittal one.

4 THE COURT: It just doesn't make any sense to me.

5 Okay. And I'm well aware that the appeal is going
6 to go on. Nonetheless I do need to take a right index
7 fingerprint.

8 And here is the ink pad. And straight down on the
9 ink pad.

10 Be sure to get the ink off your finger, otherwise
11 it ends up where you don't want it.

12 We are going to go to paperless on all of this.

13 MR. COFFINGER: When will that occur?

14 THE COURT: Pardon me?

15 MR. COFFINGER: When will that occur?

16 THE COURT: Well, they are doing it court by
17 court. And had I realized that I -- you know, I should have
18 applied to be moved up in the queue.

19 That goes out on Fridays. Can you see that --

20 THE CLERK: Yeah, I will.

21 THE COURT: Okay.

22 THE CLERK: (Inaudible to Court) address the civil
23 traffic charge.

24 THE COURT: This was McClintock and Southern as I
25 recall.

1 MR. COFFINGER: Yes.

2 THE COURT: Just north of Southern and McClintock;
3 right?

4 THE DEFENDANT: Yes.

5 THE COURT: And I just -- I know that because it's
6 right across -- that's where McClintock High School is and
7 that's why it's posted at 35 miles an hour.

8 MR. COFFINGER: The time of day, my recollection
9 it was after school was out was the time of day.

10 THE COURT: I know. I don't remember what day --
11 the time of day it was.

12 But just some historical knowledge, the reason
13 there is a light there at Alameda is because somebody was
14 killed there decades ago. And before that there wasn't even
15 a light there let alone 35 miles an hour posted.

16 MR. COFFINGER: It says 2027 was the hour. 2027
17 would be 8:27 I believe.

18 THE COURT: I'll suspend the fine on the (A)
19 charge.

20 MR. COFFINGER: Thank you.

21 THE COURT: Just think about that when you drive
22 down that road. It's a relief that they have that. And,
23 you know, high school kids, whether or not it's in school
24 time, you know, there's activities that go on and sometimes
25 they don't think very well. So you have to be prudent.

1 Okay.

2 MR. COFFINGER: Thank you.

3 THE DEFENDANT: Thank you.

4 THE COURT: Good enough. We are going to get a
5 rubber band for that file. Okay.

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I, SALLY STEARMAN, do hereby certify that the foregoing 13 pages are a true and accurate transcript of electronically recorded proceedings, recorded at said time and place, all transcribed to the best of my skill and ability.

14

Dated this 26th day of April, 2013.

15

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— SALLY STEARMAN
Certified Court Reporter
No. 50401

19

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Exhibit G



Maricopa County Justice Courts, Arizona

University Lakes Justice Court 201 E. Chicago St. #101, Chandler, AZ 85225 602-372-3400

STATE OF ARIZONA

VS.

CASE NUMBER: TR201105609

JUDGMENT AND SENTENCE ORDER

☐ MODIFIED (All terms of the original order not modified remain in full force and effect.)

Defendant

THE COURT RENDERS JUDGMENT and Orders as follows:

Violation Codes: FEA 13-3004 A. 28-701A B. 28-1381A1 C. 28-1381A3 D. _____ E. _____

Not Guilty / Not Responsible ☐ ☐ ☐ ☐ ☐

Dismissed ☐ ☐ ☐ ☐ ☐

Guilty / Responsible \$ _____ \$ Susp \$ 0 \$ 493.00 \$ _____ \$ _____

Surcharges waived ☐ ☐ ☐ ☐ ☐

Sentence Suspended ☐ ☒ ☐ ☐ ☐

Attorney Reimbursement \$ _____ \$45.00 Warrant Fee \$ _____ ☐ \$30.00 Default Fee

☐ \$35.00 FARE Delinquent Fee ☐ \$50.00 DV Shelter (Effective for Violations for 7/20/11 to 12/31/11)

☐ FARE Special Collection Fee ☐ \$50.00 DV Address Confidentiality Assessment (Effective 1/1/2012)

Restitution

☐ Restitution shall be paid through the Maricopa County Check Enforcement Program, 301 West Jefferson, #200, Phoenix, Arizona 85003 (602-372-7300) in monthly installments of \$ _____ beginning on the _____ day of _____ and each month thereafter until paid in full. For a total of: \$ _____

DUI (Prison Constr Fund) \$ _____ \$ _____ \$ 500.00 \$ _____ \$ _____

DUI (Addl Assessment) \$ _____ \$ _____ \$ 500.00 \$ _____ \$ _____

EXTREME DUI

(Abatement Assessment) \$ _____ \$ _____ \$ _____ \$ _____ \$ _____

- ☐ The defendant shall pay jail costs for every day served on these charges at the rate of \$189.00 for the first day and \$74.00 for every day thereafter. For a total of: \$ _____
- ☐ The fine shall be reduced if the defendant shows the following proof to the court NO LATER THAN: _____
- ☐ Insurance (in effect on the date of violation) ☐ A new 6-month policy of insurance ☐ Current registration
- ☐ Legible or duplicate driver's license ☐ Reinstated driver's license ☐ Other: _____

ALL AMOUNTS ARE DUE AND PAYABLE TODAY. If you are unable to pay today you must report to the Court's Fines Manager. A \$20.00 time payment fee will be added to fine(s) not paid in full today. Additional penalties will be added to all balances not paid as agreed. Collection costs will be added to all balances referred to a collection agency.

☐ Cash bond of \$ _____ shall be applied as follows:

\$ _____ \$ _____ \$ _____ \$ _____ \$ _____ \$ _____

Any remaining bond is exonerated.

☐ IT IS FURTHER ORDERED: _____

☐ Additional orders as set forth on the JUDGMENT AND SENTENCE ORDER ADDENDUM.

☐ Additional orders as set forth on the DOMESTIC VIOLENCE ADDENDUM.

Until all conditions of this order are completed, you must immediately notify the court in writing, of any change of address or telephone number.

Date: 8/16/12 M. B. Stahl
Justice of the Peace

I acknowledge receipt of a copy of the foregoing Judgment and Sentence Order. I understand that, if I fail to comply, the court will take appropriate action as follows: Direct MVD to suspend my driver's license and/or registration. My privilege to drive will remain suspended until the judgment and any additional penalties are paid in full, or issue an order requiring me to show cause why I should not be held in contempt and a warrant may be issued for my arrest.

- ☐ I am a teacher certified to teach by the Board of Education or I am teaching in a community college district or a charter school.
- ☐ I am not a teacher

Date: 8/16/12 Be D.
Defendant's signature

()
Defendant(s) Name / Address / Phone

Name: Bryan D. ...

Ci: 702-440-225

☐ JUDGMENT AND SENTENCE ORDER ADDENDUM

IT IS FURTHER ORDERED that defendant shall:

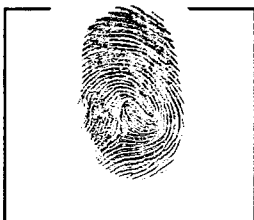
- ☒ 1. Be confined in the Maricopa County Jail for a period of 1 days, as set forth in the Order of Confinement.
- ☒ 10 days in jail (9 days suspended on completion of alcohol or drug screening, education or treatment program)
- ☐ 30 days in jail (all but 10 consecutive days suspended upon completion of alcohol or drug screening, education or treatment program)
- ☐ 45 consecutive days in jail
- ☐ 90 days in jail (all but 30 consecutive days suspended upon completion of alcohol or drug screening, education or treatment program)
- ☐ 120 days in jail (all but 60 consecutive days suspended upon completion of alcohol or drug screening, education or treatment program)
- ☐ 180 consecutive days in jail
- ☐ 2. 30 hours of community restitution service.
- ☒ 3. Participate in an alcohol / drug screening as set forth in the Treatment Order. You must participate in any and all programs, counseling or treatment recommended pursuant to the screening.
- ☒ 4. Participate in the Mother's Against Drunk Driving (MADD) Victim Impact Panel.
- ☐ 5. Participate in and complete hours of community (service) restitution by , at the following location:
- ☐ 6. Participate in counseling at:
- ☐ 7. Show proof of completion by . You are responsible for ensuring the court receives proof of compliance.
- ☒ 8. Defendant's ☒ driving privileges ☐ registration be suspended for day(s) 12 month(s)
- ☒ 9. Ignition interlock ~~extended~~ for day(s) 12 month(s)
- ☐ 10. Additional Orders:

PROBATION ADDENDUM

- ☐ 11. Defendant is placed on probation under the supervision of this court and subject to the terms and conditions checked below for the following violation for a period of month(s) year(s) from this date, ending
- ☐ **IN ADDITION TO COMPLIANCE WITH ALL ORDERS** contained within this judgment and sentence order, which are hereby made apart of and included in the terms and condition of probation, defendant shall:
- ☐ At all times be a law-abiding citizen.
- ☐ Remain gainfully employed or enrolled as a student at all times and shall keep the court advised of such employment or schooling and progress therein.
- ☐ Not drink intoxicating and / or alcoholic beverages to excess.
- ☐ Not knowingly associate with any person of lawless reputation nor with any person who has a criminal record or who is on probation or parole without approval of the court.
- ☐ Not possess or use any drug or narcotic including marijuana or dangerous drugs in violation of any law.
- ☐ Not possess or control any deadly weapon or firearm
- ☐ Not leave the State of Arizona nor change the place of residence without notification and approval of the court.
- ☐ Report to the court at least once each month, in writing, or in person, or at all other such times as directed by the court.
- ☐ Not drive a vehicle in Arizona unless properly licensed by the State of Arizona.
- ☐ Defendant shall have no contact with the victim.
- ☐ Special conditions:

Failure to fulfill all terms of this Order may result in imposition of any suspended or deferred jail time.

- ☐ RIGHT TO APPEAL this judgment will end 14 calendar days after TODAY'S date. A NOTICE OF RIGHT TO APPEAL setting forth the procedures I must follow to exercise this right appears on the back of the Judgment and Sentence Order given me.
- ☐ A NOTICE OF RIGHT OF SETTING ASIDE JUDGMENT and my RIGHT TO POST CONVICTION RELIEF, and the procedures I must follow to exercise these rights, appears on the back of the Judgment and Sentence Order given me.



Right Index Finger

Date: 8-16-12

Bryan D. ...
Defendant



Maricopa County Justice Courts, Arizona

University Lakes Justice Court 201 E. Chicago St. #101, Chandler, AZ 85225 602-372-3400

STATE OF ARIZONA

CASE NUMBER: TR 2011 165609

VS.

Benjamin Dolny
Defendant

JUDGMENT OF GUILT AND SENTENCE

Defendant has personally appeared before this court for sentencing and the court has ascertained the following facts, pursuant to ARS 13-607, noting each by initialing it.

Defendant's date of birth is 9/8/80

Defendant was convicted of:

- ☐ 13-1802 Theft, a class 1 misdemeanor
- ☐ 13-1805 Shoplifting, a class 1 misdemeanor
- ☒ 28-1381A1 Driving while under the influence, alcohol, drugs, toxic vapor or combination, a class 1 misdemeanor
- ☐ 28-1381A2 Driving while under the influence with alcohol concentration of .08 or more, a class 1 misdemeanor
- ☒ 28-1381A3 Driving while under the influence, drugs or metabolite, a class 1 misdemeanor
- ☐ 28-1381A4 Commercial driver driving while under the influence with B.A.C. of .04 or more, a class 1 misdemeanor
- ☐ 28-1382A1 Extreme driving while under the influence (Alcohol content of .15 to .19), a class 1 misdemeanor
- ☐ 28-1382A2 Extreme driving while under the influence (Alcohol content of .20 or more), a class 1 misdemeanor

Counsel for the defendant was Richard Coffinger Bar I.D. 03040

Or,

- ☐ Defendant knowingly, voluntarily and intelligently waived his right to counsel after having been fully apprised of his right to counsel.

The basis for the finding of guilt was by:

- ☐ Trial to jury
- ☐ Trial to court
- ☐ Plea of guilty
- ☒ ~~Plea of no contest~~ Submitted to the court

- ☐ Defendant knowingly, voluntarily and intelligently waived his right to a jury trial when requesting a trial to court.

- ☐ Defendant knowingly, voluntarily and intelligently waived all pertinent rights when found guilty by a plea of guilty or no contest.

The offense ☐ is or ☐ is not of a dangerous or repetitive nature pursuant to ARS 13-604 or 13-604.02.



Right Index Finger

I hereby certify that at the time of sentencing and in open court the defendant's fingerprint was permanently affixed to this document.

Date: 8/16/12

[Signature]
Justice of the Peace

Exhibit H

IN THE SAN TAN JUSTICE COURT
COUNTY OF MARICOPA, STATE OF ARIZONA

COPY

STATE OF ARIZONA,

Plaintiff,

vs.

MUIKAM HO,

Defendant.

No. JC2011-149247

TRIAL

May 10, 2012

TRANSCRIPTION PROVIDED BY

Julie A. Fish
Quick Response Transcription Services
829 East Windsor Avenue
Phoenix, Arizona 85006
602-296-5178

ORIGINAL PREPARED FOR:
CRAIG GILLESPIE, ESQ.

SAN TAN JUSTICE COURT
2012 AUG 14 PM 2:15

1 JUDGE: Okay. We will. Is the -

2 RYBARSYK: She's here.

3 JUDGE: Is - Ms. Ho here? Okay. All right. We can
4 - we can go ahead and proceed into the next trial.

5 RYBARSYK: We need an interpreter, we have one here.

6 JUDGE: Okay. Yeah. We - we have one here. I -
7 what I do need to have - have you, sir, if you would bring Ms.
8 Ho up to the front here. We have a notice of right to appeal.
9 I need to have that notice signed prior to trial. And if -
10 you may have already explained to her the appeal process in
11 the justice court; she needs to come up and sign though.

12 RYBARSYK: Who does?

13 JUDGE: Your client? Ms. Ho.

14 RYBARSYK: She hasn't been convicted yet, why would
15 she want an appeal?

16 JUDGE: Because the rules require us to inform
17 before we proceed with trial; the notice and the steps of a
18 right to appeal. You know, I - I agree with you on that one,
19 it's kind of backwards, but they're telling us that these are
20 required prior to the hearing.

21 RYBARSYK: Okay. She's going to explain that you
22 have some papers to sign, and you have the right to appeal.

23 JUDGE: Okay. Ma'am, what I need her to do is to
24 sign here and date it and then I'm going to give her a copy.
25 And then this is for you, ma'am. Okay? All right. Thank you

1 very much. Case number JC2011-149247, State of Arizona vs. -
2 is it Muikam Ho?

3 HO: Muikam.

4 JUDGE: Muikam? Am I pronouncing that right? Okay.
5 Ms. Ho you've been charged with a Class 1 misdemeanor,
6 prostitution. You've entered a plea of not guilty, and are
7 you ready to proceed here today?

8 HO: Yes.

9 JUDGE: Okay. And for the record, we do have an
10 interpreter here. Ma'am, would you state your name for the
11 record, please?

12 INTERPRETER: (Inaudible). (Inaudible) interpreter.

13 JUDGE: Okay. Thank you, ma'am. State, are you
14 ready to proceed?

15 STATE: Thank you, Your Honor. State (inaudible)
16 opening.

17 RYBARSYK: Likewise.

18 JUDGE: Okay. We'll go ahead and proceed. Call
19 your first witness please.

20 STATE: State would like to call Detective Brian
21 Knuckles to the stand. Knuckles.

22 JUDGE: Do you swear, affirm the testimony you offer
23 the Court's the truth, nothing but the truth so help you God?

24 KNUCKLES: I do.

25 JUDGE: Okay. Have a seat, sir.

1 no bearing in this case. I - I - I take into account all that
2 I heard here today, the testimony, the - the - the - each
3 witnesses' ability to testify and remember what happened.
4 Officer did make some mistakes that he corrected in a
5 supplemental that you, you brought out. He explained that
6 mistake. That happens often where supplementals are done
7 whenever police officers review reports. It's not uncommon.
8 He corrected that on the stand. What I do feel happened, and
9 from what I heard and gathered, it's - it's the believability
10 of each witnesses, and I believe that an offer was made by Ms.
11 Ho of the \$100 and \$200 for certain acts to be performed, and
12 he gave the \$100 and she accepted the \$100. And then, at some
13 point, whatever was going in her mind, I don't know. And -
14 and again, it doesn't matter. She made the offer, she
15 accepted the 100 and I feel that - and my ruling is that she's
16 guilty of the prostitution charge.

17 RYBARSYK: To clarify my argument, it's not whether
18 she gave the money back. The reason she gave the money back
19 proves that she was not a prostitute or she would've kept the
20 money and that she was confused and there was no meeting of
21 the minds, if you will, as to an agreement for sex for money.

22 JUDGE: I understand what you're -

23 RYBARSYK: That's - okay.

24 JUDGE: No, I understand that, and the fact that
25 what - in her mind, why she gave it back is, for me, I don't

1 care because before she attempted to give the money back, she
2 made the offer and she accepted the money. And if she offered
3 - made the offer and he gave it, she accepted it and then all
4 of the sudden realized, okay, what's going on here. I don't
5 know. I don't know what was going on through her mind. Maybe
6 she was confused. I don't know. But that has no bearing on
7 making my decision here today. Any recommendations for the
8 sentencing?

9 STATE: Your Honor, the State recommends statutory.

10 JUDGE: Okay.

11 RYBARSYK: I have nothing to say, other than if
12 there's a jail sentence imposed, I am going to ask you, for
13 the record, for home detention.

14 JUDGE: Okay. I do not do home detention. At this
15 point, I don't have the ability to do home detention per
16 statute. Ms. Ho, the sentencing here today is 15 days in
17 jail. Are you prepared to do your days today or do you want
18 to come and look at a calendar and I'll let you pick the 15
19 days?

20 RYBARSYK: I suspect that she would prefer to look
21 at a calendar and -

22 JUDGE: Okay. Come on up and we'll go over that
23 real quick.

24 STATE: Your Honor, may I be excused?

25 JUDGE: Yes. Thank you all parties for coming.

Exhibit I

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,)	
	)	LC 2011-149247
Appellee,)	
)	
vs.)	
)	
MUIKAM HO,)	
)	
Appellant.)	
_____)	

TRANSCRIPT OF ELECTRONICALLY-RECORDED PROCEEDINGS

Phoenix, Arizona
March 4, 2013

BEFORE: THE HONORABLE CRANE McCLENNEN

TRANSCRIBED BY:

SALLY STEARMAN
Certified Reporter
AZ Certification No. 50401

1 **APPEARANCES**

2

3 For the State of Arizona:
4 ANDREA L. KEVER

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6 For Muikam Ho:
7 DAVID ROSCOE

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1 raised it.

2 THE COURT: All right, okay.

3 MR. ROSCOE: So, Judge, I probably won't need all
4 the time that was allotted me because that was probably the
5 most complicated issue. If I can, I'd like to reserve maybe
6 five minutes or so for rebuttal.

7 So I'll move onto the second issue.

8 And, Judge, the second is issue, is what's
9 happening in these justice courts -- and this has been
10 happening for some time now, much to the annoyance of
11 defense attorneys, is they are telling people prior to trial
12 to sign a form. And the form says you have been convicted,
13 here are your appellate rights. And they have to sign the
14 form, they have fill it out, and they are told this before
15 trial.

16 And the Rule, it says that there is a requirement
17 to notify the Defendant of their rights to appeal, is Rule
18 26.11. And it very clearly says, the first two words in the
19 rule it says, after trial the defendant must be notified of
20 their right to appeal.

21 THE COURT: Now that form, is that contained in
22 the record?

23 MR. ROSCOE: It should be, Judge. It's not
24 attached as an exhibit but it should be part of the Court's
25 file that was transmitted on appeal.

1 THE COURT: All right. Well, unfortunately one of
2 the difficult things with this job is when you start things,
3 start saying things like, well, it should be in the record,
4 you're getting on pretty thin ice. Because I found the
5 justice courts are terrible at what they give to me.

6 And so I am paging through here --

7 MR. ROSCOE: Well, fair enough, Judge. And I
8 would just refer to the record that we definitely have which
9 is the transcript.

10 THE COURT: Well, okay. I think I've got it here.

11 MR. ROSCOE: Okay.

12 THE COURT: And it says Defendant's notice of
13 right to appeal criminal. That's the form you're talking
14 about?

15 MR. ROSCOE: I believe so. May I take a brief
16 look at it?

17 Correct.

18 THE COURT: Then down at the bottom --

19 Wait, don't leave.

20 Is that your client's --

21 MR. ROSCOE: That's correct.

22 THE COURT: Okay.

23 MR. ROSCOE: And so --

24 THE COURT: Well, hang on. Let me see.

25 Well, I'm going to read this through carefully.

1 But reading through, I'm trying to see whether it says,
2 somewhere where it says you have been convicted or you will
3 be convicted.

4 It says: This notice explains your rights and
5 responsibility to file an appeal to Superior Court from an
6 order of final judgment, and your right to an attorney to
7 represent you.

8 You have a constitutional right to an attorney
9 during the appeal stages of your case. This means --

10 I don't know, is there some place that says you
11 have been convicted or you will be convicted?

12 MR. ROSCOE: Well, Judge, I don't know that I had
13 a copy of that. I guess my argument would be, perhaps you
14 can review it yourself prior to writing your order, but
15 whether explicitly it says it or not, my argument is that it
16 implicitly means that.

17 You have the right to appeal. That's something
18 you tell somebody when they've been convicted at the end of
19 the trial. And that's exactly the exchange that happened on
20 page 1 of the trial transcript. The trial judge says, here,
21 come sign for your appellate rights. Trial counsel, who is
22 not us, it was a different attorney --

23 THE COURT: Paul Rybarsyk.

24 MR. ROSCOE: Correct. He objects. She hasn't
25 been convicted yet why would she want an appeal. There is

1 an exchange about that.

2 And, Judge, our position is that this is a due
3 process violation. And the cases that we have cited in our
4 brief say that there is a long line of US Supreme Court
5 cases that say the mere appearance of judicial bias is a due
6 process violation under *Caperton*, *Murchison*, some of the
7 other cases that we have cited in our brief.

8 THE COURT: Well on that, Mr. Rybarsyk never
9 says -- what happens is the judge, who was --

10 Who is the judge here?

11 MR. ROSCOE: I think it was Goodman.

12 THE COURT: Goodman. I think it was Goodman.

13 Judge Goodman says, page one 1, line 8: We have a
14 notice of right to appeal. I need to have that notice
15 signed. And if -- you may have already explained to her the
16 appeal process in justice court. She needs to come up and
17 sign it though.

18 Rybarsyk: Who does?

19 Judge: Your client, Ms. Ho.

20 Rybarsyk: She hasn't been convicted yet. Why
21 would she want an appeal?

22 Judge: Because the rules require us to inform
23 before we proceed, you know. You know, I, I agree with you
24 on that one. It's kind of backwards. But they are telling
25 us that these are required prior to the hearing.

1 Rybarsyk: Okay.

2 She is going to explain that to you -- she is
3 going to explain that to you, have some papers to sign and
4 you have the right to appeal.

5 I'm not sure who Rybarsyk is referring to as she.

6 MR. ROSCOE: I believe that may have been the
7 bailiff in the courtroom who had the paperwork.

8 THE COURT: All right. But anyway, now the thing
9 is what you're saying is, well, this creates an appearance
10 of impropriety. But in effect it makes the client appear
11 that, judge, you've made up your mind and you're going to
12 find my client guilty. That's an appearance of impropriety.

13 MR. ROSCOE: That's correct.

14 THE COURT: I don't see Mr. Rybarsyk saying that
15 anywhere here, because the standard rule is that you are
16 supposed to raise an issue with the trial court if it's
17 something that can be corrected. Because rather than Mr.
18 Rybarsyk on line 21 saying, okay, indicating to me that he's
19 okay with that, what's going on. Rather than saying, Judge,
20 wait a minute, it's not okay. Because what you are doing is
21 conveying to my client that there is no point in having a
22 trial. She will be convicted because what else is there a
23 reason to file an appeal. You are prejudicing my client.

24 The judge says, well, wait a minute, yeah, I
25 understand that. But, you know, I think it's backwards.

1 I'm not -- I haven't made up my mind yet. I've got to
2 hear -- so here is the thing, I have got to listen to the
3 evidence and the State has to prove it to me beyond a
4 reasonable doubt that you have committed the offense. And
5 you will not be convicted until they convince me beyond a
6 reasonable doubt. Now, if they don't convict me -- convince
7 me beyond a reasonable, you are found not guilty. Then as
8 far as this sheet of paper, throw it out because it's not
9 going to mean anything.

10 On the other hand, if -- and that's a big if
11 because it hasn't happened yet, if they convince me beyond a
12 reasonable doubt you will have the right to appeal and these
13 are your rights. Now do you understand that.

14 MR. ROSCOE: Certainly, Judge, that's the exchange
15 we would have liked to have seen happen.

16 THE COURT: Yes.

17 MR. ROSCOE: Judge, if you are saying that defense
18 attorney, the trial counsel didn't strenuously object
19 enough, I will concede that he didn't strenuously object.
20 My position is, he made his objection. The judge responded
21 and said the rules makes us do this.

22 THE COURT: Well, I --

23 MR. ROSCOE: And he said, you're saying the rules
24 and that's the situation. And he didn't object a second
25 time.

1 THE COURT: I don't see him objecting at all.

2 MR. ROSCOE: Well, Judge, he's saying she hasn't
3 been convicted yet why would she want to appeal it. Our
4 position at least is that that's an objection whether or not
5 the word objection is said. I'm not aware of any case law
6 that says the word objection has to actually be said. And
7 so --

8 Our position, Judge, is that he makes an
9 objection, the judge shuts him down. He makes the tactical
10 decision not to start the trial with an argument with the
11 judge and so he accedes to the trial counsel -- denying his
12 objection so he moves on with the trial.

13 THE COURT: You know, if attorneys on both sides
14 adopted the procedure of, I'm not going to start out the
15 trial with an argument to the judge we'd probably cut our
16 court time by at least a third.

17 MR. ROSCOE: (Inaudible). That's my explanation
18 of the record for the purposes of appeal.

19 THE COURT: Yes.

20 MR. ROSCOE: And so my position is that he made an
21 objection. Certainly he could have made a stronger
22 objection. We would have liked to see a stronger objection
23 and then we could see what the judge said. But that's not
24 what happened. And so we have got these cases that say,
25 mere appearance is enough. We don't have to prove actual

1 bias.

2 Now, the State has countered with the fact that
3 many of the cases that we cited, the Supreme Court cases, it
4 was a more serious type of a situation.

5 I'll agree to that. It certainly -- the Supreme
6 Court cases it was a more serious situation. Perhaps the
7 judge (inaudible) contribution, something like that.

8 THE COURT: Uh-hmm.

9 MR. ROSCOE: Nonetheless, the point of the cases
10 is appearance of judicial bias is enough.

11 And, Judge, what I like to do, kind of a little
12 thought experiment on these things, is I imagine every
13 criminal case when I am evaluating the legal issues is a
14 first degree murder because we use the same legal issues, we
15 make the same ruling no matter how serious or unserious the
16 type of charge is.

17 And my argument would be that if you were accused
18 of first degree murder, walked in on the first day of trial
19 and you sat down and you were told to come up and sign for
20 appellate rights you would probably be horrified. And so I
21 think that this is a practice that needs to be stopped.

22 And, of course, you are the person who has the
23 power to stop it. So we're not arguing that you need to
24 find her not guilty. We're just saying, send it back down,
25 let's have a trial where a person is not told before they

1 start implicitly or explicitly -- I haven't had a chance to
2 review the entire form -- that they are being convicted and
3 may need to appeal. And that will stop the practice with
4 all the justice court.

5 That's our argument on that issue, Judge.

6 THE COURT: All right.

7 MR. ROSCOE: And let me move onto the next issue.
8 This is a very simple issue so I won't need to spend much
9 time on it.

10 Rule 604 requires that the interpreter give an
11 oath and be sworn in. The record is clear here that the
12 interpreter was not sworn in. So the question is, well, so
13 what. What does it mean if the interpreter is not sworn in.
14 There is nothing in the rule that says what happens if they
15 fail to swear the interpreter in.

16 So when I first took a look at this issue, my
17 supervisor and I, we reviewed the transcript and noticed
18 that that happened, I did some on preliminary research and I
19 found all the cases that the State has cited. And at first
20 I thought it wasn't a good issue. Then I went and I looked
21 at them in more detail and I realized those cases aren't
22 really saying that. And I'll get into that in just a
23 moment.

24 So I did some other research in the rest of the
25 country to see if I could find anything that's right on

1 point. They don't swear in the interpreter, what happens.
2 And I was only able to locate two cases that directly
3 address that issue and those are the ones that I have cited
4 in my brief.

5 The first one is *Menchaca*, which is a California
6 Court of Appeals case. That was a case where the trial was
7 continued several times. They had the interpreter there,
8 they didn't have the interpreter there. There were issues.
9 And at one point in a pinch defense attorney grabbed his
10 investigator and said, why don't you interpret for us. And
11 then went forward and then that became an issue on appeal.
12 And the California Court of Appeals said very clearly the
13 evidence code requires the administration of an oath. The
14 requirements are mandatory in a criminal proceeding. The
15 failure to administer such an oath is fatal to the
16 constitutional effectiveness of an interpreter. And they
17 said the lack is so fundamental as to result in denial of
18 due process, hence the issue is not waived on appeal.

19 The only other case I found, a Florida case, *Kelly*
20 *v State*, also cited. It says the same thing. Quote: The
21 failure to administer the proper oath to an interpreter
22 renders the interpreter incompetent.

23 And the State -- as I said, there were some cases
24 cited by the State that are Arizona cases. When you first
25 skim them they appear to be fatal to our position. When you

1 read them in more detail, you pick them apart, you see that
2 they are not really saying what it looks like they are
3 saying at first.

4 I'll start with the *Navarro* case, Judge. There is
5 some language in there that says things about interpreters
6 assumed to carry out their duties, that sort of a thing.

7 But that's not actually a case where they fail to
8 swear in the interpreter. That was a case where there was
9 an interpreter and the argument was the interpreter failed
10 to swear in a witness. So it was a different issue. It
11 wasn't an unsworn interpreter. The argument was this
12 interpreter didn't swear in a witness.

13 So all this language, we are going to assume the
14 interpreter (inaudible) carry out their duties, not really
15 the same thing we have here.

16 Here we have an interpreter that wasn't sworn in.

17 There is the *Burris* case they cited. That's
18 really a case where the defense was trying to challenge an
19 interpreter's qualifications. They were saying, we don't
20 know that they really are qualified to be an interpreter. A
21 similar issue but not the same issue as an unsworn
22 interpreter. And so I would argue that that is not on
23 point.

24 And the same thing with the *Broadhead* case they
25 cited. That was actually a case where there was a parole

1 revocation hearing and they were having a back and forth,
2 can we -- do we have to swear in witnesses at parole
3 revocation hearings. Not really relevant to this which is a
4 Rule 604 case.

5 And so in sum, based on the case law that's
6 provided, the only cases that are directly on point
7 immediately are from other jurisdictions and obviously not
8 binding. But I would argue they are persuasive. And they
9 say that the failure to swear in the interpreter is a due
10 process violation and then we would send it back down. And
11 the language from *Menchaca* is something like -- and I put it
12 in my brief -- it is our opinion that nothing less than a
13 sworn interpreter at the defendant's elbow will suffice.

14 And, Judge, I would argue that the reason it's due
15 process and the reason it's different than just a failure to
16 swear a witness is that there is some language in one of the
17 cases that says, if you have an interpreter that's unsworn
18 that's due process because you might have an issue where the
19 defendant is not properly understanding the proceedings.
20 And they have this language about imagine are in a
21 soundproof box during your trial. You can't participate.
22 And that is why it rises to the level of a due process
23 violation.

24 Whereas if you simply have an unsworn witness it
25 doesn't necessarily rise to a due process violation because

1 if they have -- if they are not telling the truth you get to
2 cross-examine them. You get to ask them questions. And you
3 ferret out the fact that they are not telling the truth, not
4 something that happens with interpreters.

5 THE COURT: Well, what if you had a situation
6 where the Court swears in the interpreter and then the
7 interpreter starts interpreting. And let's say the
8 defendant doesn't speak English at all but the defendant has
9 some family members there who happen to be all bilingual and
10 very skillful at knowing the relationship with English and
11 whatever their native language is. And they are listening
12 to this. And then suddenly they start realizing that this
13 interpreter, although they are sworn to tell -- to interpret
14 properly, just isn't interpreting it properly. And would
15 that be the kind of due process violation, similar due
16 process violation?

17 MR. ROSCOE: I think that that might be a
18 different issue simply because the facts that you just
19 pointed out reminds me of one of the cases that was cited by
20 the Court in *Navarro*. *Navarro* is one of the cases, the
21 Arizona cases cited by the State.

22 They cited a 1st Circuit case out of Florida
23 called *Defino Martone*.

24 In that case they said that there was no due
25 process violation because defense counsel was bilingual in

1 the same language that was being translated and defense
2 counsel should have brought it to the attention at the time.
3 Should have made it known to the Court. And by failing to
4 do that it waived the issue.

5 This is a different situation because there is
6 nobody there except for the interpreter who knows whether
7 everything is being successfully translated. You have
8 Mr. Rybarsyk, only speaks English. Of the relevant
9 languages here, he only speaks English. Ms. Ho only speaks
10 Cantonese or whatever it was. And the interpreter is the
11 only person in the courtroom that speaks both.

12 THE COURT: But as far as swearing in the
13 interpreter, that's typically done in English.

14 MR. ROSCOE: That's true. But then there is a
15 record that that has been done and the person is held
16 accountable.

17 THE COURT: And so Mr. Rybarsyk -- you know,
18 that's what I'm getting to. Mr. Rybarsyk never said
19 anything about it, that he said, oh, hey, Judge, you never
20 swore in the interpreter.

21 Oh, thank you for reminding me. Interpreter, do
22 you solemnly swear that the interpretation, blah blah blah
23 blah, and he goes through.

24 And the interpreter says, of course, I do it all
25 the time.

1 Done deal.

2 MR. ROSCOE: Right.

3 THE COURT: And, you know, as far as it being a,
4 you know, fundamental error -- because there is no objection
5 here so it has to be fundamental error -- as far as when we
6 are looking at errors, if we have the two situations, we
7 have what happened here, nobody put the interpreter under
8 oath. We have the other situation I pose, that the
9 interpreter is under oath and just misinterprets everything
10 and we know it because there are people sitting there and
11 they're listening to it. And they know this is just
12 garbage.

13 But versus another one where the interpreter is
14 not under oath but you have got the same people sitting
15 there and saying, boy, that's a sharp interpreter. Every
16 single thing, word for word, right spot on, gosh, I wish I
17 could -- you know, perfect. You know, no problems.

18 So what's worse not putting them under oath and or
19 not interpreting properly?

20 MR. ROSCOE: Well, that's two questions you pose.
21 I'll address them one at a time.

22 The first is, does the fact that Mr. --

23 THE COURT: Rybarsyk.

24 MR. ROSCOE: -- Rybarsyk fail to object waive the
25 issue, which is something that the State has argued.

1 THE COURT: Yes.

2 MR. ROSCOE: We cited -- I can't remember exactly
3 which case it was about that. I would argue that that case
4 says that you waive the issue if a witness is not sworn.
5 And I will agree that that -- if you don't, if you don't
6 object to a witness being unsworn you waive the issue for
7 purposes of appeal.

8 THE COURT: Uh-hmm.

9 MR. ROSCOE: There is no Arizona case that I am
10 aware of that says the same is true if you fail to, to swear
11 the interpreter. And I would argue that there's a
12 difference and that's the same difference that I just went
13 through which is to address this question, is that if the
14 witness is unsworn it's not a big deal because you get to
15 cross-examine them, ferret out the truth. So if they are
16 sitting up there lying it's not as big of a deal as if the
17 interpreter is misinterpreting everything.

18 Let's say you have some rogue interpreter who is
19 just misinterpreting everything. They can't be held
20 accountable because they haven't been sworn. That's the
21 difference between the two. So that's my answer to the
22 first issue.

23 The second issue, Judge, I would say that's a
24 little bit harder to differentiate. I would agree with you.
25 I would just say that the answer to that is the only case

1 law that is out there says that it's a fundamental issue
2 because this is a rule. It's a mandatory criminal
3 procedure. It is to be followed. And that's the result
4 that happens if you don't do it.

5 And I would say again that a situation where
6 somebody is misinterpreting could be caught by somebody. In
7 that situation, let's say you have got the family members,
8 you have got the defense counsel who understand it, they
9 would be duty-bound to point something out. But if it's
10 just failure to be sworn we don't know if they are
11 successfully translating. And so I would argue -- our
12 position is that's (inaudible).

13 THE COURT: Well, the thing is about fundamental
14 error, fundamental error in Arizona is that fundamental
15 error requires you -- well, to prevail on a claim of
16 fundamental error it requires the appellant -- typically in
17 this case would be the defendant -- to prove two things.

18 Number 1, error happened; and,
19 Number 2, prove that the person was prejudiced by
20 the error.

21 Now fundamental error is not, in Arizona it's just
22 not error that, well, as long as you can stamp a label of
23 fundamental error on it then it excuses the requirement of
24 objecting. That's not the rule in Arizona.

25 You have to prove error and you have to prove

1 prejudice. Because in Arizona you only have -- you're only
2 relieved from the obligation of proving prejudice if you can
3 get it in the category of structural error.

4 With fundamental error you have to prove
5 prejudice, and you're kind of saying like, well, you're
6 going one step, two step. Because you're saying, well, the
7 error here is not putting them under oath and that means
8 they may not be translating properly. Well, that's the --
9 if in fact they're translating properly -- for example, this
10 was, this transcript, this came from a CD; correct?

11 MR. ROSCOE: It did.

12 THE COURT: Then you could in fact -- because on a
13 CD I'm sure you hear the things said --

14 Well, I don't know. Do you hear both the English
15 and the Chinese?

16 MR. ROSCOE: Judge, I assume so. To be honest
17 with you, we got it transcribed and I have been working off
18 the transcript.

19 THE COURT: Right. Well, assuming that you got
20 both the English and the Chinese, you could have somebody
21 sit down there and listen to that, and say, well, wait a
22 minute, here is a mistake here, here is a mistake here, here
23 is a mistake here. But the mistake is in the translating,
24 not in the taking the oath. Because it seems to me, so you
25 omit the oath. If you have the best Mandarin or Cantonese

1 or whatever Chinese interpreter in the world who is
2 interpreting exactly 100 percent spot on, but they were
3 never put under oath, where is the, where is the prejudice?

4 MR. ROSCOE: Well, Judge, and I think you're
5 raising a point that was brought by the State --

6 THE COURT: Uh-hmm.

7 MR. ROSCOE: -- which is they are saying that you
8 have to present evidence that there was some sort of
9 interpreter misinterpretation.

10 THE COURT: Uh-hmm.

11 MR. ROSCOE: And, you know, our position is we
12 don't actually have to demonstrate that. All the case law
13 that's on that issue is talking about if you want to
14 directly attack the interpreter's qualifications, that's
15 what you have to do. That's not addressed in any of the
16 Arizona cases on the issue.

17 I would argue that if that is a requirement then I
18 would direct you to pages 42 through 44 of the trial
19 transcript. There is an exchange there where the trial
20 judge starts questioning the witness and essentially
21 grilling the Defendant himself. And there is quite a back
22 and forth and her answers are kind of all over the place.
23 And he even comments that she's not answering the questions.
24 The prosecutor chimes in, her answers are all over the
25 place. I would just -- our position would be that if that

1 was required that would be a portion of the transcript
2 (inaudible).

3 THE COURT: All right. All right.

4 Well, Ms. Kever.

5 MS. KEVER: Thank you, Your Honor.

6 The State will be brief. Actually, I'm kind of
7 disappointed that he waived issue number 1 because that was
8 the issue that I was looking forward to arguing the most.

9 However, Your Honor, with regards to the issue of
10 the trial judge offering Appellant a copy of her appeal
11 rights before the trial took place, Appellant has not been
12 able to prove that she was either biased or prejudiced when
13 that happened.

14 THE COURT: Well, she meaning?

15 MS. KEVER: The Defendant, the Appellant.

16 THE COURT: Uh-hmm, uh-hmm.

17 MS. KEVER: Has not been able to prove that by
18 receiving a copy of her appeal rights that the judge was
19 acting with bias or with prejudice towards her or that she
20 suffered any bias or prejudice on the trial court's offering
21 her the appeal rights before trial.

22 It's indicated in the transcript that the trial
23 court judge was following a rule and that he believed he
24 needed to do this.

25 And Appellant's counsel did not say, no, this is

1 improper procedure, Your Honor, you need to do this after my
2 client has been convicted. Appellant's counsel just kind of
3 cavalierly said, well, okay, if that's what you want to do,
4 Judge, go ahead.

5 THE COURT: Now, the question I have is what was
6 the prosecutor doing when this happened? Your answer is, I
7 have know way of knowing.

8 MS. KEVER: I have no I way of knowing, Your
9 Honor.

10 THE COURT: All I can think of is the prosecutor
11 is out in la-la land and I guess I -- I find it
12 interesting -- I can't find -- I can't tell who the
13 prosecutor was. The prosecutor never identifies himself or
14 herself.

15 Well, wait a minute.

16 Do you have any of idea who the prosecutor was?
17 It just keeps referring to State.

18 MS. KEVER: That's correct, Your Honor.

19 And all I have in the trial file are squiggles
20 for signatures. And I have that Caroline Escalante was the
21 Deputy County Attorney who issued the criminal subpoenas in
22 this matter.

23 MR. ROSCOE: I believe that was the prosecutor.

24 THE COURT: Carol Escalante?

25 MR. ROSCOE: Caroline.

1 MS. KEVER: Caroline Escalante.

2 THE COURT: You know, always thinking facetiously,
3 do the prosecutors also wear a paper bag over their head
4 doing these?

5 Because in all seriousness, I can tell you this,
6 I'm getting tired of the sloppiness of the county attorney's
7 office. It's like, well, we can go to sleep. We can screw
8 off. We can text mail or whatever we're doing. And we can
9 make all sorts of mistake that we could have corrected and
10 we will just leave it to somebody down the road, either our
11 appellate department -- you, Ms. Kever -- to try to bail us
12 out or it's going to go to Judge McClennen, and we'll just,
13 you know, we'll just dump it on him. We will make him
14 figure out a way of cleaning up our garbage.

15 I can tell you this, Ms Kever, and you can tell
16 your people, I'm getting tired of cleaning up the county
17 attorney's garbage.

18 And this gets back to the County Attorney, William
19 Montgomery. He's elected here. And I don't think he --
20 well, maybe he doesn't care. Maybe it's just, hey, I'm too
21 busy going after illegal aliens and people smoking pot. I
22 don't worry about what happens in the lower court because
23 that's just a big joke anyway. And besides, we put our
24 least -- attorneys with least ability there so I don't
25 expect them to be doing anything other than just screwing up

1 all along, so I really don't care.

2 If that's his attitude then I guess you and I are
3 going to have to try to clean up the garbage that these
4 people strew along these transcripts.

5 But if he really cares about it and if the
6 appellate department cares about it, and if whoever is in
7 charge of doing the lower court prosecuting cares about it,
8 they ought to tell these people to ship -- to straighten,
9 up, shape up or ship out.

10 MS. KEVER: Your Honor, it is my understanding
11 that Mr. Montgomery is trying to take care of some issues
12 that are currently taking place in the lower courts. He has
13 appointed Lee White from vehicular to work as a mentor. And
14 I am having a meeting with her this week where she and I are
15 going to sit down and we are going to discuss some of the
16 issues that are currently going on in the justice courts at
17 this time.

18 THE COURT: I think what you need to do -- far be
19 it for me to tell Mr. Montgomery how to run his office. But
20 I would suggest that because these things come through you,
21 as you see the problems, you make sure the problems get back
22 to the attorney, like -- what was this attorney's name
23 again?

24 MS. KEVER: Caroline Escalante.

25 THE COURT: Get back to Ms. Escalante and say,

1 what were you doing? How did you let this go by? Why
2 didn't you say, Judge, excuse me, you didn't swear the
3 interpreter in.

4 Oh, I'm sorry. Would you raise your hand?
5 Issue goes away.

6 And also this other thing, Mr. Roscoe says that
7 the standard practice in justice court is to tell them the
8 appeal rights before they even start a trial. Is that in
9 fact what happens down there?

10 MS. KEVER: This is the first time that I have
11 ever seen this, Your Honor.

12 THE COURT: Well, I will tell you what I will do,
13 because every month when we have the meeting of municipal
14 court judges, the presiding judge of the justice courts,
15 Steve McMurdie is there. I'll sure tell him about this
16 problem and I'm sure he will bring it up at their meeting.
17 And I hope that will tell them, disabuse the judges, there
18 is no rule that says you do it at the front end. It says --
19 now it does say -- well, it says you have to do it after
20 judgment and sentence. It never says you are prohibited
21 from doing it before but it does seem backwards. But I'm
22 sure -- I'm not sure how this judge ever thought that the
23 rules said you have to do it at the front end. It indicates
24 to me the judge never read the rules or is getting some
25 really bad information.

1 Anyway --

2 MS. KEVER: Yes, Your Honor.

3 And, Your Honor, with regards to the interpreter
4 not being sworn, again, this was not raised at the trial
5 court level. And again Appellant cannot say that she was
6 prejudiced by not having the interpreter sworn.

7 It appears from the transcripts that even
8 though -- and the pages that counsel had us -- had noted I
9 believe, 40 through -- 42 through 45, he indicated that
10 Appellant's answers were kind of all over the place but that
11 was her testimony. There was no indication that the
12 Cantonese interpreter was misinterpreting what the appellant
13 was saying. And it appeared from the record that Appellant
14 understood what was -- the exchange that was taking place in
15 the courtroom that day from the Cantonese interpreter.

16 Also I would assume -- and this is big assumption
17 on my part -- that Maricopa County Superior Court would have
18 a listing of interpreters that would be substantially
19 qualified to interpret in this courthouse.

20 THE COURT: All right. Anything else?

21 MS. KEVER: No, Your Honor. Thank you.

22 THE COURT: All right. Mr. Gillespie.

23 MR. ROSCOE: I'm sorry, Judge. Mr. Gillespie is
24 my supervisor.

25 THE COURT: I'm sorry. I'm sorry.

1 MR. ROSCOE: That's all right.

2 I think we have sufficiently covered everything
3 (inaudible).

4 THE COURT: All right. Well, I'll take the matter
5 under advisement and rule as soon as I can.

6 MR. ROSCOE: Thank you, Judge.

7 THE COURT: All right.

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I, SALLY STEARMAN, do hereby certify that the foregoing 29 pages are a true and accurate transcript of electronically recorded proceedings, recorded at said time and place, all transcribed to the best of my skill and ability.

Dated this 24th day of April, 2013.

SALLY STEARMAN
Certified Court Reporter
No. 50401

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STATE OF ARIZONA
COMMISSION ON JUDICIAL CONDUCT

Inquiry concerning)	Case No.: 13-074
Judge Crane McClellenn	)	STATEMENT OF CHARGES
Superior Court)	
Maricopa County)	
State of Arizona,)	
)	
)	
)	
Respondent,)	

An investigative panel of the Commission on Judicial Conduct (Commission) has determined that there is reasonable cause to commence formal proceedings against Judge Crane McClennen (Respondent) for misconduct in office. This statement of charges sets forth the Commission's jurisdiction and specifies the nature of the alleged misconduct.

JURISDICTION

1. The Commission has jurisdiction of this matter pursuant to Article 6.1, § 4 of the Arizona Constitution.

2. This Statement of Charges is filed pursuant to Rule 24(a) of the Rules of the Commission on Judicial Conduct (Commission Rules).

3. Respondent has served as a superior court judge in Maricopa County since 1997, and was serving in his capacity as a judge at all times relevant to these allegations.

4. As a judge, Respondent is subject to the relevant provisions of the Code of Judicial Conduct (Code) as set forth in Supreme Court Rule 81.

PRIOR DISCIPLINE

5. Closed files pertaining to discipline of Respondent may be referred to and used by the Commission or by Respondent for the purpose of determining the severity of the sanction, a pattern of misconduct, or exoneration of the judge pursuant to Commission Rule 22(e).

6. Consistent with the requirements of Commission Rule 22(e), undersigned Disciplinary Counsel (Counsel) notified Respondent on July 5, 2013, that his prior disciplinary history may be referenced.

Private Reprimand

7. On June 21, 2002, during a hearing regarding the retrial in a criminal matter, Respondent made statements on the record suggesting that the Maricopa County Attorney's Office pursued different prosecution strategies in two different cases based on the race of the potential defendants. In other words, Respondent impugned the integrity of the prosecutor's office by inferring a racist motive to the office's charging decisions. During this same hearing, Respondent discussed and relied on information he obtained by independently investigating some facts.

8. On December 17, 2002, the Commission privately reprimanded Respondent for making improper rhetorical and inflammatory comments about the Maricopa County Attorney's office and conducting his own investigation into the facts of an unrelated case, which he then relied upon in making his rulings.

Public Reprimand

9. On February 12, 2012, Respondent presided over an oral argument in an appeal from justice court of a criminal matter. During the oral argument, Respondent made several disparaging remarks impugning the integrity and professional conduct of an attorney appearing before him.

10. On December 4, 2012, the Commission publicly reprimanded Respondent for his improper comments and demeanor.

FACTUAL BACKGROUND

11. On January 28, 2013, Respondent presided over oral argument in an appeal from the justice court in *State v. Julius*, LC 2011-163114¹. During the argument, Respondent made improper comments directed at both the prosecutor's office and defense counsel.

12. With regard to the Maricopa County Attorney's Office, Respondent made sarcastic remarks impugning the integrity of prosecutors.

13. For example, Respondent suggested that the prosecutor assigned to the justice court matter "sat there like a bump on a log and was so oblivious to what was going on . . . probably was text messaging . . . Not listening, sitting around, daydreaming or something."

14. With regard to defense counsel, Respondent threatened to report the attorney to the State Bar of Arizona for professional misconduct because the

¹ The proceedings referenced in these charges were captured in a For the Record (FTR) recording. An informal transcription of the relevant portions of the recordings is attached as Exhibit A to the Charges.

1 attorney did not alert a justice of the peace who failed to abide by certain procedural
2 requirements.

3 15. Respondent also engaged in an inappropriate sarcastic demeanor and
4 made comments suggesting a political bias: “[Laughs] That’s the way Mr.
5 Montgomery likes to run his office? Boy, maybe if the voters knew that, hey, I may
6 be the County Attorney, but you know, my deputies don’t have to be there, you
7 know, take time out of their busy schedule to do things like represent the state at
8 sentencing, so we’ll just skip that. [Laughs]”
9
10

11 16. Respondent’s comments in this case occurred in proceedings taking place
12 less than two months after he received a public reprimand from the Commission for
13 similarly improper comments.
14

15 17. On March 4, 2013, Respondent presided over oral argument in an appeal
16 from the justice court in *State v. Ho*, LC 2011-149247. During the argument,
17 Respondent again made inappropriate comments impugning the integrity of and
18 personally attacking members of the Maricopa County Attorney’s Office, including
19 the inference of politically motivated attacks against the County Attorney himself.
20

21 18. Specifically, Respondent made the following comments:

22 I was thinking facetiously, do the prosecutors also wear a paper bag
23 over their head during these? Because in all seriousness, I can tell you
24 this, I’m getting tired of the sloppiness of the County Attorney’s Office.
25 It’s like, well, we can go to sleep. We can screw off. We can text mail or
whatever we’re doing.

* * *

26 And this gets back to the County Attorney, William Montgomery. He’s
27 elected here, and I don’t think he, well, maybe he doesn’t care. Maybe
28 it’s just, hey, I’m too busy going after illegal aliens and people smoking
pot. I don’t worry about what happens in the lower court, because

1 that's just a big joke anyway. And besides, we put our attorneys with
2 least ability there, so I don't expect them to be doing anything other
than just screwing up on the law, so I really don't care.

3 19.To the extent Respondent's comments described above related to his
4 personal or political opinions about the Maricopa County Attorney and his office,
5 they were not protected by the United States Supreme Court's ruling in *Republican*
6 *Party of Minnesota, et. al. v. White*, 536 U.S. 765 (2002). In that case, the Court
7 ruled that candidates for judicial election are entitled to protection under the First
8 Amendment for announcing their views on disputed legal and political issues.
9 Importantly, the Court's ruling was specific to the judicial election arena, which is
10 controlled by Canon 4 of the Code of Judicial Conduct (Code), and did not involve
11 judicial speech in court.²

12 20.Respondent's misconduct in the underlying cases here did not occur in the
13 context of a judicial election. Rather, Respondent made the improper comments at
14 issue from the bench, implicating rules in Canons 1 and 2.

15 VIOLATIONS OF THE CODE OF JUDICIAL CONDUCT

16 21.Respondent's conduct, as described above in Paragraphs 11-20, violated
17 the following provisions of the Code and Arizona Constitution. Specifically:

18 A. Rule 1.2, which requires a judge to "act at all times in a manner that
19 promotes public confidence in the independence, integrity, and impartiality of the
20 judiciary";

21
22
23
24
25
26
27
28 ² In 2002, Canon 5 governed the ethical conduct of judicial candidates, but under the
current version of the Code, the relevant rules are found in Canon 4.

1 B. Rule 2.2, which requires a judge to “perform all duties of judicial office
2 fairly and impartially”;

3 C. Rule 2.8(B), which requires a judge to be “patient, dignified, and
4 courteous” to lawyers; and
5

6 D. Article 6.1, Section 4, of the Arizona Constitution, which forbids a
7 judge to engage in conduct that is prejudicial to the administration of justice that
8 brings the judicial office into disrepute.
9

10 REQUESTED RELIEF

11 WHEREFORE, Disciplinary Counsel hereby requests that the members of
12 the Hearing Panel recommend to the Supreme Court that Respondent be censured,
13 suspended, or removed from judicial office; that costs be assessed against
14 Respondent pursuant to Commission Rule 18(e); and that the court grant such other
15 relief as it deems appropriate.
16

17 Dated this 15th day of July, 2013.
18

19 COMMISSION ON JUDICIAL CONDUCT

20 _____
21 Jennifer M. Perkins
22 Disciplinary Counsel

23 Copies of this pleading hand-delivered
24 On July 15, 2013, to:

25 Hon. Crane McClennen

26 *Respondent*

27 By: _____
28

EXHIBIT A

State v. Julius (Jan. 28, 2013 argument)

MR. COFFINGER (Defense counsel): Do I have an obligation to tell this judge who's not doing it right, "Judge, you're not doing it right"?

JUDGE MCCLENNEN: Yes

MR. COFFINGER: That's the question.

JUDGE: Yes

MR. COFFINGER: I don't think so.

JUDGE: Oh, so in other words . . . We're not talking about the prosecutor, and Ms. Kever [the assigned prosecutor] can discuss that. About how the prosecutor sat there like a bump on a log and apparently was so oblivious to what was going on, that didn't know what was happening, probably was text messaging to find out, you know, something else. Not listening, sitting around daydreaming, or something, to let this happen. But you can get into that Ms. Kever. Because you weren't there obviously, you have no reason to know what happened. So you probably cannot opine on that, although I assume the prosecutor was from your office.

MS. KEVER: That is correct, Your Honor.

JUDGE: Yeah, well. [Laughs] I don't suppose you ever talk to the prosecutor and say, you know, Joe or Bob or Susan or Betty, you just blew this one. I don't suppose you talked to them, did you?

MS. KEVER: Ah, no.

JUDGE: Why not? It might be a good idea in your office when some prosecutor sits there and lets some case potentially go down the toilet. Do you call them and say, you know, you almost let this case go down the toilet, what were you doing? Did you ever think about calling the prosecutor?

MS. KEVER: Ah –

JUDGE: Yes or no?

MS. KEVER: Yes

JUDGE: You thought about it?

MS. KEVER: Yes.

JUDGE: Did you?

MS. KEVER: No.

JUDGE: You chose not to?

MS. KEVER: Correct.

JUDGE: Why not?

MS. KEVER: Ah, because –

JUDGE: It's not my job.

MS. KEVER: It's not that it's not my job. I didn't feel that it was my place. However, there are things that are going on in the courtroom that I am going to be having a discussion with my supervisor about to take this to the supervisor, because we are getting a lot of appeals out of this courtroom where the prosecutors are not present during sentencing, during fundamental things that are proceeding.

JUDGE: When you say this courtroom, you mean the justice court?

MS. KEVER: Yes, sir.

JUDGE: You're not talking about my court?

MS. KEVER: No, sir, I was talking about Meg Burton-Cahill's courtroom.

JUDGE: Alright. Well, we'll get to you.

But Mr. Coffinger, so what you're saying is, when you sit there and you see the judge fail to do what the judge is required to do, you get to sit there and say, oh boy, we got an appeal issue here. Let's just sit there and let it sit, because if I don't like what's happening, I'll raise that on appeal. I'll get this thing reversed and sent back, and who knows what will happen. Because when we get it sent back, possibly the State's witnesses will be all gone, and they won't be able to prove a case, and therefore, I'll force the State to dismiss this case, and my client gets to walk. That's a great strategy.

MR. COFFINGER: My duty is to my client. My duty is not to a lay judge who has under Arizona law entitled to serve in the office of justice of the peace, who may not be familiar, wasn't law trained through law school, and I have my duty is to my client.

JUDGE: And you have no duty to the court? You have no ethical duty if you see an error like this happening, you have no ethical duty to say anything about it?

MR. COFFINGER: In the quantum of who is my duty to, I believe my duty is to the client. I told her it was going to be a test case –

JUDGE: I'll tell you what, Mr. Coffinger, two of these cases of yours, if I see a third one, from this point on, rest assured I will file a complaint with the State Bar pointing out your failure to point out the mistake to the judge. Now, if you want to go ahead and not point it out, and say alright, McClennen's off-base in sending this complaint to the Bar Association, and I'll fight it out with the Bar Association, be my guest, but I will do it. You understand that?

MR. COFFINGER: I do.

[Some additional argument and discussion with defense counsel]

JUDGE: I think the State blew it on that . . . The prosecutor may have cost the State \$3500 under that call . . . If that's the way Mr. Montgomery wants to run his attorneys, I'm not gonna get involved in his supervision of his attorneys.

[Conclusion by Mr. Coffinger]

MS. KEVER: Your Honor, with regards to the sentencing issue that the counsel just brought up, it's my understanding there was no prosecutor present at sentencing.

JUDGE: [Laughs] That's the way Mr. Montgomery likes to run his office? Boy, maybe if the voters knew that, hey, I may be the County Attorney, but you know, my deputies don't have to be there, you know, take time out of their busy schedule to do things like represent the state at sentencing, so we'll just skip that. [Laughs]

MS. KEVER: Your Honor, there are a few other appeals filed by the State that are going to be hitting your office where again the State was not present during sentencing.

JUDGE: I'm certain you've brought that up to their supervisors.

MS. KEVER: Yes, I have. Hopefully this issue will be corrected.

JUDGE: [Laughs] Hope springs eternal.

State v. Ho (March 4, 2013 argument)

JUDGE MCCLENNEN: I was thinking facetiously, do the prosecutors also wear a paper bag over their head during these? Because in all seriousness, I can tell you this, I'm getting tired of the sloppiness of the County Attorney's Office. It's like, well, we can go to sleep. We can screw off. We can text mail or whatever we're doing. And we can make all sorts of mistakes that could have corrected, and we'll just leave it to somebody down the road, either our appellate department, you Ms. Kever, to try to bail us out, or it's gonna go to Judge McClennen and we'll just, you know, dump it on him. We'll make him figure out a way of cleaning up our garbage. And I can tell you this, Ms. Kever, and you can tell your people, I'm getting tired of cleaning up for the County Attorney's garbage.

And this gets back to the County Attorney, William Montgomery. He's elected here, and I don't think he, well, maybe he doesn't care. Maybe it's just, hey, I'm too busy going after illegal aliens and people smoking pot. I don't worry about what happens in the lower court, because that's just a big joke anyway. And besides, we put our attorneys with least ability there, so I don't expect them to be doing anything other than just screwing up on the law, so I really don't care. If that's his attitude, then I guess you and I are gonna have to try to clean up the garbage that these people strew along these transcripts. But if he really cares about it, and if the appellate department cares about it, and if whoever is in charge of doing the lower court prosecuting cares about it, they ought to tell these people to ship, to straighten up, shape up or ship out.

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STATE OF ARIZONA
COMMISSION ON JUDICIAL CONDUCT

Inquiry concerning)	Case No.: 13-074
Judge Crane McClennen)	
Superior Court	)	STIPULATED RESOLUTION
Maricopa County)	
State of Arizona,)	
)	
Respondent,)	

COME NOW Judge Crane McClennen, Respondent, and Jennifer Perkins, Disciplinary Counsel for the Commission on Judicial Conduct (Commission), and hereby submit the following proposed resolution of this case pursuant to Rule 30 of the Commission Rules.

JURISDICTION

1. The Commission has jurisdiction of this matter pursuant to Article 6.1 of the Arizona Constitution.

2. Respondent has served as a superior court judge in Maricopa County since 1997, and was serving in his capacity as a judge at all times relevant to the facts contained herein.

3. As a judge, Respondent is and has been subject to the relevant provisions of the Code of Judicial Conduct (Code) as set forth in Supreme Court Rule 81.

PROCEDURAL BACKGROUND

4. On July 15, 2013, Disciplinary Counsel filed a Statement of Charges against Respondent after an investigative panel found reasonable cause to begin formal proceedings. In lieu of submitting an Answer to the Charges, Respondent agreed to this stipulated resolution of the matter.

STIPULATED FACTS

5. On January 28, 2013, Respondent presided over oral argument in an appeal from the justice court in *State v. Julius*, LC 2011-163114. During the argument, Respondent made comments directed at both the prosecutor's office and defense counsel.

6. With regard to the Maricopa County Attorney's Office, Respondent made sarcastic remarks impugning the integrity of prosecutors.

7. For example, without receiving any evidence as to the actual conduct of the prosecutor assigned to the underlying justice court matter, Respondent suggested that the prosecutor assigned to the justice court matter “sat there like a bump on a log and was so oblivious to what was going on . . . probably was text messaging . . . Not listening, sitting around, daydreaming or something.”

8. Respondent also engaged in an inappropriate sarcastic demeanor, as follows: “[Laughs] That’s the way Mr. Montgomery likes to run his office? Boy, maybe if the voters knew that, hey, I may be the County Attorney, but you know,

1 my deputies don't have to be there, you know, take time out of their busy schedule
2 to do things like represent the state at sentencing, so we'll just skip that. [Laughs]"

3 9. On March 4, 2013, Respondent presided over oral argument in an appeal
4 from the justice court in *State v. Ho*, LC 2011-149247. During the argument,
5 Respondent again made comments impugning the integrity of members of the
6 Maricopa County Attorney's Office.
7

8 10. Specifically, Respondent made the following comments:
9

10 I was thinking facetiously, do the prosecutors also wear a paper bag
11 over their head during these? Because in all seriousness, I can tell you
12 this, I'm getting tired of the sloppiness of the County Attorney's Office.
13 It's like, well, we can go to sleep. We can screw off. We can text mail or
14 whatever we're doing. * * * And this gets back to the County Attorney,
15 William Montgomery. He's elected here, and I don't think he, well,
16 maybe he doesn't care. Maybe it's just, hey, I'm too busy going after
17 illegal aliens and people smoking pot. I don't worry about what
18 happens in the lower court, because that's just a big joke anyway. And
19 besides, we put our attorneys with least ability there, so I don't expect
20 them to be doing anything other than just screwing up on the law, so I
21 really don't care.

22 11. Remarks such as these in open court, whether directed at prosecutors or
23 defense counsel, risk undermining the atmosphere of mutual respect and
24 professionalism between the court, governmental agencies, and members of the bar.
25 That professionalism is necessary to facilitate a justice system that is efficient,
26 impartial, and inspires confidence in the public.
27

28 **AGREEMENT**

12. Respondent agrees that his conduct, as stipulated and described above,
constitutes ethical misconduct in violation of Rules 1.2, 2.2, and 2.8(B) of the Code
of Judicial Conduct, and conduct prejudicial to the administration of justice that

1 brings the judicial office into disrepute, a violation of Article 6.1, Section 4, of the
2 Arizona Constitution.

3 **MITIGATING AND AGGRAVATING FACTORS**

4 13. The parties stipulate to the following mitigating (m) and aggravating (a)
5 factors pursuant to Commission Rule 19:
6

7 a. Prior public discipline: Respondent's comments in this case occurred in
8 proceedings taking place less than two months after he received a public reprimand
9 from the Commission for similarly improper comments. (a) In some mitigation of
10 this aggravating factor, Disciplinary Counsel notes that the prior improper
11 comments, though found to be a violation of the Code, were not egregious.
12

13 b. Respondent has served as a judge for 16 years. (m)
14

15 c. The misconduct occurred in Respondent's official capacity. (a)
16

17 d. Respondent recognizes and acknowledges the wrongful nature of his
18 misconduct, and states affirmatively his intention to reform his conduct. (m)
19

20 c. Respondent cooperated fully and honestly with the commission in
21 these proceedings. (m)

22 **AGREED UPON SANCTION**

23 14. After the filing of formal charges, the investigative panel in this matter
24 reconsidered the facts of this case as well as the language found in paragraph 5 of
25 the Scope section of the Code and the mitigating and aggravating factors listed
26 above in paragraph 12. Respondent's prior discipline and the commission's general
27 policy of progressive discipline notwithstanding, the panel and the parties agree
28

1 that the appropriate sanction based on the Respondent's admitted misconduct as set
2 forth in paragraphs 5-10 is an informal public reprimand.

3 **OTHER TERMS AND CONDITIONS**

4 15. Respondent waives his right to file a Response to the Statement of
5 Charges, pursuant to Commission Rule 25(a)
6

7 16. This agreement, if accepted by the hearing panel, fully resolves all issues
8 raised in the Statement of Charges and may be used as evidence in later
9 proceedings in accordance with the Commission's Rules. If the hearing panel does
10 not accept this agreement as a full resolution, then Respondent's admissions are
11 withdrawn, Respondent may file a response, and the matter will be set for hearing
12 without use of this agreement.
13

14 17. Both parties waive their right to appeal the charges at issue in this
15 matter, including the appeal procedures set out in Commission Rule 29 and the
16 review procedures set out in Commission Rule 23.
17

18 18. Both parties agree not to make any statements to the press that are
19 contrary to the terms of this agreement.
20

21 19. Both parties will pay their own costs and attorneys' fees, if any, associated
22 with this case.
23

24 20. Respondent has reviewed, clearly understands, and agrees with the terms
25 and conditions of this agreement.

26 21. This agreement constitutes the complete understanding between the
27 parties.
28

SUBMITTED this 29th day of August, 2013.

s/ Crane McClennen

Hon. Crane McClennen
Respondent

August 29, 2013

Date Signed

s/ Jennifer Perkins

Jennifer Perkins
Disciplinary Counsel

August 29, 2013

Date Signed