

## **APPLICATION FOR NOMINATION TO JUDICIAL OFFICE**

### **APPLICATION INSTRUCTIONS**

**Note:** Canon 4 of the Code of Judicial Conduct applies to candidates for judicial office. See [Ariz. Sup. Ct. R. 81](#), Application.

1. **This application is a public record. As such, all information except that specifically denoted herein as confidential (Section II) is available for public inspection and may be posted at the Commission's website. Additionally, completed applications, including the confidential portion, are forwarded to the Governor upon nomination by the Commission. Although the Commission asks the Governor to maintain the confidential portions of this application as confidential, it cannot compel the Governor to do so.**
2. Do not include these instructions or the Judicial Vacancy Announcement with the completed application form.

Applicants must download or request the application form in electronic format. To download the form, go to the Judicial Department website (<http://www.azcourts.gov/jnc>). To request the form, send your request to: [jnc@courts.az.gov](mailto:jnc@courts.az.gov).

3. Completely answer all questions. If a question does not apply, write "Not applicable" in the space provided. If information is not available, write "Not available" and state the reason(s) the information is not available. Sign the Waiver of Confidentiality and Release of Information Sheet.
4. Questions in the application ask about legal matters you have handled as a lawyer. You may reveal nonpublic, personal, identifying information relating to client or litigant names or similar information in the confidential section of this application.
5. You may reveal contact information for any individual in the confidential section of this application.
6. File with the Administrative Office of the Supreme Court a signed original application with all attachments and a .pdf version of the application and attachments (the "application packet"). The original application may include tabbed sections and must be bound a rubber band or clip; do not submit it with a cover or in a notebook. Submit the .pdf version in a searchable format and on a flash drive or disk. You are encouraged to insert bookmarks into the .pdf version for ease of navigation through the application and attachments. The original application is sent to the Governor if an applicant is nominated. The signed original application governs if discrepancies exist with the .pdf version.

The application packet must be filed by 3:00 p.m. on the deadline date, with:

Administrative Office of the Courts  
Human Resources Department  
1501 W. Washington, Suite 221  
Phoenix, AZ 85007

The Administrative Office of the Courts cannot be responsible for applications not received; if the U.S. mail is used, applications should be sent by registered or certified mail, return receipt requested. If you would like acknowledgment of receipt of the application, enclose a self-addressed, stamped envelope.

7. The deadline for applications is stated in the Judicial Vacancy Announcement and at the bottom of the application form. Applications should be submitted by the stated deadline.

### **INSTRUCTIONS FOR LETTERS OF REFERENCE AND TELEPHONE CALLS**

The Commission welcomes and needs written assessments of the applicants' skills, expertise, ethics, and any other characteristic relevant to an individual's qualifications to be a judge. Many applicants solicit letters of reference. "More" is not necessarily "better." Applicants are encouraged to solicit ten to twelve substantive letters of reference. This number provides sufficient insight into the applicant's potential for serving as an outstanding judge.

Letters regarding applicants should be sent to the Commission in care of the Human Resources Department, Administrative Office of the Courts, 1501 W. Washington, Suite 221, Phoenix, AZ, 85007, no later than three business days before the screening and/or interview meetings. All letters timely submitted to that address will be forwarded to all commissioners.

Individual commissioners welcome letters, e-mails, and telephone calls no later than three business days before the screening and/or interview meetings, from individuals who can provide candid insight into an applicant's qualifications. But commissioners do not need or desire "phone banks" on behalf of applicants. Again, more is not necessarily better. All letters, e-mails, and verbal communications about an applicant may be disclosed to the applicant and the public unless a source requests confidentiality as to the applicant and/or the public. All such communications must be disclosed to the entire Commission, except that the source may request that his or her identity be kept confidential.

Applicants should not personally contact commissioners regarding their application or the nomination process from the time the application is submitted until the individual's application is no longer under consideration. Applicants whose applications have rolled over from a previous vacancy may communicate with commissioners from the date the application was released from consideration in the previous vacancy until the date the new application period closes. Commissioners cannot individually interview applicants or commit in advance to vote for any applicant.

### **INSTRUCTIONS FOR INTERVIEWS**

Subject to applicable rules, applicants are interviewed in public session. In fairness to other applicants, an applicant should not attend earlier scheduled interviews of other applicants or otherwise seek out or accept information about the content of such interviews.

### SUMMARY OF THE NOMINATION PROCESS

1. **Application Period:** The Commission announces the vacancy. The press release announcing the vacancy advises where applications forms can be obtained and the deadline for submitting applications. Potential applicants are given a Judicial Vacancy Announcement, which provides specific information about the nomination process for that particular vacancy.
2. **Public Notice:** The date, time and location of the commission's screening meeting are usually given in the Judicial Vacancy Announcement. The names of applicants are made available to the public. The public is invited to attend the screening meeting and may submit oral or written comments. Section I (public portion) of all applications may be posted on the commission's website.
3. **Screening Meeting:** At the screening meeting the Commission reviews all applications received and the results of any investigation conducted by commissioners. Voting to determine the applicants to be interviewed is conducted in public session.
4. **Notification to Applicants:** Applicants selected for interview are notified by letter of the date, time and location of the interviews. Applicants not selected for interview are notified by letter.
5. **Public Notice:** The Commission announces the names of the applicants to be interviewed and invites oral or written public comment regarding their qualifications.

6. **Investigation:** Further investigation of the applicants to be interviewed is conducted. The credit, criminal, and professional discipline histories of the applicants are requested, and the results are given to the commissioners. The commissioners seek comments from judges, attorneys and the community.
7. **Interviews:** Subject to applicable rules, the applicant is interviewed in public session. After all the interviews are completed the Commission discusses the relative qualifications of all the applicants. Voting to determine the nominees to be submitted to the Governor is conducted in public session.
8. **Nominations:** The names of at least three nominees for each vacancy are submitted to the Governor. The nominees are listed in alphabetical order without any indication of preference by the commissioners. Each nominee's application and any letters or written public comments on file are forwarded to the Governor.
9. **Public Notice:** The names of the nominees are announced. Each nominee's city of residence, political party registration, and current employment are included in the announcement.
10. **Records Retention:** The commissioners' personal notes are not public information. The original application packet and all documents received with respect to the application are maintained and destroyed pursuant to Rule 6, Uniform Rules of Procedure for the Commissions on Appellate and Trial Court Appointments. At an applicant's request, the original application, the .pdf version, and any supplemental material submitted by the applicant will be returned to the applicant during the one-year retention period set forth in Rule 6. Otherwise, all documents and the .pdf file shall be retained and provided to the Commission that originally considered the application if a new vacancy arises during the one-year period. The applicant can withdraw his or her application for any or all vacancies occurring during that period by notifying the Commission in writing of the withdrawal. After the one-year period, any applications, .pdf files, and supplemental materials retained by the Commission shall be destroyed and deleted.
11. **Minutes:** Minutes of all commission meetings are available on request for five years from the date the names of nominees are submitted to the Governor.

**APPLICATION FOR NOMINATION TO  
JUDICIAL OFFICE**

**SECTION I: PUBLIC INFORMATION  
(QUESTIONS 1 THROUGH 65)**

**PERSONAL INFORMATION**

1. Full Name: Walter I. Gonçalves, Jr.
2. Have you ever used or been known by any other name? **No**. If so, state name:
3. Office Address: Federal Public Defender, District of Arizona  
407 W. Congress Street #501  
Tucson, Arizona 85701
4. How long have you lived in Arizona? What is your home zip code?  
24 years in August, 2023. 85712
5. Identify the county you reside in and the years of your residency.  
Pima County, 1999 to present
6. If nominated, will you be 30 years old before taking office? yes no  
If nominated, will you be younger than age 65 at the time the nomination is sent  
to the Governor? yes no

7. List your present and any former political party registrations and approximate dates of each: Registered as a Democrat in 2008. I have been a registered as a Democrat since that year.

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

8. Gender: Male

Race/Ethnicity: Latino

### EDUCATIONAL BACKGROUND

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

Southwestern University (Georgetown, Texas) 1995 – 1999 graduated cum laude with BA in international studies (disciplinary focus on economics with Latin America as geographic area of emphasis). I minored in history.

University of Arizona (Tucson, Arizona) 1999 – 2001 MA in Latin American Studies

James E. Rogers College of Law, University of Arizona (Tucson, Arizona) 2001 – 2004 JD

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

No extracurricular activities. I focused on academic endeavors.

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

Member of Alpha Chi (national honor society)

### PROFESSIONAL BACKGROUND AND EXPERIENCE

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

Arizona. Date of Admission is July 8, 2005.

13. a. Have you ever been denied admission to the bar of any state due to failure to pass the character and fitness screening? **No** If so, explain.

Filing Date: January 13, 2023  
Applicant Name: Walter I. Gonçalves, Jr.  
Page 3

- b. Have you ever had to retake a bar examination in order to be admitted to the bar of any state? Yes. If so, explain any circumstances that may have hindered your performance.

I took the Arizona bar exam twice. I was a distracted law student and should have studied harder in the period leading to the bar exam the first time I took it.

14. Describe your employment history since completing your undergraduate degree. List your current position first. If you have not been employed continuously since completing your undergraduate degree, describe what you did during any periods of unemployment or other professional inactivity in excess of three months. Do not attach a resume.

EMPLOYER

DATES

LOCATION

University of Arizona Modern Languages Department (1999 – 2001 graduate teaching assistant) 1423 E. University Blvd. Rm. 545 · Modern Languages Building  
P.O. Box 210067 · Tucson, Arizona 85721  
Phone 520-621-3123

Pima County Attorney's Office (2002 law clerk) 32 N. Stone Ave. Tucson AZ 85701

Pima County Attorney's Office (2003 – 2005 law clerk) 32 N. Stone Ave. Tucson AZ 85701

Pima County Public Defender (2005 – 2015, attorney) 33 N. Stone Ave. Tucson, AZ 85701

Federal Public Defender (2015 – present, attorney (supervisor 2021 - 2022)) 407 W. Congress Street, Tucson, AZ 85701

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

Michael Areinoff  
Jamiel Allen  
Tamara Mulembo  
Eric Rau  
Vicky Brambl



Jay Sagar  
Jay Marble  
Leticia Marquez  
Timothy Rogers  
Sonia Fleury  
Ryan Moore  
Nancy Arce  
Matei Tarail  
Leo Costales  
Lee Tucker  
Jordan Malka  
John Connelly  
Jessica Murillo  
James Smith  
Greta Vietor  
Gregory Berger  
Fernanda Munoz  
Esmeralda Gaxiola  
Elena Kay  
Edie Cunningham  
Carlos Velazquez  
Ben Singerman  
Annamarie Valdivia  
Angeles Rodriguez  
Alan Macias  
Alessandra Bermudez

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

My practice consists of representing serious felonies in federal court. A promotion to supervisor in April of 2021 decreased my caseload, but I have matters set for trial that date to before the COVID-19 pandemic. I am now line attorney. I represent persons charged with violent crimes including first degree murder (I recently had one active death-eligible case), complex white-collar prosecutions, drug cases, weapons trafficking, alien smuggling, illegal re-entry, and other federal crimes.

My practice as a Pima County Public Defender consisted of serious felonies. I tried thirty cases to jury as Assistant Pima County Public Defender. Several juries acquitted or could not agree on verdicts. A jury acquitted one client of first-degree murder and attempted first degree murder. Fortunately, all of my first-degree clients received a term of years in prison, dismissal, or acquittal. No client currently serves life in prison.

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

No other areas.

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

No other areas of specialization.

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

I have negotiated myriad plea agreements for clients during my career.

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

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

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

Sole Counsel: \_\_\_\_\_

Chief Counsel: \_\_\_\_\_

Associate Counsel: \_\_\_\_\_

21. Have you handled any matters that have been arbitrated or mediated? **No**

If so, state the approximate number of these matters in which you were involved as:

Sole Counsel: \_\_\_\_\_

Chief Counsel: \_\_\_\_\_

Associate Counsel: \_\_\_\_\_

22. List at least three but no more than five contested matters you negotiated to settlement. State as to each case: (1) the date or period of the proceedings; (2)

the names, e-mail addresses, and telephone numbers of all counsel involved and the party each represented; (3) a summary of the substance of each case: and (4) a statement of any particular significance of the case.

The prosecutors for the cases below are Assistant United States Attorneys. The address and phone number for that office is 405 W. Congress Street #4800, Tucson AZ 85701, phone # 520-620-7300.

*United States v. Juan Ramos Yajimovich*, No. CR-18-01832-001-TUC-RM (BGM)  
August 17, 2018 – December 20, 2019

Assistant United States Attorney Brian Hopkins (Brian.Hopkins@usdoj.gov)

This was a case involving conspiracy to transport undocumented immigrants for profit. The case resulted in a favorable plea agreement after we suppressed our client's pre-trial identification at a motions to suppress hearing before the magistrate judge. The client received a plea agreement to time served. The case was noteworthy because it was Mr. Yajimovich's second plea agreement to time served relating to eye-witness identification problems. I also represented Mr. Yajimovich in two previous proceedings in Pima County Superior Court.

*United States v. Ahmad Ahmad*, CR-18-02417-001-TUC-RCC (LCK)

October 26, 2018 – October 6, 2021

Assistant United States Attorney Erica Seger (Erica.Seger@usdoj.gov)

The charges involved heroin possession and distribution of information relating to explosives, devices, and weapons of mass destruction. The case was noteworthy because of the media attention it gathered in Arizona and around the country. The case resolved with a plea agreement but there was litigation over the sentencing guidelines. The proceedings also spilled over to the COVID-19 pandemic. This case made it clear that representing middle eastern clients in matters related to explosives or violence was sensitive and difficult. Fortunately, Mr. Ahmad received a reduced sentence.

*United States v. Sevigney Avila*, CR-19-00259-001-TUC-JAS (LAB)

January 30, 2019 – October 28, 2020

Assistant United States Attorney Angela Woolridge  
(angela.woolridge@usdoj.gov)

The charges involved possession of ammunition as prohibited possessor. Agents found the ammunition in the house where Mr. Sevigney spent time. The matter was significant because of pre-sentencing litigation. We strongly litigated and won objections filed by the prosecutor to the sentencing guidelines. Our client received a reduced sentence. The outcome of the litigation helped him more favorably resolve his Pima County Superior Court case. It is also significant as most of the litigation and client visits at the Pima County Jail took place during the COVID-19 pandemic. The visits and court proceedings were all remote.

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

The approximate number of cases in which you appeared before:

Federal Courts:	900
State Courts of Record:	600
Municipal/Justice Courts:	0

The approximate percentage of those cases which have been:

Civil:	0%
Criminal:	100%

The approximate number of those cases in which you were:

Sole Counsel:	850
Chief Counsel:	30
Associate Counsel:	5

The approximate percentage of those cases in which:

You wrote and filed a pre-trial, trial, or post-trial motion that wholly or partially disposed of the case (for example, a motion to dismiss, a motion for summary judgment, a motion for judgment as a matter of law, or a motion for new trial) or wrote a response to such a motion:	1%
You argued a motion described above	85%
You made a contested court appearance (other than as set forth in the above response)	85%
You negotiated a settlement:	75%
The court rendered judgment after trial:	0%
A jury rendered a verdict:	95%

The number of cases you have taken to trial:

Limited jurisdiction court	0
Superior court	30
Federal district court	2
Jury	32

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

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

The approximate number of your appeals which have been:

Civil:	0%
Criminal:	100%
Other:	Not applicable

The approximate number of matters in which you appeared:

As counsel of record on the brief:	1
Personally in oral argument:	0

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

**Not applicable.**

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

**Not applicable.**

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

**Not applicable.**

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

During my years of practice I served as supervising attorney to students at the Arizona College of Law's criminal defense clinic, have given talks to different law offices and professional trainings, served as supervisor for 1 ½ years in the my current office, and serve as mentor/senior attorney to newer lawyers in the office. I was also one of two team leaders in the office from 2018 to 2021.

<b>BUSINESS AND FINANCIAL INFORMATION</b>
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30. Have you ever been engaged in any occupation, business or profession other than the practice of law or holding judicial or other public office, other than as described at question 14? **No.** If so, give details, including dates.
31. Are you now an officer, director, majority stockholder, managing member, or otherwise engaged in the management of any business enterprise? **No.** If so,

give details, including the name of the enterprise, the nature of the business, the title or other description of your position, the nature of your duties and the term of your service.

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

32. Have you filed your state and federal income tax returns for all years you were legally required to file them? **Yes**. If not, explain.
33. Have you paid all state, federal and local taxes when due? **Yes**. If not, explain.
34. Are there currently any judgments or tax liens outstanding against you? **No**. If so, explain.
35. Have you ever violated a court order addressing your personal conduct, such as orders of protection, or for payment of child or spousal support? **No**. If so, explain.
36. Have you ever been a party to a lawsuit, including an administrative agency matter but excluding divorce? **No**. If so, identify the nature of the case, your role, the court, and the ultimate disposition.
37. Have you ever filed for bankruptcy protection on your own behalf or for an organization in which you held a majority ownership interest? **No**. If so, explain.
38. Do you have any financial interests including investments, which might conflict with the performance of your judicial duties? **No**. If so, explain.

<b>CONDUCT AND ETHICS</b>
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39. Have you ever been terminated, asked to resign, expelled, or suspended from

employment or any post-secondary school or course of learning due to allegations of dishonesty, plagiarism, cheating, or any other "cause" that might reflect in any way on your integrity? **No**. If so, provide details.

40. Have you ever been arrested for, charged with, and/or convicted of any felony, misdemeanor, or Uniform Code of Military Justice violation? **Yes**. If so, identify the nature of the offense, the court, the presiding judicial officer, and the ultimate disposition.

The Tucson Police Department cited me for misdemeanor DUI in November of 2003. This took place after I left a bar on 4th avenue in Tucson in October of 2003. I quickly took responsibility, pled guilty, and spent two nights in jail as part of my sentence in Tucson City Court. I also attended ten alcohol rehabilitation meetings. This took place during my third year of law school. The experience was incredibly humbling and eye opening. I learned a lot. I disclosed all information to the Arizona State Bar. The Arizona Bar admitted me to practice in 2005 after passing character and fitness requirements (the Bar did not order additional requirements and never placed me on any probationary term).

41. If you performed military service, please indicate the date and type of discharge. If other than honorable discharge, explain. **Not applicable**.
42. List and describe any matter (including mediation, arbitration, negotiated settlement and/or malpractice claim you referred to your insurance carrier) in which you were accused of wrongdoing concerning your law practice.

I have never been accused of wrongdoing in any matter concerning my law practice.

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

None.

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

None.

45. Have you received a notice of formal charges, cautionary letter, private admonition, referral to a diversionary program, or any other conditional sanction from the Commission on Judicial Conduct, the State Bar, or any other disciplinary body in any jurisdiction? \_\_\_\_\_ If so, in each case, state in detail the circumstances and the outcome.



None.

46. During the last 10 years, have you unlawfully used controlled substances, narcotic drugs or dangerous drugs as defined by federal or state law? \_\_\_\_\_ If your answer is "Yes," explain in detail.

None.

47. Within the last five years, have you ever been formally reprimanded, demoted, disciplined, cautioned, placed on probation, suspended, terminated or asked to resign by an employer, regulatory or investigative agency? **Yes**. If so, state the circumstances under which such action was taken, the date(s) such action was taken, the name(s) and contact information of any persons who took such action, and the background and resolution of such action.

I am completing a performance improvement plan (PIP) in my office. There was no demotion, although I was re-classified as a line Assistant Federal Public Defender from Supervisory Assistant Federal Public Defender. I am successfully completing the plan. The attorney in charge of it is Eric Rau, phone number 520-879-7534 or [eric\\_rau@fd.org](mailto:eric_rau@fd.org). The plan finishes on March 17, 2023. It began on November 17, 2022.

For a period as supervisor, I had too many complex cases besides supervisory duties. I managed some matters in a way the office did not like. I reduced my caseload and returned to duties as line attorney. One of my supervisors, Eric, can attest to my successful completion of this program. As of this writing, I am close to halfway done.

48. Have you ever refused to submit to a test to determine whether you had consumed and/or were under the influence of alcohol or drugs? **No**. If so, state the date you were requested to submit to such a test, type of test requested, the name and contact information of the entity requesting that you submit to the test, the outcome of your refusal and the reason why you refused to submit to such a test.

No applicable.

49. Have you ever been a party to litigation alleging that you failed to comply with the substantive requirements of any business or contractual arrangement, including but not limited to bankruptcy proceedings? **No**. If so, explain the circumstances of the litigation, including the background and resolution of the case, and provide the dates litigation was commenced and concluded, and the name(s) and contact information of the parties,

Not applicable.

**PROFESSIONAL AND PUBLIC SERVICE**

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

*“How Much Time Am I Looking at?”: Plea Bargains, Harsh Punishments, and Low Trial Rates in Southwest Border Districts*, 59 Am. Crim. L. Rev. 293 (2022)

*Crushing the Soul of Federal Public Defenders: The Plea-Bargaining Machine’s Operation and What to Do About It*, 49 Fordham Urb. L.J. 699 (2022)

*Outsider Public Defenders as Organic Intellectuals*, 32 Berkeley La Raza L.J. 1 (2022)

*Banished and Overcriminalized: Critical Race Perspectives of Illegal Entry and Drug Courier Prosecutions*, 10 Colum. J. Race & L. 1 (2020)

*Narrative, Culture, and Individuation: A Criminal Defense Lawyer’s Race-Conscious Approach to Reduce Implicit Bias for Latinxs*, 18 Seattle J. Soc. Just. 333 (2020)

*Busted at the Border: Blind Mule and Duress Defenses in Border Crossing Cases*, The Champion Magazine, January/February 2018, Vol. XLII No. 1

*Tips and Strategies for Excellent Closing Arguments* - ABA Criminal Justice Magazine, Winter 2018 Vol. 32, No. 4

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

52. Have you taught any courses on law or lectured at bar associations, conferences, law school forums or continuing legal education seminars? **Yes**. If so, describe.

Over the last several years I have given these presentations:

Presentations:

Andrea Taylor Sentencing Advocacy Workshop

*Facilitation at:*

Defender Services – Training Division, Charleston, South Carolina July 2022

“Defending Federal Drug Prosecutions: What You Need to Know”

*Presented at:*

Fundamentals of Federal Criminal Defense – Defender Services  
Organization, Training Division – February 22 (virtual)

Presentations for Federal Public Defender Training Program, District of Arizona:

“Initial Appearances, DH/PH’s, and Dangerousness Hearings,” June  
2021

“Common Sentencing Guidelines: 1326, Drug Trafficking, Criminal  
History,” August 2021

“Suppression: Miranda Violations,” September 2021

“Plea Negotiations: Bargaining Strategies, Modifications to Plea Agreement  
Language,” October 2021

“Trial Prep: Jury Instructions, Witness Questions, Exhibits, Themes/Theories,”  
November 2021 “Sentencing: Specific Guideline Provisions (Criminal History, Minor  
Role, Safety Valve),” December 2021

“Outsider Public Defenders as Champions of Clients”

*Presented at:*

Federal Public Defender, Middle District of Florida,  
August 2021 Arizona Public Defender Association, June  
2021

Non-Capital Sentencing Mitigations Skills Workshop

*Facilitation at:*

Virtual Workshop: Defender Services – Training Division, June 21 – 24, 2021

“Applications of Drug Guideline §2D1.1 and Criminal History Guidelines §§4A1.1 –4A1.2”

*Facilitated at:*

Virtual Fundamentals of Federal Criminal Defense: Guidelines Workshop,  
Defender Services Workshop – Training Division, April 2021 and March 2022

“How to Bring Race into Client Representation”

*Presented at:*

Advanced Trial Advocacy Class (Prof. Barbara Bergman), April 2022  
Federal Public Defender, Middle District of Florida, April 2021

“Prejudice and Due Process: Combatting Implicit Bias in Court”

*Presented at:*

Racial Justice Conference (NAPD), October 2022  
Barbara Bergman’s Advanced Trial Advocacy Course,  
April 2021 Arizona Public Defender Association, Tempe,  
AZ, December 2020

“Sharing/Brainstorming Successful Baseline Strategies for Defending Against 1324 Prosecutions”

*Presented at:*

Live Webinar – Decriminalizing Migration Convening, National Immigration Project of the National Lawyers Guild  
October 2020 (panelist)

“Federalizing Floyd: Race in the Defense of Federal Criminal Cases”

*Presented at:*

Live Webinar – Office of the Federal Public Defender, Northern District of California, June 2020 (panelist)

“How Critical Race Theory Improves Drug Courier and 8 U.S.C. § 1326 Representation”

*Presented at:*

Online seminar - Federal Defender Services Office Training Division, June 2020

“How to Reduce Implicit Bias for Latinx Clients Through the Use of Narrative, Culture, and Individuation”

*Presented at:*

Barbara Bergman’s Advanced Trial Advocacy Course,  
March 2020 Pima County Public Defender, Tucson, AZ,  
February 2020  
Multi-Track Federal Criminal Defense Seminar, New Orleans, LA,  
February 2020 James E. Rogers College of Law, University of Arizona,  
September 2019  
Multi-Track Federal Criminal Defense Seminar, Denver, CO,  
August 2019 Arizona Public Defender Association, Tempe, AZ,  
June 2019  
National Seminar for Federal Defenders, Detroit, MI,  
May 2019 Arizona Minority Bar Association, Tucson,  
AZ, March 2019  
Online seminar - Federal Defender Services Office Training Division, January 2019

“Checkpoints and the 4<sup>th</sup> Amendment”

*Presented at:*

Arizona Public Defender Association Conference, Tempe, AZ,  
June 2019 Federal Public Defender and CJA Training, Tucson,  
AZ, December 2018 Winning Strategies Seminar, San Diego,  
CA, December 2018

“Duress Defenses”

*Presented at:*

Resistance on All Fronts Conference, Tucson, AZ, November 2017

“Duress and Blind Mule Defenses in Border Crossing Cases”

*Presented at:*

CJA Panel Training, Phoenix, AZ, September 2020 (Zoom recording) Winning Strategies Seminar, Los Angeles, CA, January 2020 Winning Strategies Regional (WSR), San Antonio, TX, August 2018  
Arizona Public Defender Association Conference, Tempe, AZ, June 2018 Arizona Public Defender Association Conference, Tempe, AZ, June 2017 Winning Strategies Seminar, Houston, TX, June 2017

National Seminar for Federal Defenders, New Orleans, LA, May 2017 Federal Public Defender and CJA Training, Phoenix, AZ, March 2017 Federal Public Defender and CJA Training, Tucson, AZ, January 2017 Winning Strategies Seminal, Long Beach, CA, January 2017

“The Lost Art of Direct Examination”

*Presented at:*

Arizona Public Defender Association Conference, Tempe, AZ, June 2015

“Closing Arguments from the Perspective of a Ten-Year Public Defender”

*Presented at:*

James E. Rogers College of Law, University of Arizona, March 2015

“Introduction to Effective Plea Bargaining”

*Presented at:*

Arizona Public Defender Association Conference, Tempe, AZ, June 2014

“Fingerprint Evidence in Light of the NSA Report”

*Presented at:*

Pima County Public Defender, Tucson, AZ, March 2012

## Academic conferences and workshops:

2021 “Outsider Public Defenders as Organic Intellectuals”  
Law and Society Association Annual Meeting: Crisis, Healing, Re-Imagining Chicago, IL, May (virtual conference due to COVID-19)

“Public Defenders as Organic Intellectuals – Questions About Becoming a PD” CUNY Law Review (virtual presentation due to COVID-19)  
February

2020 “Outsider Public Defenders as Organic Intellectuals”  
Clinical Law Review Writers’ Workshop, New York University Law School, New York, NY, October (virtual workshop due to COVID-19)

2019 “Banished and Overcriminalized: A Critical Race Perspective of Illegal Entry

Filing Date: January 13, 2023  
Applicant Name: Walter I. Gonçalves, Jr.  
Page 17

and Drug Courier Prosecutions” (presented as work-in-progress)  
LatCrit 2019 – Georgia State University College of Law, Atlanta, GA, October

“Banished and Overcriminalized: A Critical Race Perspective of Illegal Entry  
and Drug  
Courier Prosecutions”  
Clinical Law Review Writers’ Workshop, New York University Law School  
(scholarship recipient), New York, NY, September

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

I was briefly a member of the Arizona Minority Bar Association in 2018. I also attended several meetings of the Tucson chapter of the Federal Bar Association. I did not continue activities in these organizations due to my caseload and writing/teaching commitments.

Have you served on any committees of any bar association (local, state or national) or have you performed any other significant service to the bar? **No.**

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

Not applicable.

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

Time constraints from work, family, and extracurricular activities have prevented me from engaging in these activities.

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

None.

56. List any elected or appointed public offices you have held and/or for which you have been a candidate, and the dates. None.

Have you ever been removed or resigned from office before your term expired?  
Not applicable. If so, explain.

Have you voted in all general elections held during the last 10 years? Not

applicable. If not, explain.

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

I have played in a local rock band since 2007, Early Black. I am the lead singer, chief song writers, booker, and founding member of the band. As explained above I enjoy writing on law related topics and am working on a manuscript for a book on criminal law. I enjoy time with my spouse and 8-year-old twin boys. Finally, I am a avid runner and plan to run my first marathon this year (2023).

### HEALTH

58. Are you physically and mentally able to perform the essential duties of a judge with or without a reasonable accommodation in the court for which you are applying? Yes. I am in great health (physical and mental).

### ADDITIONAL INFORMATION

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

I was born in Guarulhos, Brazil, and grew up in Venezuela and Mexico before returning to the United States for my senior year of high school. I speak Spanish and Portuguese. We lived in Akron, Ohio for one and a half-years when I was in the fourth and fifth grades. I also studied at the University of Salamanca, Spain, during the spring of my junior year as an undergraduate. My life as a brown-skinned Latin American, culturally and linguistically, along with my international experience, have given me a unique perspective on the law. My multi-cultural viewpoints help me see the different sides of the law.

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

Lacking in my professional background is prosecutorial and civil work. I clerked for the criminal and civil divisions of the Pima County Attorney's Office, but never practiced there as a lawyer. But I have rich criminal defense experience as a county and federal

defender.

I have been a member of Al-Anon Family Groups for over seven years. Al-Anon is an international mutual aid organization for people impacted by another person's alcoholism. This program has deepened my life and provided me with a rich perspective to see the world and live a healthier life. Alcoholism has plagued people close to me. Addictions to alcohol and other drugs influence the lives of many people charged in federal court. As a member of Al-Anon I can understand the addiction process and empathize with those affected by it.

I come from a working-class family. While my mother and father furthered their education and obtained middle class jobs, other family members (all live in Brazil) cannot claim the same status. I saw both sides of social-class stratification in my youth and young adulthood. I see how the law impacts those from advantaged and less advantaged backgrounds.

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

I enjoyed my practice as a Pima County Public Defender and looked up to the Superior Court judges that presided over my cases. Being on the federal side for over seven years, including all the teaching and writing I have done gives me a broader view and appreciation for practice in State Court. I also seek to apply the skills I have acquired as a public defender such as empathy, compassion, and patience, to being a trial judge in both civil, criminal, and family law cases. Finally, I look forward to having more autonomy as a professional. It would be a privilege to return to Pima County in a judicial capacity.

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



**sample should be no more than five pages in length, double-spaced.** You may excerpt a portion of a larger document to provide the writing sample(s). Please redact any personal, identifying information regarding the case at issue, unless it is a published opinion, bearing in mind that the writing sample may be made available to the public on the commission's website.

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

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

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8 IN THE UNITED STATES DISTRICT COURT  
9 FOR THE DISTRICT OF ARIZONA

11 United States of America,  
12 Plaintiff,  
13 vs.  
14 [REDACTED],  
15 Defendant.

CR16-2368-TUC-RM (LAB)  
**MOTION TO DISMISS INDICTMENT  
PURSUANT TO 8 U.S.C. § 1326(d)**  
(Oral Argument and/or Evidentiary  
Hearing Requested)

16 Excludable delay under Title 18, United States Code, § 3161, et. seq., may occur  
17 as a result of this motion or an order based thereon. Defendant, [REDACTED]  
18 [REDACTED], pursuant to 8 U.S.C. § 1326(d) and *United States v. Mendoza-Lopez*, 481 U.S. 828  
19 (1987), hereby moves this Court to dismiss the indictment because defects in the  
20 underlying removal proceedings violated his right to due process, foreclosed judicial  
21 review, and resulted in prejudice.

22 **I. Facts and Procedural History:**

23 [REDACTED] first ever encounter with federal immigration officials took place  
24 on May 23<sup>rd</sup>, 2013. On May 24<sup>th</sup> he was subject to expedited removal proceedings. The  
25 Border Patrol Agent who conducted his proceeding, Joseph Wilkes, asked him a number  
26 of questions and took a sworn statement. [REDACTED] reports that the agent never  
27  
28

1 explained to him that there was the possibility of withdrawing his application of removal.  
2 Agent Wilkes never took the time to explain the nature of the proceeding: that he would  
3 be ordered removed from the country and that a formal order of removal was being  
4 issued against him. [REDACTED] initialed the forms but there was no explanation of  
5 what took place. He was subsequently presented with a “Notice to Alien Ordered  
6 Removed/Departure Verification”. He was deported from the United States for a period  
7 of five years but should have been voluntarily returned after a withdrawal of his  
8 application for admission.

9 The officer that conducted the proceeding asked [REDACTED] to initial pages on a  
10 sworn questionnaire and jurat, however Mr. Barragan was not adequately explained  
11 exactly what was taking place, nor the fact that he could have received a withdrawal of  
12 application, the only type of relief available at an expedited removal proceeding 8 C.F.R.  
13 § 1235.4. Consequently, [REDACTED] was prejudiced in that he could have taken  
14 advantage of withdrawal of the application for admissibility and not have been removed  
15 from the United States for five years. No order of removal would have issued against  
16 him. Now, this order is being used as a basis to criminally prosecute him under this  
17 indictment. *United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1047 (9<sup>th</sup> Cir. 2007)  
18 (defendants in 8 U.S.C. § 1326 prosecutions have a Fifth Amendment right to collaterally  
19 attack a removal order because the removal order serves as a predicate element for  
20 convictions).

## 21 **II. Argument:**

22 An application of the six factors in the Field Officer’s Manual and a comparison of  
23 the facts of his case to that of *United States v. Raya-Vaca* show that he was prejudiced.  
24 *United States v. Raya-Vaca*, 771 F.3d 1195, 1199-1200 (9<sup>th</sup> Cir. 2014). As such, the  
25 Court must dismiss the indictment against him. 8 U.S.C. § 1326(d).

## 26 **III. Law and analysis:**

### 27 **A. Expedited Removal in General:**

28

1 An expedited removal is an administrative proceeding conducted by an ICE  
2 officer who is neither a lawyer nor an immigration judge. 8 C.F.R. § 235.3 (b)(2)(ii).  
3 The prosecutor acts as prosecutor and judge. There is no hearing before a neutral fact-  
4 finder. *Id.* There is no appeal to the Board of Immigration Appeals. 8 C.F.R. § 235.3  
5 (b)(2)(ii). There is no right to counsel. *United States v. Barajas-Alvarado*, 655 F.3d  
6 1077, 1088 (9<sup>th</sup> Cir. 2011). There is no right to be advised of eligibility for relief. *United*  
7 *States v. Sanchez-Aguilar*, 719 F.3d 1108, 1112 (9<sup>th</sup> Cir. 2013).

8 Expedited removal applies to arriving aliens and also by regulation to aliens who  
9 are present without being admitted or paroled and are encountered within 100 air miles of  
10 the United States international land border, and cannot establish that they have been  
11 physically present in the United States continuously for the 14-day period immediately  
12 preceding the date of encounter (since 2004, see 69 Fed. Reg. 48877-01, 48880 (Aug. 11,  
13 2004)). It can also apply to those who arrive at a Port of Entry or by sea. The ICE  
14 officer must determine that the alien is inadmissible under INA § 212(a)(6)(C) (fraud or  
15 misrepresentation in procuring a visa, other documentation, or admission) or § 212(a)(7)  
16 (lack of valid documentation). 8 U.S.C. § 1225(b)(1)(A)(i), (iii); and *Raya-Vaca*, at 1199-  
17 1200. The proceeding requires advising the alien of the charges and gives the alien an  
18 opportunity to respond to those charges in a sworn statement. 8 C.F.R. § 1235.3(b).

19 Form I-860 (Notice and Order of Expedited Removal) must be properly executed  
20 and signed by the alien acknowledging receipt. 8 C.F.R. § 1235.3(b)(2). The examining  
21 immigration officer shall advise the alien of the charges against him or her on Form I-860  
22 and “shall serve the alien with Form I-860 and the alien shall sign the reverse of the form  
23 acknowledging receipt. *Id.* Form I-867AB (Record of Sworn Statement). Form I-867A  
24 must be read to alien.

25 Forms I-867A and B must record the alien’s responses regarding identity,  
26 alienage, and inadmissibility, and must be signed or initialed by the alien as being  
27 correct. There must be a competent translation in the alien’s language. *United States v.*  
28

1 *Barajas-Alvarado*, 655 F.3d 1077, 1081 (9<sup>th</sup> Cir. 2011). No further hearing or review is  
2 authorized unless the alien claims to be a Lawful Permanent Resident, was previously  
3 admitted as a refugee, or claims a fear of return (in which case there is judicial review). 8  
4 C.F.R. § 1235.3(b)(5). The statute itself precludes meaningful judicial review. *Raya-*  
5 *Vaca*, at 1202.

6 On the other hand, relief is available in the form of withdrawal of application for  
7 admission. 8 U.S.C. § 1225(a)(4), 8 C.F.R. § 1235.4; *Raya-Vaca*, at 1205; *Barajas-*  
8 *Alvarado*, at 1090 (citing to Inspector’s Field Manual for guidance).

9 **B. [REDACTED] exhausted all administrative remedies to seek relief**  
10 **against the order and the removal proceeding improperly deprived him of the**  
11 **opportunity for judicial review:**

12 The statute governing expedited removal proceedings afforded [REDACTED]  
13 [REDACTED] no opportunity for administrative or judicial review. 8 U.S.C. § 1225(b)(1)(C).  
14 “Except as provided [in the subparagraph on credible-fear interviews], a removal order...  
15 is not subject to administrative appeal...’); *Id.* § 1225(b)(1)(A)(i). “If an immigration  
16 officer determines that an alien... who is arriving in the United States... is  
17 inadmissible..., the officer shall order the alien removed from the United States without  
18 further hearing or review...” *Barajas–Alvarado*, at 1082. The Immigration &  
19 Nationality Act (INA) precludes meaningful judicial review of the validity of the  
20 proceedings that result in an expedited removal order. *Id.* “Judicial review” means  
21 review in the federal courts of a “final” administrative agency determination. 8 U.S.C. §  
22 1252(a). For these reasons, [REDACTED] exhausted all available administrative remedies  
23 and was deprived of the opportunity for judicial review.

24 **C. The entry of the deportation order as a result of the expedited removal was**  
25 **fundamentally unfair:**

26 **i. There were due process violations in the removal proceedings:**  
27  
28

1 An officer's failure to inform an alien of the charge of inadmissibility and to read  
2 him (or allow him to read) his sworn statement is a violation of due process. *Raya-Vaca*,  
3 at 1204. Likewise, it is a violation of due process for the officer to fail to advise an alien  
4 of the possibility of withdrawing his application for admission. *Id.* The officer must  
5 explain exactly what the alien is signing. *Id.* As ██████████ was not adequately  
6 explained what he signed or initialed, there were due process violations.

7 **ii. But for the due process violations, relief was “plausible”:**

8 To succeed in demonstrating that an expedited removal order is fundamentally  
9 unfair, an alien must also establish that he suffered prejudice as a result of the entry of the  
10 order. *United States v. Jimenez–Marmolejo*, 104 F.3d 1083, 1085 (9<sup>th</sup> Cir.1996); 8 U.S.C.  
11 §1326(d)(3). To do so, an alien must show that he had “plausible grounds for relief”  
12 from the removal order. *Id.* at 1086. Even though ██████████ did not formally apply  
13 for admission to the United States, he is considered to have been an applicant for  
14 admission and as such was eligible for “withdrawal of application for admission”. 8  
15 U.S.C. § 1225(a)(4).

16 The Ninth Circuit's two leading cases on whether it was plausible for someone in  
17 ██████████ shoes to have been granted withdrawal of the application are *Barajas-*  
18 *Alvarado* and *Raya-Vaca*. Guidance comes from the Inspector's Field Manual, an  
19 internal agency document that counsels immigration officers as to when to grant  
20 withdrawal of application for admission. *Raya-Vaca* at 1207. An alien need only  
21 establish “some evidentiary basis on which relief could have been granted.” *Id.*

22 There are six factors in the field manual that the Ninth Circuit analyzed in *Raya-*  
23 *Vaca*: “(1) the seriousness of the immigration violation; (2) previous findings of  
24 inadmissibility against the alien; (3) intent on the part of the alien to violate the law; (4)  
25 ability to easily overcome the ground of inadmissibility; (5) age or poor health of the  
26 alien; and (6) other humanitarian or public interest considerations.” *Id.* at 1207, citing  
27 *Barajas–Alvarado*, at 1090 (citing INS Inspector's Field Manual § 17.2(a) (2001)).

28

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7  
8 IN THE UNITED STATES DISTRICT COURT  
9 FOR THE DISTRICT OF ARIZONA

10 United States of America,  
11 Plaintiff,  
12 vs.  
13 [REDACTED]  
14 Defendant.

15 [REDACTED]  
16 **MOTION TO SUPPRESS IN AND OUT**  
17 **OF COURT IDENTIFICATIONS**  
18 **(Evidentiary hearing requested)**

19 It is expected that excludable delay under Title 18, United States Code, §  
20 3161(h)(1)(D) will occur as a result of this motion or an order based thereon.

21 **I. Background**

22 On August 16, 2018 at 7:14 AM, Border Patrol Agent [REDACTED] attempted  
23 to make a traffic stop on a 2016 red Ford Fusion. Agent [REDACTED] made the decision to  
24 stop due to the car's registration, lack of border crossing history, driving behavior, the  
25 behavior of the passengers, an alert and "be on the lookout" for the vehicle, and the driver's  
26 apparent attempt to avoid the ICE officer. As soon as the driver saw the lights and heard  
27 the siren, he sped away. The Fusion led the officer on a chase through several streets in  
28 Tombstone. Eventually, the car broke through a service gate at Tombstone High School

1 and stopped near a barbed wire fence. Agent [REDACTED] wrote in his report that “I could  
2 clearly see an adult Hispanic male wearing a black stripped shirt and dark jeans running  
3 away from the vehicle on foot northwest away from the vehicle.” The Agent wrote that  
4 the suspect “appeared to have short black hair and was of average height and build. This  
5 took place at approximately 7:17 AM.

7 Immigration officers arrested Mr. [REDACTED] walking in an area approximately half a  
8 mile away from the car. The arrest took place at 7:42 AM. Mr. [REDACTED] was shirtless but  
9 carried a black and red stripped shirt in his hand. The arresting officer reported that  
10 scratches and cuts covered him due to the surrounding brush because he attempted to  
11 conceal himself approximately 20 feet off Highway 80. Agent [REDACTED] wrote in his report  
12 that Mr. [REDACTED] “matched the description of the subject” he saw running from the car.  
13 There were no houses or businesses close by. Officers arrested four other persons some  
14 distance from the crashed car, hiding under vegetation. The government’s air units spotted  
15 them. Their arrest took place close in time to Mr. [REDACTED] arrest. One of these four  
16 witnesses was a juvenile. Law enforcement did not hold him as material witness.

20 Officers transported all suspects to the Willcox Border Patrol Station. According to  
21 footage from a holding cell, officers placed the three adult material witnesses in the same  
22 cell as Mr. [REDACTED].

24 Around 10:34:00, Mr. [REDACTED] entered the cell. Several unrelated detainees were  
25 inside. Around 10:35:53, Mr. [REDACTED] sat in the corner and appeared to talk to the four other  
26 individuals. Others were behind him on the other side. Around 10:38:51, material witness  
27 [REDACTED] entered and sat on the side away from and behind Mr. [REDACTED].  
28



1 Around 10:39:37, material witnesses [REDACTED] and [REDACTED] entered  
2 and likewise sat across the room, away from Mr. [REDACTED].

3  
4 Almost immediately, around 10:40:03, Mr. [REDACTED] approached the witnesses and  
5 appeared to talk to them for approximately five minutes. According to Evangelista-  
6 Beristain's later deposition, Mr. [REDACTED] asked them "what would have been asked," before  
7 returning to his seat. Then, around 10:46:32, Mr. Ramos approached a water cooler next to  
8 the door where [REDACTED] stood. Mr. [REDACTED] remained there and idly watched  
9 Evangelista-Beristain as agents summoned him.  
10

11 Shortly thereafter, around 10:46:54, Mr. [REDACTED] returned to the side of the room  
12 where he had initially sat. He faced the witnesses as he walked to the other end of the  
13 room. After about a minute passed, around 10:46: 54, Mr. [REDACTED] approached the water  
14 cooler facing the witnesses. He proceeded to meander around the cell, winding back to the  
15 side of the room where the witnesses sat. There he stood, leaning against the wall and  
16 facing them until 10:55:00 when he walked back to the opposite end of the room. He still  
17 faced the witnesses. At about 10:55:53, Mr. [REDACTED] sat at his original place, facing away  
18 from the witnesses before laying down to rest around 10:56:36. Around 11:08:03, Mr.  
19 [REDACTED] got up and left the room, followed by [REDACTED] and [REDACTED].  
20  
21

22 It was after this encounter, in the afternoon, that agents individually interviewed the three  
23 adult material witnesses. According to BPA [REDACTED], [REDACTED] described  
24 the driver and positively identified him after seeing Mr. [REDACTED] in the detention facility.  
25 [REDACTED] did not recognize any of the suspects when shown the photographs but  
26 said that he was the driver in the holding cell because "he was still wearing the exact  
27  
28

1 clothing.” The other two material witnesses were not able to identify the suspect after  
2 seeing a photographic line-up.

3 All three material witnesses identified Mr. [REDACTED] as the driver of car during the  
4 videotaped deposition on September 10, 2018.

## 6 II. Discussion

7 Unduly suggestive identification procedures violate due process. *Stovall v. Denno*,  
8 388 U.S. 293 (1967). The Supreme Court has held that these rules apply only to  
9 identifications that involve suggestive law enforcement conduct. *Perry v. New Hampshire*,  
10 565 U.S. 228, 242 (2012). However, there is no per se rule that a trial court must exclude  
11 identifications resulting from suggestive identification procedures. *See Manson v.*  
12 *Brathwaite*, 432 U.S. 98, 113-14 (1977).

13 In considering the admissibility of challenged identification testimony, courts have  
14 utilized a two-part test: “the defendant must first establish that the identification procedure  
15 was unnecessarily suggestive. If the defendant satisfied this burden, the court considers  
16 whether, viewed under the totality of the circumstances, the identification is reliable despite  
17 the suggestive procedure. *See United States v. Sleet*, 54 F.3d 303, 309 (7<sup>th</sup> Cir. 1995). In  
18 other words, under the totality of the circumstances, if a “substantial likelihood of  
19 irreparable misidentification” exists, the identification is unreliable. *Brathwaite*, 432 U.S.  
20 98.

### 25 *Step 1: Unduly Suggestive?*

26 Due process concerns arise when the identification procedure implemented by law  
27 enforcement is both suggestive and unnecessary, that is, without emergency or exigent  
28

1 circumstances justifying it. *Manson v. Brathwaite*, 432 U.S. 98. Law enforcement  
2 identification procedures are supposed to take place as impartially as possible. For  
3 example, the United States Supreme Court found line-up procedures where one petitioner  
4 stands out in contrast to the other as suggestive. *United States v. Wade*, 388 U.S. 218  
5 (1967).  
6

7         Photographic procedures that emphasize the focus upon a single individual increase  
8 the danger of misidentification. *Simmons v. United States*, 390 U.S. 377, 382–83, 388  
9 (1968). *United States v. Hanigan*, 681 F.2d 1127, 1133 (9<sup>th</sup> Cir.1982), cert. denied, 459  
10 U.S. 1203, 103 S.Ct. 1189, 75 L.Ed.2d 435 (1983). Because they are inherently suggestive  
11 and increase the likelihood of misidentification, courts have largely condemned the  
12 practice of one-person show ups. *Stoval v. Denno*, 388 U.S. 293, 302 (1967). With a show  
13 up, there is danger that the witness will “be influenced by the fact that the police appear to  
14 believe the person brought in is guilty, since presumably the police would not bring in  
15 someone that they did not suspect had committed the crime.” *United States v. Funches*, 84  
16 F.3d 249, 254 (7<sup>th</sup> Cir. 1996).  
17  
18  
19

20         In this case, the identifications were unduly suggestive because there was no  
21 exigency and because Mr. ██████ was kept in the same holding cell as the witnesses prior  
22 to being asked to identify him. Border patrol should have separated them in order to ask  
23 the witnesses to identify Mr. ██████ under a proper line-up procedure with other similar  
24 looking individuals. The photo array here did not contain similar-looking individuals.  
25

26         *Step 2: Sufficiently Reliable?*  
27  
28