

**APPLICATION FOR NOMINATION TO  
JUDICIAL OFFICE**

Honorable Christopher L. Kottke

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

**PERSONAL INFORMATION**

1. Full Name: **CHRISTOPHER L. KOTTKE**
  
2. Have you ever used or been known by any other name? **No** If so, state name:
  
3. Office Address: **Yavapai County Superior Court – Camp Verde Division  
2840 N. Commonwealth Drive  
Camp Verde, Arizona 86322**
  
4. How long have you lived in Arizona? **18 yrs.** What is your home zip code? **86326**
  
5. Identify the county you reside in and the years of your residency. **Yavapai, 18 yrs.**
  
6. If nominated, will you be 30 years old before taking office? **Yes**  
  
If nominated, will you be younger than age 65 at the time the nomination is sent to the Governor? **Yes**
  
7. List your present and any former political party registrations and approximate dates of each: **Republican 2003-current**

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

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8. Gender: **Male**  
Race/Ethnicity: **White, Caucasian**

**EDUCATIONAL BACKGROUND**

9. List names and locations of all post-secondary schools attended and any degrees received.
1. **University of Alabama, School of Law, LL.M, 1999**
  2. **Samford University, Cumberland School of Law, J.D., 1992**
  3. **University of South Florida, B.S., 1988**
  4. **Manatee Community College, A.A., 1986**
10. List major and minor fields of study and extracurricular activities.
1. **University of Alabama, Taxation**
  2. **Samford University, Doctor of Jurisprudence**
  3. **University of South Florida, Business Degree**
  4. **Manatee Community College, Aerospace Management**
  5. **Selected for coveted Jefferson County Attorney's Office, Law Clerk, Civil Division, 1991-92**
  6. **Private Pilot License, 1984**
  7. **Black Belt, Shotokan Karate**
11. List scholarships, awards, honors, citations and any other factors (e.g., employment) you consider relevant to your performance during college and law school.
1. **Samford, Academic Scholarship; Law Journal, 1990-92**
  2. **Samford University, Managing Editor, *American Journal of Trial Advocacy*, 1990-92**
  3. **American Jurisprudence Book Award, Equitable Remedies, Criminal Law Best Paper, 1990**
  4. **Published, *Constitutionality of Telephone Tips in Support of Reasonable Suspicion*, *American Journal of Trial Advocacy*, 14:3, 1991 (Cited: *Worth Reading*, *Nat'l. Law Journal*)**
  5. **Commissioned, LTJG, US Navy Reserve, 1992**
  6. **Worked full time during college to support myself, and pay for my education.**

**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.

- 1. **Alabama, September 1992**
- 2. **Arizona, November 1994**
- 3. **Georgia, October 2000**
- 4. **Indiana, June 2001**
- 5. **U.S. Court of Appeals for the Armed Forces, June 1996**

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

b. Have you ever had to retake a bar examination in order to be admitted to the bar of any state? **Yes** If so, explain any circumstances that may have hindered your performance. **While transitioning out of the military, and due to time constraints while working full time, raising my children and attending night and weekend school to complete my LL.M in Taxation program, I was unable to afford or engage in meaningful study for the Georgia bar exam. I missed one portion by a few points and had to retake the bar, passing the next admission.**

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
<b>Yavapai County Superior Court, Full Time, Judge Pro Tem (Criminal, Civil, Domestic Relations, Guardianships, Probate, Drug and Mental Health Court)</b>	<b>October 2017- Current</b>	<b>Camp Verde, Arizona</b>
<b>Kottke Law Firm, plc Attorney, Estate Planning, Probate, Business Transactions</b>	<b>June 2010- December 2017</b>	<b>Prescott, Arizona</b>

<b>Vakula Kottke, plc Attorney, Estate Planning, Probate, Business Transactions</b>	<b>June 2003- June 2010</b>	<b>Prescott, Arizona</b>
<b>Whelchel Dunlap, LLP, Attorney, Estate Planning, Business Transactions</b>	<b>January 2000- June 2003</b>	<b>Gainesville, Georgia</b>
<b>U.S.Navy/U.S. Air Force, JAG Officer</b>	<b>June 1992- January 2000</b>	<b>Washington, D.C.</b>
<b>Jefferson County Attorney's Office</b>	<b>1991-92</b>	<b>Birmingham, Alabama</b>

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.

1. Honorable John Napper, Yavapai County Superior Court
2. Honorable Tina Ainley, Yavapai County Superior Court
3. Honorable Krista Carmen, Yavapai County Superior Court
4. Honorable Cele Hancock, Yavapai County Superior Court
5. Honorable Anna Young, Yavapai County Superior Court
6. Honorable Michael Bluff, Yavapai County Superior Court
7. Honorable Debra Phelan, Yavapai County Superior Court
8. Honorable Joe Goldstein, Yavapai County Superior Court
9. Honorable Thomas Kelly, Yavapai County Superior Court
10. Honorable Don Stevens, Yavapai County Superior Court
11. Honorable Rhonda Repp, Yavapai County Superior Court

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.

**Prior to my appointment to the bench my law practice consisted of estate planning (50%), business transactions (30%), probate and probate litigation (20%). My many years in Prescott, doing complex and often high-profile work, had allowed me to develop a very large and diverse client base of both businesses and individuals.**

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

**As a military attorney I practiced in the area of criminal prosecution, criminal defense, and procurement law litigation. My eight (8) years experience as a litigator combined with my 20 years in civil law, business and estate planning has prepared me to be an appellate judge to understand the procedural aspects of litigation, while having a broad and diverse background in substantive areas of law.**

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.

**Not applicable**

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

**My experience in negotiating and drafting important legal documents has been proven successful in my last two and one-half years as a Superior Court Judge. Before my appointment I had been licensed to practice law for over 25 years. While in law school, I was published as a student, and my comment was cited in the *National Law Journal's Worth Reading* section. I was further honored to be appointed the assistant managing editor and thereafter managing editor of the *American Journal of Trial Advocacy*. I began my legal career as litigator and after receiving my LL.M transitioned to a transaction practice wherein I drafted important legal documents on a weekly if not daily basis. As a judge, I have drawn on my academic, research and significant hands on experience as counsel to draft hundreds of Rulings, Orders and other Memoranda from 2017 through current. My negotiating skills have been honed over my career to a point where I was assigned, and then resolved as settlement judge, numerous high profile domestic and criminal cases that were previously unresolved. My colleagues have praised me for this work, and the Court of Appeals opinions, attached, largely affirms my significant analytic and writing skill.**

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

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

**U.S. Navy/U.S.Air Force; Arizona MVD Department of Transportation; Arizona Department of Economic Security**

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

Sole Counsel: **90**

Chief Counsel: **1**

Associate Counsel: **4**

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

as:

Sole Counsel: 12  
Chief Counsel: 0  
Associate Counsel: 7

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.

***State of Arizona vs. JCG-S***

**V1300CR820080062/V1300CR820080093, Division PTB**

- (1) July 24, 2018- January 15, 2019**
- (2) Michael Terrible, Esq., Defense Attorney, (602) 254-5544 (Email unavailable); Treasure Van Druemel, Esq., (602) 253-7348; Steve Young, Esq., Yavapai County Attorney's Office (928) 771-3344 (Email unavailable).**
- (3) The Defendant was indicted in 2008, accused of murder. The Defendant had been held in pre-trial detention in Yavapai County since the time of his indictment, awaiting trial. The case worked its way through the system with often contentious litigation involving multiple judges, divisions and legal counsel assigned. In July 2018 the case was assigned to my division for a settlement conference. Within a few months I resolved this matter with a negotiated plea acceptable to both parties resulting in a prison sentence.**
- (4) This case was highlighted in the local media as one of a few cases that had lingered in the system for years where the Defendant was retained in custody at the Detention Center. While neither the Courts, the State of Arizona, the Defendant or his counsel are at fault for the matter lingering in the system it was through my division and experience processes that a negotiated compromise was possible.**

***State of Arizona vs. SLC,***

**V1300CR201580246; Division PTB**

- (1) August 10, 2018- August 13, 2018**
- (2) Stephanie Willison, Esq., Defense Attorney, (928) 445-3534 (Email unavailable); Patti Wortman, Esq., Yavapai County Attorney's Office, (928) 771-3344, patti.wortman@yavapai.us**
- (3) The Defendant was accused of veering into oncoming traffic in 2014 while under the influence causing serious injuries to a family riding in a van. The case, and companion cases of this Defendant, had worked their way through the system 2014-18 with various starts and stops. In July 2018 the case was**

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assigned to my division for a settlement conference. In August 2018 I settled this case with a plea of guilt.

- (4) This case was highlighted in the local media as one of several cases that had lingered in the system for years. While neither the courts, State of Arizona or the Defendant are necessarily at fault for the case lingering in the system it was through my division efforts that a negotiated compromise was met.

*Yavapai County Superior Court, W. v. G., Division PTB*  
V1300CR201880067, Division PTB

- (1) February 26, 2018- March 9, 2018  
(2) Jeffrey Murray, Esq., Counsel for Defendant, (602) 772-5505 (no email is available)  
(3) The civil matter involved a preliminary injunction, and lawsuit filed over the development plans of the large Camp Verde Sports Complex. The Plaintiff sued a city official of Camp Verde alleging certain improprieties and development breaches. Rather than engage in protracted litigation my division progressed the matter forward to settlement discussions which led to a swift resolution.  
(4) This case was publicized in the local media and had garnered much attention due to the contentious relationship between the parties and the development of the large sports complex in Camp Verde.

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:	75 (military)
State Courts of Record:	45
Municipal/Justice Courts:	5

The approximate percentage of those cases which have been:

Civil:	40%
Criminal:	60%

The approximate number of those cases in which you were:

Sole Counsel:	110
Chief Counsel:	0
Associate Counsel:	10

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: **10%**

You argued a motion described above **5%**

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

You negotiated a settlement: **75%**

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

A jury rendered a verdict: **1%**

The number of cases you have taken to trial:

Limited jurisdiction court **0**

Superior court **5**

Federal district court (mil) **15**

Jury **15**

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

**Many of my cases were military courts martial matters and I was not able to retain files.**

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: **2**

Criminal: **4**

Other: **0**

The approximate number of matters in which you appeared:

As counsel of record on the brief: 2

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.

***U.S. v. E, U.S. District Court, Central District of Alabama***

- (1) June 1998; I prosecuted this matter.
- (2) U.S. Magistrate Court – Montgomery, Alabama
- (3) The file was retained in the JAG Officer, Gunter Annex.
- (4) In my capacity as Special Assistant U.S. Attorney, I prosecuted a domestic violence case in the U.S. District Court, Middle District of Alabama. It was a difficult, three-day trial, calling eight witnesses to the incident, and memorable cross examination of the defendant. I received a *guilty* verdict.
- (5) This case received local media attention because the defendant was a known retired military member. I was awarded a service medal, in part, because of my work on this matter. The matter is documented in my JAG Officer Fitness Report dated April 9, 1999, available upon request. The file is likely retained in the legal office, Gunter Annex, AFB

***U.S. v. S, Navy-Marine Corps Trial Judiciary-Central Circuit, Corpus Christi, Texas***

- (1) 1994; I was Defense Counsel.
- (2) LT Traci Williams, Trial Counsel (contact information not available); LT Gordon Moderi, Associate Defense Counsel (contact information not available)
- (3) I was a Navy Lieutenant serving as Defense Counsel in Corpus Christi, Texas, Naval Legal Service Office. A Petty Officer (Second Class) was my client, accused of hiring a Dallas 'hit man' to murder his spouse. The alleged hit man was a convicted felon with a long criminal history. After the second contact with my client, the hit man, in a quest to garner favor with law enforcement, contacted local police and agreed to wear a wire to record his next conversation with the Defendant. Based upon the evidence, including a cash exchange between the Defendant and the hit man, my client

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was charged with Solicitation to Commit Murder, and life insurance fraud. After reviewing all the evidence, I negotiated a very favorable deal from the General Court Martial convening authority as non-trial resolution. The Defendant rejected the plea, insisting we go to trial, because, as he repeatedly stated, he was 'just kidding.' Prior to trial, on his own volition, the Defendant contacted *The Montel Williams Show*, and agreed to appear on a segment so he could tell his story, how he was 'joking around.' Over my objection the Defendant appeared on the show which aired a month before trial. At the General Court Martial, the Trial Counsel's first government witness was a show producer, who introduced Government Exhibit "A" as a certified copy of *The Montel Williams Show* episode "Why Men Murder Their Spouses." Despite my best trial efforts the jury, clearly not amused, convicted the Defendant and sentenced him to seven (7) years confinement.

- (4) This trial was significant not only for its media attention but because it honed and solidified my trial advocacy skills, motion practice and management of client expectations early on in my career. As an aside, in my current assignment as a Superior Court Judge and in the brief time on the bench I have presided over 21 criminal jury trials, and 1 civil jury trial and those litigation skills are never lost as evidenced by my jurors providing me questionnaire feedback concerning their positive trial experience in my courtroom. I have those questionnaires available for review and I have further detail of this trial, as well as other trials, documented in my Official Navy JAG Officer Fitness Reports, available upon request. The case filed was retained at the NLSO Command, Corpus.

***Estate of K v. M, Yavapai County Superior Court;  
P1300PB20080041***

- (1) February 26, 2014- October 14, 2014  
(2) J. Andrew Jolley, Counsel for Defendant, (928) 445-1909; [ajolley@prescottlawgroup.com](mailto:ajolley@prescottlawgroup.com); Co-Counsel for Petitioner, David E. Lieberman of Levin Schreder & Carey, (312) 332-6300; [david@lsclaw.com](mailto:david@lsclaw.com)  
(3) The estate litigation involved a large estate, and argument over the disposition of expensive estate artwork. The matter involved *pro hac vice* counsel, whom I sponsored, and an appeal in Division 1.  
(4) This case was significant because it dealt with a multi-jurisdictional estate settlement, multi state discovery, where Yavapai, Arizona jurisdiction was ancillary to Cook County, Illinois.

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.).

**I serve as a full time Superior Court judge in Yavapai County. I was appointed in October 2017, and after closing my law practice in Prescott, I moved my family to the Verde Valley, where my division is assigned. With 400 plus cases, I have a mixed calendar 100% of the Verde Valley civil cases, 100% of the Verde Valley Probate cases, 20% of the Verde Valley criminal trials, and the Verde Valley Drug and Mental Health Court. While I was appointed roughly 2.5 years ago, I have already presided over 22 jury trials. As you might guess from this calendar, and territory covered, my division is very busy. I am currently calendaring with three other judges to address the backlog of criminal trials due to the pandemic. During the pandemic I continued to manage all of the civil and probate cases in the Verde, my criminal cases, using Microsoft Teams as our primary tool for hearing attendance.**

**Equally important during the pandemic I continued to staff drug court on a weekly basis to assist those participants struggling during the crisis. My drug court team was amazing during this timeframe. I also handle Protective Orders and Emergency Petitions on a rotating basis.**

**I have years of experience, and a strong interest in furthering therapeutic drug and mental health courts and look forward to assisting the judicial branch in progressing and coordinating our respective programs to expand and focus those services. While I am a conservative judge, I believe there exists a huge gap of services as it relates to serving the needs of those suffering from drug abuse and mental health issues within the legal justice system.**

**My division handles a multitude of settlement conferences for other divisions, as they do for my criminal and civil matters.**

**I have years of experience in administrative management, and personnel matters, and would welcome an expansion of that assignment.**

**Prior to my full time appointment to the bench I served as a juvenile hearing officer in Yavapai County.**

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.

**P1300CV201600183, Court of Appeals, Div.1 CA-CV 18-0358**

- (1) 2016- June 4, 2019**
- (2) Judge Christopher Kottke, Yavapai County Superior Court, Division PTB**
- (3) Leonard T. Fink, attorney, Springel & Fink, LLP (480) 367-1018 [lfink@springelfink.com](mailto:lfink@springelfink.com); attorneys for Plaintiff/Appellee; Scott Zerlaut, Shorell, McGoldrick & Brinkman, (602) 230-5400, co-counsel to R.E.P. Custom Builders; and Diane Bornschuer, attorney for Defendant/Appellant, Wright, Welker & Pauole, (480) 961-0040, [info@wwpfirm.com](mailto:info@wwpfirm.com)**
- (4) This was a complex civil matter inherited by my division, entailing various motions including a dispositive Motion for Summary Judgment based upon the Statute of Repose for building trades. Based upon the facts, statute and case law, I ruled in favor of the movant, and dismissed the cause of action with a somewhat lengthy legal analysis.**
- (5) The matter was appealed to the Arizona Court of Appeals, Division 1 where my Ruling was AFFIRMED.**

**V1300DO201680249, Court of Appeals, Div.1 CA-CV 19- 0143-FC**

- (1) 2016- December 10, 2019**
- (2) Judge Christopher Kottke, Yavapai County Superior Court, Division PTB**
- (3) Robert Fruge, Esq.; attorney for Appellant; (928) 445-5500 (no email is available)**
- (4) This was an extremely difficult and lengthy divorce matter entailing numerous issues, judges, and hearings. On December 14, 2018, after three hearings, and pouring through lengthy files, I issued a comprehensive Ruling to finalize the action.**
- (5) A portion of my Ruling was appealed to the Arizona Court of Appeals, Division 1 where my Ruling was AFFIRMED.**

**V1300CR201880086, Court of Appeals, Div.1 CA-CR 19- 0159**

- (1) 2018- June 30, 2020**
- (2) Judge Christopher Kottke, Yavapai County Superior Court, Division PTB**
- (3) Glen Hammond, Esq., 141 S McCormick Street, Suite 211, Prescott, Arizona 86303, (928) 496-0357, Defendant's Counsel; Larrisa Parker, Esq., (928) 2830 N Commonwealth Drive, #106, Camp Verde, Arizona 86322, (928) 567-7717, [larrisa.parker@yavapai.us](mailto:larrisa.parker@yavapai.us), County Attorney**
- (4) This is a criminal matter and jury trial involving an interesting search and seizure issue that was a raised at trial. Defense argued the probation search exceeded the reasonable scope of necessity. I ruled that the scope was not exceeded, and**

**prepared an Order to that end. The defendant was found guilty at trial, and appealed to the Arizona Court of Appeals. The Court of Appeals AFFIRMED my ruling.**

**These three diverse cases all appealed and affirmed during my tenure provides the Governor evidence of my experience, ability to study an area of law assigned, and legal accumin which will be an asset to the Court of Appeals.**

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

**Often judicial officers are one dimensional and excel only in academia or a single area of law. My background is dynamic, diverse and filled with real life experiences. While I excel in academia, I also bring the added dimension of working as a law enforcement officer in Sarasota County Florida from 1986-88, before I attended law school. I was employed as a Sheriff's Deputy assigned to the uniform patrol division. That experience was invaluable to understanding the special pressures involved in law enforcement and the unique skills good officers bring to the security and stability of our community.**

**As I review cases, or matters of Special Action, I can draw from those experiences, where I saw superior police work contrasted with poor police work, placing me in a position of first-hand knowledge allowing me to assess cases or contribute to a panel from a unique perspective. Add to the foregoing my eight years military experience where I served with distinction and was awarded the Meritorious Service Medal.**

**Finally, I earned the LL.M in Taxation through hard work, significant study and determination. While tax is an arcane area of law, the ability to study and comprehend complex business and regulatory matters and their statutes is invaluable to the Court of Appeals.**

## **BUSINESS AND FINANCIAL INFORMATION**

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

\_\_\_\_\_ If not, explain your decision. **Not applicable**

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? **Yes** If so, identify the nature of the case, your role, the court, and the ultimate disposition.  
**In 2014, after exhausting all other remedies, I sued a former client for non-payment of legal fees. I was represented by counsel, received a judgment, and collected the fee. Yavapai County Superior Court.**
37. Have you ever filed for bankruptcy protection on your own behalf or for an organization in which you held a majority ownership interest? **No** If so, explain.
38. Do you have any financial interests including investments, which might conflict with the performance of your judicial duties? **No** If so, explain.

**CONDUCT AND ETHICS**

39. Have you ever been terminated, asked to resign, expelled, or suspended from employment or any post-secondary school or course of learning due to

allegations of dishonesty, plagiarism, cheating, or any other "cause" that might reflect in any way on your integrity? **No** If so, provide details.

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

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

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

**U.S. Navy, JAGC, June 1992-September 1996, Honorable Discharge; U.S. Air Force, JAG Department, September 1996-December 1999, Honorable Discharge.**

**I was awarded two Expert Marksman, two navy Achievement Medals, a Navy Commendation Medal, and a Meritorious Service Medal.**

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.

**Not applicable**

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

**Not applicable**

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

**Not applicable**

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? **Yes** If so, in each case, state in detail the circumstances and the outcome.

**In my 28 years (2.5 as a judge) of law practice, including eight years as a military officer, I have not received any complaints, ethics or otherwise, or any inquiries, sanctions or reprimands of any kind, nature or sort. In March 2020, coincidentally just months in advance of certain judicial vacancies, I received a judicial complaint, emanating from the Yavapai County Public**

**Defender's Office, unfairly alleging that I would not listen to certain public defender in court arguments, that I made certain comments in out of court staffing which is alleged to have offended certain public defender attorneys. The complaint also alleges my staff member made an inappropriate gesture and retaliated for this complaint. The complaint, I *strongly* contest, is being reviewed by the *Commission on Judicial Conduct* and I am hopeful it will be dismissed in the near future. Even after the complaint was filed I continue to maintain a superior and respectful working relationship with the various attorneys of that office.**

46. During the last 10 years, have you unlawfully used controlled substances, narcotic drugs or dangerous drugs as defined by federal or state law? **No** If your answer is "Yes," explain in detail.
47. Within the last five years, have you ever been formally reprimanded, demoted, disciplined, cautioned, placed on probation, suspended, terminated or asked to resign by an employer, regulatory or investigative agency? **No** If so, state the circumstances under which such action was taken, the date(s) such action was taken, the name(s) and contact information of any persons who took such action, and the background and resolution of such action.
48. Have you ever refused to submit to a test to determine whether you had consumed and/or were under the influence of alcohol or drugs? **No** If so, state the date you were requested to submit to such a test, type of test requested, the name and contact information of the entity requesting that you submit to the test, the outcome of your refusal and the reason why you refused to submit to such a test.
49. Have you ever been a party to litigation alleging that you failed to comply with the substantive requirements of any business or contractual arrangement, including but not limited to bankruptcy proceedings? **No** If so, explain the circumstances of the litigation, including the background and resolution of the case, and provide the dates litigation was commenced and concluded, and the name(s) and contact information of the parties.

**PROFESSIONAL AND PUBLIC SERVICE**

50. Have you published or posted any legal or non-legal books or articles? **Yes** If

so, list with the citations and dates.

**Christopher L. Kottke, *ALABAMA V. WHITE: The Constitutionality of Anonymous Telephone Tips in Support of "Reasonable Suspicion" and The Narrowing of The Fourth Amendment Protections* 14 Am. J. Trial. Advoc. 603 (1991).**

**Note: This Student Comment was cited in 1991 in *The National Law Journal's* Worth Reading Section**

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.

**Assistant Professor, Business Law I, Park College, 1994  
Assistant Professor, Business Law II, Park College, 1995  
Visiting Instructor, Criminal Law, Yavapai College, 2005  
Yavapai County Bar Assn. – Lecturer, Estate and Business Planning, 2010  
Prescott Estate Planning Council, Lecturer, Business Planning, 2008, 2009, and 2010**

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

**Arizona bar; 1994-current  
Alabama bar, 1992-2015 (inactive)  
Georgia bar, 2000-2004 (inactive)**

Have you served on any committees of any bar association (local, state or national) or have you performed any other significant service to the bar? Yes  
**In 2010, Alex Vakula and I received the Yavapai County Bar Association's outstanding members award and recognition for our joint efforts to Save the Yavapai County Courthouse. Through our efforts we built a public opposition and protest to relocating court services from the downtown location. We received statewide recognition for the efforts, and more important, the old courthouse remains in service as the centerpiece of the downtown business district of Prescott. Michael Murphy, Esq., recounted our efforts recently in a biography article in the *Arizona Attorney* magazine.**

**I have also served on the estate planning council, and have mentored Prescott attorneys in estate and business matters.**

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.

**In addition to providing free services to some of my retained clients who were having financial difficulty, I have provided free legal service to low income, and indigent persons on the annual law day celebration, 2004-2009, 2015**

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

**In 2007, I co-founded and managed *SAVE-Students Against Violence Everyday*, a non-profit, 501(c)(3), whose mission is to provide no cost services to Prescott school children who are need of help, to reduce violence and impact of violence in their lives. Those services are donated from therapists, counselors, physicians, dentists and the like. By 2009 SAVE had provided in excess of \$500,000 to students with the free donation or services by caring professionals. Noteworthy is that Chief Justice Brutinel was one of our early directors, and fully supportive of our mission. Our organization meetings were often held in his chambers when he was presiding judge of Yavapai County. This organization was merged into the Prescott Unified School District in 2011.**

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

**As a military attorney, I was awarded two *Navy Achievement Medals*, a *Navy Commendation Medal*, and a *Meritorious Service Medal*. Further, I received numerous Letters of Commendation from various commanders honoring me for service to their unit as either a prosecutor, or in support of their deployment efforts.**

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

**Not applicable**

Have you ever been removed or resigned from office before your term expired?  
n/a If so, explain.

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

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

**My grandchildren, family, neighbors, community, state and this great country are my interests. My family members and I have served in the military which has established in me a strong sense of patriotism. I support public efforts that protect our flag, Constitution and freedom.**

**My wife and I are motorcycle enthusiasts, and horse lovers. We enjoy long rides on either, and watching the Arizona sunsets. I support the rights of ranching, farming and agricultural interests in the State of Arizona which are all key to maintaining our heritage of this great state.**

**I believe a healthy body and mind work together for good, and thus I have had a lifelong fitness regime including lifting weights, practicing Shotokan karate and walk/running.**

**Finally, I am a private pilot, and while I no longer fly that often due to work and family interests I am an avid fan of general aviation.**

**HEALTH**

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

**ADDITIONAL INFORMATION**

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

**In an era of societal and civil unrest the Governor should know that the judge he is choosing for the court of appeals will support and defend the U.S. Constitution, the state constitution and executive orders. I pledge, if chosen, to continue to interpret those documents in the spirit of which they were created. Judges should not be activists, and should be mindful of those persons who historically have**

**not had access to justice as they carry out their function. In that respect the judicial system should provide an opportunity to all persons to be heard irrespective of their position in society. I further pledge to continue to follow the law, as it is given to us by the legislative or executive branch, for all of my orders and rulings. Various times in the past 2.5 years I have explained to litigants before me that while I may not always agree with the law provided to me, I am duty bound to follow that law, and my orders are consistent in that respect. This consistent application of the law provides stability and certainty to our state residents and the litigants, and furthers the premise that we are a nation of laws, where all persons enjoy equal, fair and impartial rights to justice. My track record proves this is the type of judge I am, not just a pledge of what I promise to be.**

**My family members have served this country as military members and law enforcement off and on for over 80 years. The heritage of service before self runs deep, and I pledge to continue such until I retire, or am no longer able to serve.**

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

**I have practiced in criminal law, civil law claims, probate, and estate planning. While on the bench I have been assigned to criminal, civil, probate, guardianships, mental health and drug court and excelled in each discipline.**

**Although I am far from perfect, my patient and kind judicial temperament is proven with the fast paced, and busy calendar over which I preside. It is important for the Governor to appoint persons with a proven track record. My track record of being able to manage a will contest, contentious divorce, a twelve person criminal jury trial, or a complex medical malpractice trial is already proven, and being able to understand those areas is key for an appellate judge. Adding to that success my work and efforts over the past 2.5 years in therapeutic courts and my qualifications and experience exceeds those of most candidates to this position.**

**I have a special interest in updating the state processes for mentally challenged litigants and defendants and look forward to working with other likeminded professionals to better the system in that regard.**

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 am seeking this position because being a judge is a privilege and a mission of service. I have spent a majority of my adult working life in areas of service. Being appointed by the Governor to the court of appeals would be an honor, and it means that I may continue my service to the State of Arizona in a capacity that can make a difference. As indicated above I have significant experience in drug and mental health court, and it would be an honor to continue furthering that work with an impact at a higher judicial level. I am a conservative judge but I believe Arizona can make significant changes to better expand mental health services while reducing overall costs for the state. My foregoing interest, plus my professional and academic record make me the perfect selection for the replacement of the Honorable Kenton Jones.**

**We are living in extraordinary times. An appellate judge must be logical, analytical but compassionate. Judges who understand the judicial role provide order, safety and certainty to litigants facing fear and uncertainties. It is a privilege to serve and to make an impact in the interests of justice. I currently serve as a pro tem judge in Yavapai County with pride and humility, and respectfully request the Governor's appointment to the Court of Appeals so that I may continue serving on the bench to the residents of the State of Arizona.**

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

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.

**Not applicable**

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Student Comment

Christopher L. Kottke

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## **\*603 ALABAMA v. WHITE: THE CONSTITUTIONALITY OF ANONYMOUS TELEPHONE TIPS IN SUPPORT OF "REASONABLE SUSPICION" AND THE NARROWING OF FOURTH AMENDMENT PROTECTIONS**

### **I. Introduction**

The United States Supreme Court recently narrowed the scope of fourth amendment safeguards against unreasonable vehicle searches and seizures.<sup>1</sup> The Court determined that an anonymous informant's tip, coupled with a subsequent police investigation, creates sufficient indicia of reliability to allow officers to stop a suspect vehicle.<sup>2</sup> Before this decision, the Court had not determined the outer limits of an anonymous "tipster's" reliability to support the constitutionality of a vehicle stop.

At the center of this issue are the varying levels of police authority and the requisite suspicion needed to make a vehicle stop.<sup>3</sup> Whether a mere intermediate investigatory stop is contemplated by police officers or a full blown search, the Court has historically required certain safeguards against arbitrary law enforcement procedures.<sup>4</sup> This Comment examines the modern diminution of fourth amendment procedural \*604 safeguards and the effect that contemporary societal problems tend to have on the balance. The heightened importance of this topic becomes evident when one considers that the fourth amendment right<sup>5</sup> against unreasonable searches and seizures may continue to diminish as a result of the political popularity to control the war against drugs.<sup>6</sup>

### **II. *Alabama v. White***

In *Alabama v. White*,<sup>7</sup> Vanessa Rose White was arrested and convicted in Montgomery County, Alabama, for possession of cocaine and marijuana.<sup>8</sup> The circumstances leading to the arrest began with an anonymous informant's tip to authorities.<sup>9</sup> The caller advised authorities that the defendant would leave a particular apartment and drive a certain vehicle to a motel room, where she would transport certain contraband.<sup>10</sup> Although not every detail of the call was verified, the tip provided police with enough evidence to create a reasonable suspicion, one of the standards required to make an investigatory stop<sup>11</sup> of a suspect's vehicle.<sup>12</sup> After the vehicle stop, the defendant consented to a vehicle search.<sup>13</sup> \*605 The police found marijuana and cocaine within her vehicle and subsequently placed her under arrest for possession.<sup>14</sup>

The Alabama Court of Criminal Appeals reversed her conviction, determining that the police officers failed to support the reasonable suspicion standard required for an investigatory stop under *Terry v. Ohio*.<sup>15</sup> The Alabama Supreme Court denied the State's petition for writ of certiorari, and the United States Supreme Court granted certiorari to decide whether an anonymous telephone tip may create an officer's reasonable suspicion to justify a vehicle stop.<sup>16</sup> This Comment focuses on the Supreme

Court's legal analysis related to this recent use of anonymous tips to create the required reasonable suspicion. This Comment examines the Court's recent determination that tips, once unreliable, can be utilized by the government when they are verified with a "totality of the circumstances" test.

### III. Early Development Prohibiting Unreasonable Search and Seizure

The nature of probable cause has evolved to thwart unreasonable searches and seizures.<sup>17</sup> This evolution has involved \*606 a natural tendency to balance a citizen's privacy interest with that of effective governmental authority.<sup>18</sup> This evolutionary process was relatively slow;<sup>19</sup> it had its beginnings when the first search and seizure question was examined by the Court in 1886.<sup>20</sup> The brevity and generality of the fourth amendment has perpetuated extensive litigation since that time.<sup>21</sup>

The Court laid the predicate to a balancing of interests approach in *Brinegar v. United States*.<sup>22</sup> In *Brinegar*, the defendant, known to the arresting liquor-enforcement agents as a past liquor-law violator, was observed driving a heavily-loaded vehicle into Oklahoma.<sup>23</sup> After pulling the defendant over, the agents recognized a case of liquor in plain view on the vehicle's front seat.<sup>24</sup> The agents searched the defendant's vehicle and located twelve more cases of illegal liquor.<sup>25</sup> The defendant was charged with violating the Liquor Enforcement Act of 1936.<sup>26</sup> On review, the Court upheld the search partly because the agent had personal knowledge of the defendant's past record.<sup>27</sup> The Court used guarded language in *Brinegar*, stating that probable cause is "more than bare suspicion: Probable cause exists where 'the facts and circumstances within the officers' knowledge and \*607 of which they had reasonable trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed."<sup>28</sup> The Court characterized the probable cause standard here as one which effectively weighs societal interests in individual privacy against the equally important societal needs for effective law enforcement activity.<sup>29</sup> This *Brinegar* standard effectively requires an officer to use diligence, inquiry and careful procedure as not to violate one's fourth amendment rights. Although the *Brinegar* standard appears to give officers wide latitude and personal subjective discretion in developing probable cause, the Court adhered to the objective standard of reasonableness, as subsequently discussed in *Beck v. Ohio*.<sup>30</sup>

In *Beck*, the petitioner was stopped in his vehicle by officers who received unverified "information" and "reports" about him and his gambling record in a jurisdiction where possession of gambling paraphernalia was illegal.<sup>31</sup> Without a warrant, officers stopped, searched and transported him to a police station where they found clearing house slips in his possession in violation of an Ohio criminal statute.<sup>32</sup> The petitioner's Ohio conviction was based upon a rationale that the officers' *subjective* good faith and knowledge of the petitioner's criminal activity supported probable cause.<sup>33</sup> The \*608 United States Supreme Court reversed the Ohio Supreme Court, determining that the subjective good faith of an officer does not constitute a constitutional notion of probable cause.<sup>34</sup> The Court stated: "If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers and effects,' only in the discretion of the police."<sup>35</sup> However, the Supreme Court has made it clear that an officer's expertise and law enforcement experience are appropriately involved when applying the probable cause test.<sup>36</sup> Typically, this experience includes the police officer's discovery and verification of specific facts, not mere conclusions based upon a subject's reputation.<sup>37</sup>

Although subjectivity of a police officer has been accepted as a strong factor in the probable cause formula, objective criteria is required in every arrest to support that standard. In any instance, if an officer makes an arrest or has a warrant issued without meeting the requisite level of probable \*609 cause, any evidence seized from the arrest or warrant should be excluded from trial by the exclusionary rule.<sup>38</sup> The exclusionary rule merely suggests that any evidence seized, without the fourth amendment requirement of probable cause, shall be excluded at trial by the court.<sup>39</sup> Determining what level of probability is necessary to establish probable cause, and thus to avoid exclusion at trial, has been the primary fourth amendment dispute in search and

seizure cases.<sup>40</sup> Accordingly, part of the perplexing nature of this question involves the differing degrees of suspicion required to make a seizure or arrest rather than a mere investigation.<sup>41</sup> The delineation between a mere "frisk" and a full search involves in part, the degree of probability an officer possesses to invade an individual's privacy based upon the relative amount of contact that officer has with the suspect.<sup>42</sup> The basic difference is a momentary deprivation of liberty in a frisk situation versus complete detainment in the arrest level of the probable cause standard.<sup>43</sup>

#### \*610 IV. An Intermediate Search Standard

In the 1968 case *Terry v. Ohio*,<sup>44</sup> the Court recognized an intermediary probable-cause standard. The standard is based on reasonable suspicion and is constitutionally necessary in order to make a valid investigatory "stop and frisk."<sup>45</sup> In *Terry*, a police officer patrolling his beat observed two individuals acting as though they were "casing a job" outside a downtown store.<sup>46</sup> The officer detained and "patted down" the individuals, subsequently discovering and seizing concealed firearms.<sup>47</sup> The suspects were arrested and convicted of carrying concealed weapons.<sup>48</sup> The Court affirmed Ohio's reasonable suspicion standard of probable cause which allows an identified officer to stop and frisk a suspected individual's outer clothing to protect himself and others against present danger.<sup>49</sup>

The Court in *Terry* took a cautious approach in distinguishing a frisk from a search.<sup>50</sup> The Court observed: "Only when the officer, by means of physical force or show of authority, \*611 has in some way restrained the liberty of a citizen may we conclude that a 'seizure' thus requiring traditional probable cause has occurred."<sup>51</sup> The Court approved the *Terry* standard for use in automobile stops in *Adams v. Williams*,<sup>52</sup> allowing officers to make the same cursory search of a suspect in a vehicle based merely on an informant's tip.<sup>53</sup> In *Adams*, a police officer, acting on a tip from an informant, asked the defendant to open his vehicle door so the officer could check for weapons before making an investigation for narcotics.<sup>54</sup> The officer found a gun tucked in the defendant's waistband where the informant had advised a weapon would be located.<sup>55</sup> Because the informant was known to the officer to be a good informant, the Court concluded this knowledge carried enough indicia of reliability to justify a stop and protective search of the defendant's automobile.<sup>56</sup> Thus, the Court upheld the *Terry* rationale in *Adams*, allowing a frisk-type "pat down" of a suspect driving an automobile. To further protect police officers, this "frisk" was broadened in *Michigan v. Long*<sup>57</sup> to include a quick cursory search of an automobile interior. The *Long* Court limited the search, for the purpose of discovering concealed weapons, to readily accessible areas.<sup>58</sup> In *Long*, the police stopped the defendant for erratic driving.<sup>59</sup> The defendant, acting as though he was "under the influence of something,"<sup>60</sup> was searched along with his vehicle because officers saw what appeared to be a hunting knife on his \*612 floorboard.<sup>61</sup> The cursory vehicle search revealed marijuana under the vehicle's armrest.<sup>62</sup> Characterizing the officer's apprehension upon viewing a weapon in the vehicle as reasonable, the Court upheld the search as a protective search under *Terry* rationale.<sup>63</sup>

This expansive reading of *Terry*, allowing the interior of a vehicle to be "frisked" for weapons, prompted a strong dissent from Justice Brennan in *Long*.<sup>64</sup> Justice Brennan stated that *Terry* originally "authorized only limited searches of the person for weapons."<sup>65</sup> Justice Brennan expressed his dissatisfaction with the majority's expansive reading of *Terry* that only a reasonable suspicion is required to uphold a "search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden."<sup>66</sup> Justice Brennan observed that this holding "reflects once again the threat to Fourth Amendment values posed by the Court's 'balancing' approach"; furthermore, "the Court takes a long step today toward 'balancing' into oblivion the protections the Fourth Amendment affords."<sup>67</sup> Justice Brennan criticized the majority's method of using a *Terry* stop for offensive police conduct rather than \*613 the original defensive reading of a *Terry* stop for officer protection.

## V. Contemporary Status of Search and Seizure

The balancing tests with which Justice Brennan was concerned are substantially traditional notions of the Court's response to contemporary law enforcement needs.<sup>68</sup> These tests use the *Terry* "stop and frisk" standard of reasonable suspicion or the probable cause standard required for actual arrest.<sup>69</sup> Significant in this new balancing approach is the flexibility available to the Court in determining when a search has met contemporary fourth amendment constraints.

One of the more significant reasons for a less rigid approach to determining probable cause in today's society is to fight the war against drugs.<sup>70</sup> This "war" has a significant impact on what currently constitutes reasonableness in the area of anonymous informant information.<sup>71</sup> For example, the Supreme Court established a strict rule regarding informant information with a two-prong analysis in *Aguilar v. Texas*.<sup>72</sup> In *Aguilar*, the police had a warrant issued based upon hearsay from an informant who they determined to be a "credible source."<sup>73</sup> The Court, however, determined that \*614 the affidavit failed to declare enough "underlying circumstances" to support the information and the informant's veracity.<sup>74</sup> After determining that the warrant was not supported by adequate inferences of criminal activity, the Court developed a two-prong probable cause test.<sup>75</sup> Under the first prong, the affiant must reveal facts that readily allow a judge to determine that probable cause exists.<sup>76</sup> The second prong concerns the credibility of the information source.<sup>77</sup> The *Aguilar* decision was followed by *Spinelli v. United States*.<sup>78</sup> The *Spinelli* Court followed the *Aguilar* test and imposed the same safeguards against arbitrary probable-cause averments by law enforcement officials.<sup>79</sup> In *Spinelli*, the Court ruled that, where the affidavit could not fully support the reliability of the informant's information, an informant's tip claiming the petitioner was involved in illegal gambling was inadequate to support the FBI's probable cause warrant.<sup>80</sup> The Court simply determined that the informant's information, even in conjunction with the independent FBI surveillance, could not support the arrest charges.<sup>81</sup>

This rigid two-prong test survived for over a decade. Then in 1983, the fourth amendment parameters of reasonableness for a search and seizure took on new dimensions.<sup>82</sup> As adopted in *Illinois v. Gates*,<sup>83</sup> the new standard recognizes both prongs of the *Aguilar/Spinelli* test in one "totality of the circumstances" balancing procedure.

\*615 In *Gates*, an Illinois police department received an anonymous letter detailing the drug selling activities of a husband and wife in the area.<sup>84</sup> The police and the Drug Enforcement Administration acted on this letter with their own independent investigation.<sup>85</sup> Using the letter and a separate investigation, the police obtained a warrant and seized contraband found in the respondent's car trunk.<sup>86</sup> Before trial, the drug evidence was ordered suppressed because the officers failed the *Aguilar/Spinelli* veracity test on which the search warrant was based.<sup>87</sup> Because the informant could not be identified, the veracity of the informant could not be shown. The Illinois Supreme Court affirmed the order and held, "The affidavit submitted in support of the State's application for a warrant to search the Gates' property was inadequate under this Court's decisions in *Aguilar v. Texas* and *Spinelli v. United States*."<sup>88</sup>

On certiorari, the United States Supreme Court in *Gates* considered whether to uphold a warrant based upon a partially corroborated anonymous informant's tip.<sup>89</sup> The Court determined that the two-prong analysis "should be understood simply as closely intertwined issues that may usefully illuminate the common sense, practical question whether there is 'probable cause'." <sup>90</sup> Thus a majority of the Court adopted a "totality of the circumstances" approach and suggested that "a particular informant's ... failure ... to thoroughly set forth the basis of his knowledge surely should not serve as an absolute bar to a finding of \*616 probable cause." <sup>91</sup> The Court adopted a flexible rule for determining whether the facts stated in the affidavit satisfy the traditionally required level of objective probable cause.

A dissent in *Gates* expressed concern about the majority's holding that radically changes fourth amendment analysis by removing the two-prong protective safeguards.<sup>92</sup> The emerging theory frustrates the traditional notion of built-in protections and probable cause elements,<sup>93</sup> especially in the street officer's use of warrantless search exceptions and in the context of automobile searches.<sup>94</sup> These exceptions eliminate the necessity of a third party magistrate to determine the existence of probable cause. Thus, officer discretion plays a larger role because the officer makes the ultimate "probable cause" decision.<sup>95</sup> Where officer discretion coupled \*617 with a new "totality" standard of a warrantless exception to search or arrest, the *Gates* dissent is justified in its opinion.<sup>96</sup>

Satisfying warrantless exceptions cannot be established using a subjective standard,<sup>97</sup> but rather an objective, reasonable man standard. Because the *Terry* stop and frisk<sup>98</sup> is also a warrantless exception for a search, the same objectivity must be maintained to justify an officer's infringement of a citizen's rights.<sup>99</sup> Thus, the Court's pronouncement in *Adams v. Williams*,<sup>100</sup> that a *Terry* stop based upon reasonable suspicion developed from an informant's tip, presses that objective standard.<sup>101</sup> Even acknowledging that the *Aguilar/Spinelli* two-prong probable cause analysis did not enter into the lower reasonable suspicion standard of *Terry*, there is still room to question the veracity of an informant to establish an officer's reasonable suspicion.<sup>102</sup> The only justification for the Court's pronouncement in *Adams* is the intermediary nature of the stop and frisk as formulated in *United States v. Cortez*.<sup>103</sup>

The *Cortez* Court adopted the "totality of the circumstances" approach to determining reasonable suspicion, and, accordingly, it was not difficult for the Court to determine that the government acted appropriately.<sup>104</sup> *Cortez* seems to \*618 be a factually stronger case than *Adams* in support of the "totality" standard. In *Cortez*, the Court relied on the fact that United States border patrol officers' detailed investigation was objective enough to deduce sufficient independent information to warrant a vehicle stop and arrest of the respondent.<sup>105</sup> In *Cortez*, border agents found the distinctive shoe prints of a suspect they identified as an illegal alien guide.<sup>106</sup> After their investigation, they staked out an area in which the suspect guide was operating and stopped a vehicle capable of transporting illegal aliens.<sup>107</sup> The shoe prints of one of the passengers matched those identified on earlier nights, thus establishing enough indicia of reliability to perform a search.<sup>108</sup> Aliens were subsequently found and the defendant was arrested and charged.<sup>109</sup> The Supreme Court determined that, "based upon the whole picture, they, as experienced Border Patrol officers, could reasonably surmise that the particular vehicle they stopped was engaged in criminal activity."<sup>110</sup> This holding was derived essentially from the "totality of the circumstances" definition from which one may determine a reasonable suspicion to stop a subject exists. The Court in *Cortez* concluded that "the detaining officers must have a particularized and objective \*619 basis for suspecting the particular person stopped of criminal activity."<sup>111</sup>

With those cases as a foundation, the Court in *Alabama v. White*<sup>112</sup> analyzed whether an anonymous phone tip provided the particularized and objective basis required for police officers to stop and investigate a suspect's vehicle. In *White*, the Court seemed to have "bridged the gap" between an unverified anonymous telephone tip and the creation of an officer's objective reasonable suspicion, merely using a *Cortez*<sup>113</sup> and *Gates*<sup>114</sup> "totality of the circumstances" approach to establish tip veracity. By simply allowing officers to trail a subject after receiving a tip, to verify the caller's ability to predict the suspect's behavior, the Court has ameliorated the need for any other positive indicia that an anonymous tip has any credibility. Although overruled, the *Aguilar/Spinelli* test requiring "an informant's 'veracity,' 'reliability,' and basis of knowledge remain s highly relevant ... in determining the value of the tipster's report."<sup>115</sup> Thus, the veracity portion of a *Cortez* or *Gates* test is merged into other facts and taken as "highly relevant" rather than as a "critical" element under the *Aguilar/Spinelli* test.<sup>116</sup> The *Aguilar/Spinelli* test was simply a make or break safeguard, softened to allow marginal cases to be upheld as constitutional.

**SUPERIOR COURT, STATE OF ARIZONA, IN AND FOR THE COUNTY OF YAVAPAI**

<p>CARRIE YOKI</p> <p align="center">Plaintiff,</p> <p>and</p> <p>JOHN DOE</p> <p align="center">Defendant.</p>	<p align="center"><b>Case No. V1300CV20178****</b></p> <p align="center"><b>RULING</b></p>	<p align="center"><b>FILED</b></p> <p><b>DATE:</b> _____</p> <p align="center">_____ O'Clock ____ . M.</p> <p align="center"><b>DONNA McQUALITY,</b></p> <p align="center"><b>CLERK</b></p> <p><b>BY:</b> _____</p> <p align="center"><b>Deputy</b></p>
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<p><b>HONORABLE CHRIS L. KOTTKE</b></p> <p><b>DIVISION PRO TEM B</b></p>	<p><b>BY:</b> Melissa May, Judicial Assistant</p> <p><b>DATE:</b> July 5, 2020</p>
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Defendant has filed a *Motion to Dismiss*, Plaintiff filed Plaintiff's *Response to Defendant's Motion to Dismiss, Motion to Extend Time for Service of Summons and Complaint* and Defendant's *Reply Supporting His Motion to Dismiss*. On this date the Court heard oral argument on the foregoing pleadings. For reasons stated herein, the Court dismisses the complaint pursuant to Rule 12(b), Arizona Rules of Civil Procedure.

The primary basis for dismissal is that the claims made, excepting the malicious prosecution, are time-barred. A claim in Arizona accrues when a plaintiff knows, or with reasonable diligence, should know the facts underlying the claim. *See, Floyd v. Donahue*, 186 Ariz. 409, 923 P.2d 875 (App. 1996). As set out in the pleadings, the Plaintiff knew, on May 25, 2015, every alleged claim except that of malicious prosecution. Plaintiff's assertion of a "continuing wrong" as it relates to the date of her subsequent prosecution and acquittal is relatively persuasive yet is inconsistent with recent Arizona case law to the contrary. *See, Watkins v. Arpaio*, 239 Ariz. 168, 367 P.3<sup>rd</sup> 72 (App. 2016). The alleged torts occurring on May 25, 2015 could stand on their

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own, and did not require some event, such as acquittal, to breathe life into them. Accordingly, all claims except the allegation of malicious prosecution are DISMISSED as being time barred pursuant to A.R.S. § 12-821.01.

With respect to the allegation of malicious prosecution, *Hockett v. City of Tucson*, 139 Ariz. 319, 678 P.2d 502 (App. 1983) states that the existence of probable cause is a complete defense to the tort of malicious prosecution. The determination of probable cause is a matter of law for this Court to determine, provided there is generally no dispute as to facts concerning probable cause. *Sarwark Motor Sales, Inc. v. Woolridge*, 88 Ariz. 173, 354 P.2d 34 (1960). Based upon Plaintiff's *own* Complaint, it is plead that 1) the Defendant was dispatched to Plaintiff's residence on a disorderly conduct complaint, 2) that upon arrival, the Defendant asked the Plaintiff to step outside the residence so he may investigate the complaint, and 3) that Plaintiff endeavors to go back inside the residence before the Defendant completed his investigation. Plaintiff's Complaint further shows that the Plaintiff was arrested at that point, outside the residence, and charged with disorderly conduct.

Following the arrest, based on the file records, the Court takes notice that a judge reviewed the charges with the Plaintiff at a first appearance and or an arraignment and that a prosecutor, not named in the Complaint, brought the charge forward to trial.

In the context of malicious prosecution the Arizona Supreme Court has stated that probable cause is defined whether "a reasonable ground of suspicion supported by circumstances, would be sufficient to warrant a reasonably prudent person to believe the accused is guilty of the offense." *See, McClinton v. Rice*, 76 Ariz. 358,

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265 P.2d 425 (1953). As parties will likely agree, the Arizona Supreme Court has set forth a relatively low threshold concerning probable cause and when applying that standard to these facts, the Court finds, that the Defendant, under these circumstances, had probable cause. The Plaintiff's own pleadings confirm this for the Court, and when the malicious prosecution was highlighted by the court at oral argument, the Plaintiff offered no additional evidence or insight to the Court with respect to absence of probable cause. The finding of not guilty at trial is not dispositive of that issue. Consequently, and pursuant to *Hockett, infra*, the Court finds that the Defendant has a legal defense to the allegation of malicious prosecution in this matter. Accordingly, the claim of malicious prosecution is **DISMISSED** in this matter.

Finally, while the Court has already made the foregoing legal findings, the Court further finds that the Complaint was not timely served upon the Defendant, whether individually or as servant of Yavapai County, as required under Rule 4(i), of the Arizona Rules of Civil Procedure, and as Defendant's counsel submits, no good cause for a waiver exists on facts herein presented.

The Court is not persuaded that any separate claims survive as are found under the State Constitution, or as to alleged § 1983 claims.

Based upon the foregoing, the Complaint is **DISMISSED**.

*Yoki v. Doe*  
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*Ruling*  
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*Page 4 of 4*

Dated: \_\_\_\_\_

\_\_\_\_\_  
Honorable Chris L. Kottke  
Superior Court

**SUPERIOR COURT, STATE OF ARIZONA, IN AND FOR THE COUNTY OF YAVAPAI**

<p style="text-align: center;">STATE OF ARIZONA,  Plaintiff,  -vs-  WILLIAM SAMPLE,  Defendant.</p>	<p style="text-align: center;">Case No. V1300201980****  <b>UNDER ADVISEMENT RULING</b></p>	<p style="text-align: center;"><b>FILED</b>  DATE: _____ _____ O'Clock _____.M.  DONNA MCQUALITY, CLERK  BY: _____ Deputy</p>
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<p><b>HONORABLE CHRIS L. KOTTKE</b></p>	<p><b>BY:</b> Melissa May, Judicial Assistant</p>
<p><b>DIVISION PRO TEM B</b></p>	<p><b>DATE:</b> July 5, 2020</p>

**BACKGROUND:**

Based upon the Probable Cause statement in the court file, on November 21, 2019 (a Thursday) Mr. Sample is alleged to have walked into the Village of Oak Creek Horizon Bank at 12:21 pm with bank employees and numerous customers present, and blew a whistle, then stated he wanted to speak to the person in charge and close his account. As a bank representative approached him, he then declared he had a bomb in a bag that he held, and another bomb inside his vehicle outside, with a 200 yard blast radius. Mr. Sample is further alleged to have become extremely belligerent and disruptive. Mr. Sample allegedly continued to shout, as he broke a large window in the bank. Perceiving the threat, bank representatives evacuated the premises including employees and customers as law enforcement were dispatched to the scene. Mr. Sample was subdued by law enforcement using a taser, and possibly pepper spray and taken into custody. Per the Release Questionnaire, Part A, the bomb squad was continuing to search for a bomb on the bank premises, reported as late as 4:33 pm. Mr. Sample was indicted for Misconduct with a Simulated Explosive Device, a class 5 felony, Criminal Damage, class 6 felony, along with various associated misdemeanors, including resisting arrest. Mr. Sample is not showing any prior offenses in his PSA.

Defense counsel requested a Rule 11 evaluation of the Defendant on December 9, 2019. Judge Jones ordered the examination to be undertaken by Dr. Karen Series, a qualifying mental health examiner. After examination of the Defendant, Dr. Series opined in her report of January 8, 2020, that Mr. Sample is not competent to stand trial, but may be restorable to competency.

Mr. Sample was ordered into the Yavapai County Restoration to Competency Program (the "Program") on January 27, 2020. The Program is administered in the Yavapai County Detention Facility by Lexford Health. Once in the Program, Mr. Sample was further evaluated by Dr. Stockton, D.Ed., (psychologist) and Dr. Carter, DO, (psychiatrist), the Program manager and Program director, respectively. Based upon the evaluation, record, and file review, Mr. Sample was diagnosed with Paranoid Schizophrenia. The Program manager, through nursing staff, attempted to counsel and train Mr. Sample without medications, to restore competency. The 60-day Program report indicates that while in that process, the training and counseling was stymied due to Mr. Sample's lack of engagement, delusional thought processes, numerous grievances, and lawsuits filed without factual basis. To reduce the delusional thought processes Dr. Carter prescribed certain antipsychotic medication (Haldol @ 2.5mg) to Mr. Sample. Mr. Sample refuses to take the prescribed medication. On February 27, 2020, a *Sell* hearing was requested by the Program. The Court conducted the *Sell* hearing on April 14, 2020.

Over the objection of defense counsel, Dr. Joseph Stockton, and Dr. Mark Carter were allowed to testify telephonically at the hearing. Note that most essential hearings are being conducted in the timeframe of this *Sell* hearing using telephone, and or video due to the Arizona Supreme Court Administrative Order 2020-48, and subsequent revisions and amendments to that Order.

## SELL V. U.S. -ANALYSIS:

After reviewing the record, and hearing the evidence, the Court **FINDS**, by clear and convincing evidence:

1. **An important governmental interest (to involuntarily medicate) exists.**
  - a. The Court follows *Wolf v. Kottke in and for the County of Yavapai*, No. 1 CA-SA 19-020039, 2020 WL 948410 (Ct. of App. Div. 1, February 27, 2020) to assist in the important government interest analysis. In *Wolf*, the Court of Appeals held that Mr. Wolf's four class 6 felonies, each charging aggravated harassment of his spouse, were not serious crimes in the context of *Sell v United States*, 539 U.S. 166, 123 S.Ct.2174, 156 L. Ed2d 197 (2003). In *Wolf*, the Court of Appeals instructed per *Cotner v. Linski*, 243 Ariz. 188, 403 P.3rd 600 (Ct. App. 2017), that the fact finder must "focus on the maximum penalty authorized by statute in determining whether the crime is serious for involuntary medication purposes." The Court of Appeals further instructed, citing *United States v. Onuoha*, 820 F.3rd 1049, 1054 (9th Cir. 2016), that in addition to the maximum penalty, the fact finder must also "consider the substance of the defendant's conduct and the nature of the crime charged." Finally, the Court of Appeals wants the fact finder to determine whether the foregoing is otherwise diminished by special circumstances, i.e., possible civil commitment, length of confinement to date, etc.
  - b. In this matter the Court reviewed *Onuoha* in detail because that case, frankly, is similar in facts to this matter *and* is consistent with our Arizona case, *Cotner v. Linski*, 243 Ariz. 188, 403 P.3rd 600 (Ct. App. 2017). *Onuoha* provides an analytical

framework for a fact finder to use when reviewing cases that are not significant in terms of maximum incarceration penalty. In *Onuoha*, the defendant *telephoned* the Los Angeles Airport TSA, and Airport security with a threat on the anniversary of 9/11, instructing them to evacuate the airport, causing significant law enforcement involvement. In the instant matter Mr. Sample made an *in person* threat to use two bombs in or about the Horizon Bank, causing fear, panic and an evacuation. Like *Onuaha*, Mr. Sample caused significant law enforcement involvement lasting at least 4 hours. The defendant in *Onuoha* was charged with false information and making telephonic threats. Mr. Sample was charged with misconduct with a simulated explosive device and criminal damage. The defendant in *Onuoha* was facing a sentencing range of 27-33 months. In the instant matter Mr. Sample faces sentencing if found guilty up to 2.5 years (30 months). During the competency examination process in *Onuoha* the government doctor diagnosed the defendant with schizophrenia, requesting involuntary administration of Haldol, to restore the defendant to competency. In the instant matter Mr. Sample had an almost identical diagnosis of paranoid schizophrenia, and a suggested medication, Haldol medication, except Mr. Sample was prescribed 2.5 mg, whereas the defendant in *Onuoha* was prescribed 10 mg.<sup>1</sup> In *Onuoha*, the defendant was also a first-time offender.

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<sup>1</sup> The District Court in *Onuoha* ordered the involuntary medication. The Ninth Circuit reversed the District Court not for a failure of important government interest but because the physician ordered 10 mg as the starting point for the defendant's involuntary medication, which exceeded the Board of Prison's recommendations being 2-5 mg protocol.

## CONCLUSION:

There was no evidence presented that the medication will cause unnecessary, or undue risk to Mr. Sample. Furthermore, Dr. Carter testified that time allows his group to begin in low dosages for safety and monitoring. Furthermore, there is no evidence presented by Dr. Carter or Dr Stockton that Mr. Sample has any medical, or physical issues that would place him at risk with dosing. Finally, Dr. Carter testified that Mr. Sample will likely find success with the Program.

Based upon the foregoing, the Court finds that *Sell v United States*, 539 U.S. 166, 123 S.Ct.2174, 156 L. Ed2d 197 (2003), has been satisfied; and that *Cotner v. Linski*, 243 Ariz. 188, 403 P.3rd 600 (Ct. App. 2017), and its analytics, have been followed.

The Court findings are herein determined under a clear and convincing standard, and **ORDERS** and approves the administration of *involuntary* medication as has been presented to the Court by the Program manager and director, to restore Mr. Sample to competency.

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Honorable Christopher L. Kottke  
Judge of the Superior Court

**SUPERIOR COURT, STATE OF ARIZONA, IN AND FOR THE COUNTY OF YAVAPAI**

BART T. Plaintiffs,  v.  Custom Builders Defendants.	Case No. P1300 CV2016 0***  <p align="center"><b>RULING</b></p> <p align="center"><b>Third Party Defendant Motion for Summary Judgment, and Third Party Plaintiff Motion for Partial Summary Judgment</b></p>	<p align="center"><b>FILED</b></p> DATE: _____ _____ O'Clock ____ . M.  <p align="center"><b>DONNA McQUALITY, CLERK</b></p> BY: _____ <p align="center"><b>Deputy</b></p>
<hr/> Custom Builders  <p align="center">Third Party Plaintiffs</p> v.  ABC Excavation Corporation  <p align="center">Third Party Defendants</p>		

<p><b>HONORABLE CHRIS L. KOTTKE</b></p> <p><b>DIVISION PRO TEM B</b></p>	<p><b>BY:</b> Melissa May, Judicial Assistant</p> <p><b>DATE:</b> July 5, 2020</p>
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Third Party Defendant, Excavation Corporation, Inc., filed *Third Party Defendant Excavation Corporation's Motion for Summary Judgment*; Defendant/Third Party Plaintiff, Custom Builders, Inc., filed *Defendant/Third Party Plaintiff Custom Builders, Inc.'s Opposition to Third Party Defendant Excavation Corporation's Motion for Summary*; and Third Party Defendant, Excavating Corporation Inc., filed *Excavating Corporation's Reply in Support of Summary Judgment, along with Excavation Corporation's Response/Objection to Custom Builder's Separate Statement of Facts*. The Court also reviewed and includes the Third-Party Plaintiff's Motion for Partial Summary Judgment against Third Party Defendant on

breach of contract, indemnity and certain equitable claims. The Court has reviewed the foregoing pleadings, exhibits, law, and considered oral argument.

In this matter, the Third Party Defendant, Excavation Corporation, Inc., (“Excavation”) is seeking a Summary Judgment to all claims asserted against them by Custom Builders, Inc. (“Custom”). Custom in turn is seeking Partial Summary Judgment against Excavation for failure to indemnify, and a declaration of a duty to defend. Excavation claims that Custom failed to serve them as a Third-Party Defendant in this matter within the timeframe established in the Arizona Statute of Repose as it relates to development of real property, in scope of work performance, and agreement to carry a liability policy. A.R.S. § 12-552. Custom defends that the Statute of Repose was tolled with their pre-litigation investigation, repair or replacement matters. The record is replete with Custom’s efforts to communicate with Plaintiff’s in this matter; however there appears to be no record of a formal repair and replace activity, of Custom, significant or even *deminimus*, as is contemplated by the tolling provision of A.R.S. § 12-1363(F). While the Court agrees with counsel for Custom, that there exists no privity between the homeowner and Excavation to enforce use of the formal repair process, the Court disagrees and confirms that Excavation has the right to assert Custom’s failure to engage in formal repair with the homeowner is a defense to an argument of tolling.

Pursuant to A.R.S. § 12-1363, one might make a tolling argument where there is a right to repair and replace and the time period under which the evidence shows good faith efforts of that nature. In this matter, there is no evidence in the record, even in Custom’s pleadings, to show anything other than minimal investigation into the alleged defects. Obtaining investigative reports in the form of an inspection does not in itself trigger repair and replacement activities contemplated in the tolling provision. From the Court’s perspective it appears the intent of this statutory scheme is to provide fairness to a homeowner that was working in good faith with a contractor, who in turn is working in good faith, expending time, and resources

to repair or replace faulty construction and the source of an alleged construction defect. In such an instance the statute of repose would be tolled to ensure that a remedy existed if such repair and replace was ineffective. Here, there does not appear to be any such activity of Custom's, material or otherwise, to repair, or replace, and the Court is hard pressed to state that "some of the repairs.." were attended to when work appears to be limited to rehanging doors, or tightening bolts. Presumably you might argue the statute was tolled, a few days as best based upon that work effort, but such provides no basis for continued tolling.

In terms of the breach of contract for liability insurance, A.R.S. § 12-552, includes *all* contractually based claims "...no action or arbitration in contract may be instituted against a person..." Insurance coverage, and insurance based indemnification are contractual in nature. Other than mere dicta in a case or two, there does not appear to be any support contrary to the clear language of the statute. Accordingly, upon the denial by Excavation's insurance company, such should have triggered greater diligence on behalf of R.E.P. to take action against Excavation *within the* eight-year statute of repose, rather than make an argument after the fact, that indemnity or claims based on insurance coverage are not included within the statute. While the Court is not elated that insurance was apparently not provided at the time of contracting, the Court is not in the business of judging business ethics; rather, the Court is required to follow the law, and its clearly defined terms as they relate to the statute of repose in this matter.

The issue whether the statute has tolled, in this particular case, where there are no significant repairs and replacement activities, is straightforward, and a matter of law for the Court. *Orme School v. Reeves*, 166 Ariz. 301, 802 P.2d 1000 (1990). There are no material issues left for a fact finder upon the pleadings provided in this matter.

In light of the foregoing analysis, the Court finds that the statute of repose was not tolled and therefore, Custom had eight years from the date the Plaintiff's certificate of occupancy was issued to initiate an action against its subcontractor, Excavation. The Court further finds there is no distinction between

work quality performance, and breach of contract for failure to provide liability insurance, or express indemnity, as the statute is clear concerning contract actions. The Court finds, for whatever reason, that Custom initiated no legal action against Excavation, within the statutory period. The Court must follow the law.

Based upon the foregoing, Excavation's Motion for Summary Judgment, is **GRANTED**; and, whereas parties expressly contracted for indemnity there exists no implied contract concerning common law indemnity, and no negligence claim due to the economic loss rule in Arizona. Accordingly, R.E.P's Motion for Partial Summary Judgment is **DENIED** as moot.

Dated: May 1, 2018

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Honorable Chris L. Kottke  
Judge of the Superior Court