APPLICATION FOR NOMINATION TO JUDICIAL OFFICE

This original application, 16 double-sided copies and one (1) single-sided copy must be filed with the Human Resources Department, Administrative Office of the Courts, 1501 W. Washington, Suite 221, Phoenix, AZ, 85007, not later than 3:00 p.m. on Monday, August 8, 2016. Read the application instructions thoroughly before completing this application form. The fact that you have applied is not confidential, responses to Section I of this application are made available to the public, and the information provided may be verified by Commission members. The names of applicants, interviewees and nominees are made public, and Commission files pertaining to nominees are provided to the Governor for review. This entire application, including the confidential portion (Section II), is forwarded to the Governor upon nomination by the Commission.

SECTION I: PUBLIC INFORMATION (QUESTIONS 1 THROUGH 71)

PERSONAL INFORMATION

1. Full Name: John Robert Lopez IV

2. Have you ever used or been known by any other legal name? __No____ If so, state name:

3. Office Address: 1275 West Washington, Phoenix, Arizona 85007

4. When have you been a resident of Arizona? 1994 to present.

4. What is your county of residence and how long have you resided there?

   Maricopa (since 1994)

6. Age: 47

(The Arizona Constitution, Article VI, §§ 22 and 37, require that judicial nominees be 30 years of age or older before taking office and younger than age 65 at the time the nomination is sent to the Governor.)

7. List your present and former political party registrations and approximate dates of each:

Republican (since 1987)

(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:
[x] White
[x] Hispanic or Latino (of any race)
[ ] Black or African American
[ ] American Indian or Alaska Native
[ ] Asian
[ ] Native Hawaiian/Pacific Islander
[ ] Other:_____

(The Arizona Constitution, Article VI, §§ 36 and 41, requires the Commission to consider the diversity of the state's or county's population in making its nominations. However, the primary consideration shall be merit.)

EDUCATIONAL BACKGROUND

9. List names and locations of schools attended (college, advanced degrees and law), dates attended and degrees.

University of Texas at Austin: 1987-92 (B.A.)
University of Chicago: 1991-94 (graduate study in political science)
Arizona State University College of Law: 1995-98 (J.D.)

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

University of Texas at Austin: Political Science; Middle Eastern Studies; History

University of Chicago: Graduate study in Political Science; Middle Eastern Studies

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

Arizona State University College of Law:
Graduate, *Cum Laude*
Senior Articles Editor, Arizona State Law Journal
Runner-Up Best Brief, First Year Moot Court
Honors, Legal Method & Writing; Honors, Legal Research & Writing
Extern, United States District Court, District of Arizona, Judge Roslyn O. Silver
Extern, Smithkline Beecham Corp., Corporate Law Department, Dispute Resolution Group (Philadelphia, PA; Summer 1996)

University of Chicago:
Century Scholarship of Full Tuition

University of Texas at Austin:
Pi Sigma Alpha, National Political Science Honor Society
Congressional Intern, Washington, D.C., Office of Congressman Tom DeLay (Summer 1990)

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 administrative bodies, which require special admission to practice.

Arizona Supreme Court (10/1998)
U.S. District Court, District of Arizona (10/1999)
Ninth Circuit Court of Appeals (1/2003)
Sixth Circuit Court of Appeals (8/2015)
D.C. Circuit Court of Appeals (12/2015)
United States Supreme Court (3/2015)

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 take a bar examination more than once in order to be admitted to the bar of any state? _No_____ If so, explain.

14. Indicate your employment history since completing your formal education. List your current position first. If you have not been employed continuously since completing your formal education, 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
Arizona Attorney General's Office (Solicitor General)	1/2015- present	Phoenix, Arizona
United States Attorney's Office (Assistant U.S. Attorney) *(See response to Question 65 for positions held)*	9/2002-12/2014	Phoenix, Arizona
Bryan Cave Law Firm (Associate)	9/1999-8/2002	Phoenix, Arizona
Arizona Supreme Court (Law Clerk)	9/1998-9/1999	Phoenix, Arizona

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

The Arizona Attorney General's Office employs approximately 350 attorneys. *(See Attachment "A" for list of Assistant Attorneys General as of June 28, 2016.)*

16. Describe the nature of your present law practice, listing the major areas of law in which you practice and the percentage each constitutes of your total practice.

As the Arizona Solicitor General, my practice is diverse. The Solicitor General's Division is responsible for handling all county and state criminal appeals, including capital cases and habeas matters, reviewing and/or handling state civil appeals, federalism litigation involving the State,

Attorney General opinions, election law litigation, defending the constitutionality of state statutes, and ethics guidance for the Attorney General's Office. In my practice, I am involved in all of these matters in a direct or supervisory role.

In my present position, I actively participate in preparing Assistant Attorneys General for oral argument in federal and state appellate courts through moot court practice. In December 2015, as counsel of record in *Harris v. AIRC,* I led the team in preparing the Arizona Attorney General for his U.S. Supreme Court oral argument.

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

Before joining the Arizona Attorney General's Office in January 2015, I served as an Assistant U.S. Attorney (federal prosecutor) for over 12 years. In that capacity, I prosecuted immigration, organized crime, narcotics, white collar and public corruption cases, and handled federal criminal and civil appeals. As a federal prosecutor, I handled criminal matters from inception to conclusion, including the investigation stage (including search warrants, subpoenas, wiretaps, and other compulsory process), grand jury, pre-trial, trial and appeal.

Prior to my service as an Assistant U.S. Attorney, I practiced general commercial litigation, state bar disciplinary defense, and (limited) white collar criminal defense with a national law firm in Phoenix.

18. Identify all areas of specialization for which you have applied or been granted certification by the State Bar of Arizona.

N/A

19. Describe your typical clients.

As Arizona Solicitor General, my clients are exclusively the State of Arizona and/or a political subdivision or agency of the State.

20. Have you served regularly in a fiduciary capacity other than as a lawyer representing clients? If so, give details.

No

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

As Arizona Solicitor General, I routinely draft, review or revise proposed legislation, Attorney General Opinions, rules of civil and/or criminal procedure, Attorney General's Office policies and procedures, inter-agency

service agreements, and the State Agency Handbook.

Prior to my departure from the U.S. Attorney's Office in December 2014, I served on the U.S. District Court's Local Rules Advisory Committee for several months. Because my Committee appointment was related to my position with the U.S. Attorney's Office, my service concluded at the end of my federal employment.

As Executive Assistant U.S. Attorney, I frequently prepared and/or revised internal office policies and procedures.

As an Assistant U.S. Attorney, I routinely negotiated and drafted plea agreements to resolve federal prosecutions.

22. 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: _____

23. 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: _____

24. List not more than three contested matters you negotiated to settlement. State as to each case: (1) the date or period of the proceedings; (2) the names, addresses (street and e-mail) 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. You may reveal nonpublic, personal, identifying information relating to client or litigant names or similar information in the confidential portion of this application.

U.S. v. Jason Alistair Lowery (CR-11-2077-PHX-JAT)
(Guilty plea entered on January 14, 2013)

Summary
In October 2011, the defendant, an Immigration and Customs Enforcement Deportation Officer, loaded 14 bundles of marijuana weighing more than 250 pounds into his government-issued vehicle during the course of an undercover investigation into his drug trafficking activities while under surveillance. The defendant intended to transport the marijuana from a remote desert site near Casa Grande to a drug trafficker in a nearby town. While the defendant was transporting the marijuana, law enforcement officers attempted to stop and arrest him. The defendant led officers on a protracted high-speed chase on I-10 resulting in a single-vehicle rollover accident.

The defendant entered a guilty plea to possession with intent to distribute marijuana and was sentenced to 87 months' imprisonment.

Significance
As the U.S. Attorney's Office White Collar and Public Integrity Section Chief, I believed that it was important that the defendant receive a substantial term of imprisonment for the violation of his oath of office as a law enforcement official. The defendant's arrest resulted from a significant internal investigation of his public corruption. His misuse of his federal law enforcement position to profit as a drug trafficker, and his willingness to endanger public safety during the attempt to evade arrest, warranted significant punishment.

Counsel
Joy Bertrand represented the defendant in the case.
(No address listed in the State Bar directory)
602-374-5321
Joyous@mailbag.com

U.S. v. Peter Morgan (CR-11-1294-PHX-ROS)
(Guilty plea entered on January 28, 2013)

Summary
Between January and May 2011, the defendant and his co-conspirators convinced two victims in Phoenix to transfer $1.6 million into the defendant's bank accounts. The defendant posed as a foreign diplomat trying to deliver a non-existent $21 million inheritance to the victims. The defendant conditioned the release of the fraudulent inheritance on the victims' payment of at least $1.6 million in fees and taxes. The victims' funds were quickly transferred from the U.S. to overseas accounts. Federal agents lured the

defendant into the U.S., purportedly to meet with one of the victims to accept delivery of an additional fee payment, and arrested him in the undercover operation. The defendant entered a guilty plea to conspiracy to commit wire fraud and was sentenced to 27 months' imprisonment. In addition, the defendant was transferred to another federal jurisdiction to answer additional fraud-related charges.

Significance

At the time of the defendant's arrest and prosecution, overseas-based "advance fee" and related financial frauds were proliferating. The defendant's conviction represented a significant victory in combatting these offenses. This case exemplified law enforcement agencies' efforts to combat financial fraud and to vindicate victims' rights. Further, this prosecution led to additional prosecutions in other jurisdictions.

Counsel

AUSA Jim Knapp was co-counsel in the case.
U.S. Attorney's Office, District of Arizona
Two Renaissance Square
40 N. Central Ave., Suite 1200
Phoenix, AZ 85004
602-514-7500
James.Knapp@usdoj.gov

Nathan Fitzpatrick represented the defendant in the case.
The Fitzpatrick Firm
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Atlanta, GA 30324
678-607-5550
nate@atlantasattorneys.com

U.S. v. Bobby Sutton & Richard Westfall (CR-05-826-TUC-CKJ)
(Guilty pleas entered, following mistrial, on December 20, 2007)

Summary

The defendants were charged in a superseding indictment on November 16, 2006, with Hobbs Act conspiracy and attempted extortion, as well as with false statements to federal law enforcement officers. The charges arose out of Marana Mayor Bobby Sutton's scheme to misuse his office to obstruct a waste company's operations in Marana should the company fail to instruct one of its subcontractors to compensate Sutton's friend, Westfall, for Westfall's termination by the subcontractor. The company refused to comply with Sutton's and Westfall's demands and reported the scheme to the federal government. Sutton and Westfall were charged following an undercover operation. Sutton resigned as Mayor of Marana following indictment.

At the conclusion of a five-week trial, the district court declared a mistrial after the jury deadlocked on all counts. Following the mistrial, rather than retrying the case, the parties resolved the case by plea agreement. Sutton entered a guilty plea to a misdemeanor charge of "Deprivation of Rights under Color of Law," in which he admitted to misuse of his public office to assist his co-defendant and friend, Westfall. Westfall entered a guilty plea to the same misdemeanor, in which he admitted his role in the scheme. In addition, Westfall entered a guilty plea to a felony count in the superseding indictment of making a false statement to a law enforcement official, which was ultimately dismissed upon his completion of probation.

Significance

The parties litigated the case vigorously, particularly on numerous complex evidentiary issues, yet the parties maintained consummate professionalism and civility. The mistrial following a lengthy, hard-fought trial could have left the parties entrenched and unwilling to explore a negotiated resolution. Instead, in part due to the civility at trial, the parties were able to reach a reasonable and just resolution of the case in lieu of a retrial.

In addition, after the district court declared a mistrial, the district court permitted counsel to discuss the case with jurors. In sum, counsel for both parties reasonably concluded that, upon retrial, a second jury would likely also deadlock. This undoubtedly motivated both parties to explore a compromise resolution of the case.

Counsel

AUSAs Howard Sukenic and Gary Restaino were co-counsel in the case.

Hon. Howard Sukenic
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201 W. Jefferson
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602-506-8214

Gary Restaino
U.S. Attorney's Office, District of Arizona
Two Renaissance Square
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Phoenix, AZ85004
602-514-7500
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Michael Piccarreta represented the defendant Sutton in the case.
Piccarreta Davis PC
145 S. 6th Ave.
Tucson, AZ. 85701
520-622-6900
mlp@pd-law.com

Steven Weiss represented the defendant Westfall in the case.
Karp & Weiss
3060 N. Swan Rd.
Tucson, AZ. 85712
520-325-4200
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25. Have you represented clients in litigation in Federal or Arizona trial courts?
Yes If so, state:

The approximate number of cases in which you appeared before:

Federal Courts: Approximately 200*

State Courts of Record: 10

Municipal/Justice Courts: N/A

**This estimate is a rough approximation because I do not have access to U.S. Attorney's Office records, nor could I successfully derive a precise case number from publicly-accessible databases. For years, I appeared in federal district court on a daily basis.*

The approximate percentage of cases which have been:

Civil: 5

Criminal: 95

The approximate number of those cases in which you were:

Sole Counsel: 125

Chief Counsel: 50

Associate Counsel: 35

The approximate percentage of those cases in which:

You conducted extensive discovery[1]:	25
You wrote and filed a motion for summary judgment:	3
You wrote and filed a motion to dismiss:	5
You argued a wholly or partially dispositive pre-trial, trial or post-trial motion (e.g., motion for summary judgment, motion for a directed verdict, motion for judgment notwithstanding the verdict):	10
You made a contested court appearance (other than as set forth in above response)	95
You negotiated a settlement:	95
The court rendered judgment after trial:	1
A jury rendered verdict:	8
Disposition occurred prior to any verdict:	0

The approximate number of cases you have taken to trial:

Court 1

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

Jury 8

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

The approximate number of your appeals which have been:*

Civil:	2
Criminal:	16

**(I also have served as the primary reviewer/editor and my name has appeared on approximately 200 appellate briefs. I estimate that approximately 85% of those appeals have been criminal.)*

[1]Extensive discovery is defined as discovery beyond standard interrogatories and depositions of the opposing party.

The approximate number of matters in which you appeared:

As counsel of record on the brief:	AZ	2
	U.S.	16
Personally in oral argument:	AZ	1
	U.S.	6

27. Have you served as a judicial law clerk or staff attorney to a court? Yes If so, state the name of the court and dates of service, and describe your experience.

I served as a judicial law clerk for then Vice-Chief Justice Charles E. Jones of the Arizona Supreme Court from August 1998 to August 1999.

My judicial clerkship with Justice Jones was my first position after law school graduation. My clerkship experience was ideal. Justice Jones involved his law clerks in the decisional process and mentored us on writing, professionalism, and advocacy. I gained valuable insight into appellate brief writing, oral advocacy, standards and principles of appellate review, the Court's case selection process, and opinion writing. In addition, I enjoyed working with the professional staff attorneys and learned their critical role in the Court. I could not have scripted a more memorable, informative and beneficial commencement of my legal career.

28. List not more than five cases you litigated or participated in as an attorney before mediators, arbitrators, administrative agencies, trial courts or appellate courts. 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 presiding judge or officer before whom the case was heard; (3) the names, addresses (street and e-mail) 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. You may reveal nonpublic, personal, identifying information relating to client or litigant names or similar information in the confidential portion of this application.

State v. Gear (CR-14-0408)
Arizona Supreme Court
(Oral argument held on January 19, 2016)

Summary
The Court considered the question "whether the Arizona Medical Marijuana Act ("AMMA") immunizes a physician against prosecution for falsely attesting that he reviewed a patient's medical records from the previous

twelve months before providing a written certification authorizing medical marijuana use." The Court held that AMMA does not grant such immunity.

The Navajo County Attorney's Office prosecuted the defendant and handled the appeal. Attorney General Mark Brnovich filed an amicus brief with the Arizona Supreme Court in support of Navajo County. With the County's consent, the Court divided oral argument time between the County and the Attorney General (as amicus). I argued the case for the Attorney General.

Significance

At oral argument, on behalf of the Attorney General, I urged the Court to reverse the court of appeals' decision on the grounds that the Court ultimately adopted-- namely, that the immunity statute's text should be interpreted consistent with its plain language to immunize physicians from prosecution based "solely" on their provision of the certifications or otherwise expressing a professional opinion concerning the benefits of medical marijuana. The Legislature's use of the word "solely" plainly precluded extending the immunity provision's reach to other crimes such as a physician's false certification of compliance with regulatory requirements on an AMMA form.

Counsel

Galen H. Wilkes, Deputy Navajo County Attorney,
argued for the State of Arizona.
Navajo County Attorney's Office
County Government Center, PO Box 668
Holbrook, AZ 86025
928-524-4021
galen.wilkes@co.navajo.az.us

Kimberly A. Kent argued for Robert Gear.
Kent Law Group PLLC
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Phoenix, AZ 85012
602-264-5600
kkent@klgaz.com

U.S. v. Kendrick Begay (CA-07-10487)

Ninth Circuit Court of Appeals
(*En Banc* oral argument held on March 23, 2010)

Summary

This case involved a Ninth Circuit *en banc* hearing in which the government sought review of a panel decision reversing two first-degree murder convictions on sufficiency of the evidence grounds. In a 3-0 decision, the panel reversed the defendant's first-degree murder convictions for lack of sufficient evidence of premeditation. The evidence showed that the defendant—a

teenager—flagged down a vehicle containing two of his acquaintances on a desolate, rural road late at night. The defendant and the victims pulled their vehicles over to the side of the road, the defendant approached the victims' vehicle, spoke briefly with them, walked back to his vehicle, pulled a rifle from under his backseat, walked back to the victims' vehicle, and fired 8 or 9 rounds through the passenger-side window killing both victims. Three witnesses were in the defendant's vehicle at the time of the shooting, although one was his sister and another was severely intoxicated. The panel held that no rational jury could have concluded beyond a reasonable doubt that the defendant deliberated the murders rather than acted in response to the victims' hypothetical provocation. There was no evidence concerning the nature of the defendant's communication with the victims before the murders.

Significance

I became counsel of record in the case at the *en banc* stage of the proceedings. Following oral argument *en banc*, the Ninth Circuit reversed the panel opinion (8-3) and affirmed the defendant's two first-degree murder convictions, holding that sufficient evidence existed to support the jury's finding of premeditation. This case was significant because it illustrated that premeditation for purposes of proving first-degree murder can be established by circumstantial evidence of brief reflection prior to killing, and that an appellate court, when conducting a sufficiency of the evidence analysis, must not supplant its judgment for the jury's. Of course, reinstatement of the defendant's murder convictions ensured justice for the victims and their families.

Counsel

Dan Kaplan represented the defendant in the case.
Federal Public Defender
850 W. Adams St., Suite 201
Phoenix, AZ 85007
602-382-2767
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U.S. v. James Everett (CR-06-795-PHX-JAT)

U.S. District Court, Hon. James A. Teilborg
(Trial commenced on April 29, 2008)

Summary

The defendant, a Phoenix tax attorney, was convicted following an 8-day jury trial of false declarations in bankruptcy proceedings, bankruptcy fraud, and money laundering for devising and executing a scheme to conceal his law firm proceeds and other assets from the bankruptcy trustee in order to purchase a luxury home through a Nevada nominee corporation during the pendency of his bankruptcy, through which he successfully discharged in excess of

$400,000 in debt. The defendant was sentenced to 13 months' imprisonment.

Significance

The intersection of civil and criminal bankruptcy law is often complex, particularly concerning a debtor's duty to disclose assets in a bankruptcy petition; this case was no exception. The parties engaged in vigorous litigation, including presenting conflicting expert testimony, concerning whether the defendant's Nevada nominee corporation was his alter ego, thus triggering his obligation to disclose his corporate interest in his bankruptcy schedules. The dispute ultimately centered on the district court's alter ego jury instruction, which the government had requested. On appeal, the Ninth Circuit held that the district court properly instructed the jury on the alter ego issue and affirmed the jury's verdict that the defendant was required, but failed, to disclose his Nevada corporation in his bankruptcy schedules.

The defendant also urged the Ninth Circuit to reverse his money laundering convictions because, he argued, a recent Supreme Court decision, *U.S. v. Santos*, commanded that in a money laundering case the statutory term "proceeds" is ambiguous and, therefore, must be interpreted to mean profits rather than gross receipts or revenue. The defendant asserted that the funds giving rise to his money laundering convictions were merely revenue. The Ninth Circuit rejected the defendant's argument and held that the *Santos* decision did not apply to his case because the nature of the "proceeds of unlawful activity," whether revenue or profits, was irrelevant because the proceeds of his predicate bankruptcy fraud offense were wholly unlawful. I represented the government as trial and appellate counsel.

Counsel

AUSA Frank Galati was co-counsel in the case.
U.S. Attorney's Office, District of Arizona
Two Renaissance Square
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Phoenix, AZ85004
602-514-7500
Frank.Galati@usdoj.gov

Bruce Feder represented the defendant in the case.
Feder Law Office PA
2930 E. Camelback Rd., Ste. 160
Phoenix, AZ 85064
Phone: 602-954-8737
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U.S. v. Jeanette Wilcher (CR-03-1098-PHX-EHC)
U.S. District Court, Hon. Earl H. Carroll (retired)
(Trial commenced on April 5, 2006)

Summary

The defendant was convicted following a 7-day jury trial of wire fraud and money laundering for devising a scheme to entice investors into a non-existent trading program in medium term bank notes and diverting more than $2 million of an elderly investor's funds for the defendant's personal use. Although the victim never met the defendant – the defendant enlisted a third-party company to locate investors for her program – the evidence showed that the defendant orchestrated the fraud scheme, misled the victim through the third-party company, and diverted more than $2 million of the victim's funds to support her luxurious lifestyle. The defendant was sentenced to 92 months' imprisonment.

Significance

The evidentiary and proof issues in the case were relatively complex for two reasons. First, the victim never met the defendant because the defendant orchestrated a tier of detachment from the victim through a third-party company, which maintained that it, too, had been deceived by the defendant about her non-existent trading program. Second, the elderly victim and a critical witness involved in the victim's investment suffered from poor health and were deposed, pre-trial, pursuant to Rule 15 of the Federal Rules of Criminal Procedure. Their deposition testimony was presented to the jury at trial in lieu of live testimony. On appeal, the defendant argued that presentation of the victim's Rule 15 deposition violated her Confrontation Clause rights. The Ninth Circuit rejected the defendant's claim because the deposition comported with constitutional standards. I represented the government as trial and appellate counsel.

Counsel

AUSA Steve Laramore (retired) was co-counsel in the case.
5745 Broadway St
Indianapolis, IN 46220
317-426-5365
slaramore@indy.rr.com

Deborah Williams represented the defendant in the case.
Federal Public Defender
Southern District of Ohio
10 W. Broad St., Suite 1020
Columbus, OH. 43215
Phone: 614.469.2999
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U.S. v. Ricardo Solarzano Rivera (CR-03-104-PHX-EHC)
U.S. District Court, Hon. Earl H. Carroll (retired)
(Trial commenced on February 25, 2003)

Summary
The defendant was convicted following a two-day jury trial of illegal reentry into the United States following deportation. The defendant entered the United States near San Luis, Arizona, and was arrested near the border within minutes of his entry. At trial, the defendant testified that he had climbed over the 15-foot border wall to escape Mexican police officers who had robbed and beaten him and threatened his life. In essence, the defendant claimed that his entry into the United States was the product of duress. No evidence corroborated the defendant's duress claim. The district court, over the defendant's objection, instructed the jury that the defendant had the burden of proving duress by a preponderance of the evidence. The defendant was sentenced to 77 months' imprisonment.

Significance
The Ninth Circuit issued a published opinion in the case. *U.S. v. Solorzano-Rivera*, 368 F.3d 1073 (9th Cir. 2004). The opinion held, as a matter of first impression, that illegal reentry defendants bear the burden of proving duress by a preponderance of the evidence, rather than requiring the government to disprove duress, because illegal reentry is a general intent offense. As a general intent offense, the government is required only to prove that a defendant voluntarily reentered the United States without permission. Since the government is required only to prove voluntary reentry, an illegal reentry defendant bears the burden of proving duress because it is an affirmative defense offered to excuse the offense rather than to negate an element of the offense. I represented the government as trial and appellate counsel.

Counsel
Atmore Baggot represented the defendant in the case.
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Apache Junction, AZ 85120
480-983-9394
Atmore1@hotmail.com

29. 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.).

N/A

30. List not 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, addresses (street and e-mail) 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. You may reveal nonpublic, personal, identifying information relating to client or litigant names or similar information in the confidential portion of this application.

N/A

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

From September 2004 to March 2005, I served with the Regime Crimes Liaison Office ("RCLO"), a Department of Justice-led organization tasked with assisting the Iraqi government in investigating and prosecuting Saddam Hussein and his top 12 regime officials for war crimes, crimes against humanity, and genocide. RCLO's mission included constructing court facilities for the imminent trials, training Iraqi prosecutors and judges in the relevant law, and investigating and preparing charges against Saddam Hussein and high-value regime officials. I was stationed in Washington, D.C., for approximately two months and then deployed to Iraq in the first wave of RCLO personnel. My primary role was to serve as a legal advisor and prosecutor. In that capacity, I was tasked with investigating the former regime for two illegal operations: (1) the regime's crimes against Shiite citizens in the Sunni Triangle village of Ad Dujayl, where the regime engaged in indiscriminate and systematic retaliation against Shiite villagers for a failed assassination attempt on Saddam; and (2) the regime's genocidal "Anfal" campaign against the Iraqi Kurdish population during which Saddam decreed unlimited presidential powers upon Iraqi General Ali Hassan Al-Majid ("Chemical Ali") to eliminate Kurdish resistance to the regime. The regime killed approximately 100,000 Kurdish civilians during the Anfal campaign. Although the RCLO headquarters was in Baghdad, to facilitate the investigation, I traveled extensively throughout Iraq in the Sunni Triangle and Kurdistan. Saddam Hussein and Chemical Ali were charged, tried, and convicted in Iraqi court proceedings, and were ultimately executed, for the Ad Dujayl and Anfal crimes.

BUSINESS AND FINANCIAL INFORMATION

32. 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.

33. Are you now an officer, director or majority stockholder, 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.

    Is it your intention to resign such positions and withdraw from any participation in the management of any such enterprises if you are nominated and appointed? __N/A__ If not, give reasons.

34. Have you filed your state or federal income tax returns for all years you were legally required to file them? __Yes__ If not, explain.

35. Have you paid all state, federal and local taxes when due? __Yes__ If not, explain.

36. Are there currently any judgments or tax liens outstanding against you? __No__ If so, explain.

37. Have you ever violated a court order, including but not limited to an order for payment of child or spousal support? __No__ If so, explain.

38. Have you ever been a party to a lawsuit, including bankruptcy but excluding divorce? __No__ If so, identify the nature of the case, your role, the court, and the ultimate disposition.

39. Do you have any financial interests, investments or retainers that might conflict with the performance of your judicial duties? __No__ If so, explain.

CONDUCT AND ETHICS

40. Have you ever been terminated, expelled, or suspended from employment or any school or course of learning on account of dishonesty, plagiarism, cheating, or any other "cause" that might reflect in any way on your integrity? __No__ If so, give details.

41. a. Have you ever been charged with, arrested for, or convicted of any felony, misdemeanor, or violation of the Uniform Code of Military Justice? __No__ If so, identify the nature of the offense, the court, and the ultimate disposition.

b. Have you, within the last 5 years, been charged with or cited for any traffic-related violations, criminal or civil, that are not identified in response to question 41(a)? If so, identify the nature of the violation, the court, and the ultimate disposition.

Based upon my review of online DMV records for the last 39 months, I do not have any record of a traffic-related violation for that period. I do not have any record or recollection of receiving a traffic-related violation within the last 5 years. If my recollection is inaccurate, I promptly would have resolved any such citation. I have never received a criminal traffic-related citation.

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

N/A

43. List and describe any litigation (including mediation, arbitration, negotiated settlement and/or malpractice claim you referred to your insurance carrier) concerning your practice of law.

N/A

44. List and describe any litigation involving an allegation of fraud in which you were or are a defendant.

N/A

45. List and describe any sanctions imposed upon you by any court for violation of any rule or procedure, or for any other professional impropriety.

N/A

46. To your knowledge, has any formal charge of professional misconduct ever been filed against you by the State Bar or any other official attorney disciplinary body in any jurisdiction? __No__ If so, when? How was it resolved?

47. Have you received a notice of formal charges, cautionary letter, private admonition or other conditional sanction from the Commission on Judicial Conduct or any other official judicial disciplinary body in any jurisdiction? __No__ If so, in each case, state in detail the circumstances and the outcome.

48. During the last 10 years, have you unlawfully used controlled substances,

narcotic drugs or dangerous drugs as defined by Federal and State laws? _No_ If your answer is "Yes," explain in detail. (Unlawful use includes the use of one or more drugs and/or the unlawful possession or distribution of drugs. It does not include the use of drugs taken under supervision of a licensed health care professional or other uses authorized by Federal law provisions.)

49. In the past year, have you ever been reprimanded, demoted, disciplined, placed on probation, suspended, cautioned or terminated by an employer as a result of your alleged consumption of alcohol, prescription drugs or illegal use of drugs? _No_ If so, state the circumstances under which such action was taken, the name(s) of any persons who took such action, and the background and resolution of such action.

50. Within the last five years, have you ever been formally reprimanded, demoted, disciplined, cautioned, placed on probation, suspended or terminated by an employer? _No_ If so, state the circumstances under which such action was taken, the date(s) such action was taken, the name(s) of any persons who took such action, and the back ground and resolution of such action.

51. Have any of your current or former co-workers, subordinates, supervisors, customers or clients ever filed a complaint or accusation of misconduct against you with any regulatory or investigatory agency, or with your employer? __No__ If so, state the date(s) of such accusation(s), the specific accusation(s) made, and the background and resolution of such action(s).

52. 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 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.

53. Within the last five years, have you failed to meet any deadline imposed by a court order or received notice that you have not complied with the substantive requirements of any business or contractual arrangement? __No__ If so, explain in full.

54. 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 in full.

PROFESSIONAL AND PUBLIC SERVICE

55. Have you published any legal or non-legal books or articles? __No__ If so, list with the citations and dates.

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

57. 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.

As Arizona Solicitor General, I have participated in the following conferences, bar association events and law school forums:

-The State Bar Convention panel on "State Solicitors General" (Phoenix, Arizona, 6/16/16);

-Arizona State University Center for Political Thought & Leadership's panel on "New Challenges to Constitutional Law" (Tempe, Arizona, 2/19/16);

-The ABA Criminal Justice Section's "White Collar Crime Roundtable" (Phoenix, Arizona, 11/4/15);

-The National Association of Hearing Officers' Annual Conference (Scottsdale, Arizona, 10/26/15); and

-CLE on the topic "Recent Trends at the Arizona Attorney General's Office" (Phoenix, Arizona, 5/20/15).

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

The Federalist Society (Phoenix Chapter), Board of Directors: 1/2015 to present

Lorna Lockwood Inn of Court (member): 1/2015 to present

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.

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

I have dedicated the past 14 years of my career to public service with the U.S. Attorney's Office and the Arizona Attorney General's Office. Through these offices, I also have been involved in various community activities, including outreach events to the Muslim, Sikh, and Hispanic communities, and Playworks (which promotes safe and inclusive play to low-income students in urban schools).

Prior to entering a career in public service, I periodically offered *pro bono* services to Community Legal Services and also represented a member of an Afghan ethnic group persecuted by the Taliban in asylum proceedings in immigration court in Florence, Arizona, through the Florence Immigration Project.

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

FBI Award for Contributions to Prosecution of Mortgage Fraud
(September, 2010)

The FBI Director's Award for contributions to cybercrimes prosecutions
(December, 2006)

The U.S. Attorney General's Special Commendation Award for service with the Regime Crimes Liaison Office in Iraq
(May, 2005)

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

Have you been registered to vote for the last 10 years? __Yes__

Have you voted in all general elections held during those years? _Yes_ If not, explain.

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

When I am not attending to professional duties and obligations, I spend the majority of my personal time with my family – my wife, Jennifer, and our two daughters (ages 16 and 10). I spend a significant portion of this time attending our daughters' extra-curricular activities, particularly volleyball.

This activity often involves travel to out-of-state tournaments. We also enjoy, as a family, running 10Ks and half-marathons. Several times a year, we travel out-of-state to spend weekends centered on such running events.

I am also an avid hunter and fisherman. My daughters also enjoy these activities and are my constant companions on these outdoor excursions. As a family, we all enjoy the outdoors, and hiking is one of our favorite activities. A couple of years ago, my wife and I completed the "Rim to Rim" Grand Canyon hike. We've committed to our oldest daughter to traverse the Canyon with her next year.

I enjoy domestic and international travel. I have traveled extensively in Europe, the Middle East, and Central America. Now that our daughters are older, I would like to resume travel with greater frequency.

I have always followed international events with great interest, particularly Middle Eastern politics and national security issues.

Finally, I attend New City Church in Phoenix. The congregation and its teachings serve as a source of inspiration, wisdom, and hope.

HEALTH

63. Are you physically and mentally able to perform the essential duties of a judge in the court for which you are applying? Yes

ADDITIONAL INFORMATION

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

Like many Americans, I have a diverse heritage; my father has Hispanic roots and my mother's ancestors emigrated from England and Germany. However, my ethnicity has not shaped my experience as an American. Like my family, I embrace Reverend Martin Luther King, Jr.'s aspiration that each citizen be judged by the content of their character. Because the federal and state constitutions are designed to protect individual rights, we should strive to measure each person on their own merits (as is required by the Arizona Constitution, Article VI, § 22). To that end, my surname renders me

no more – and no less – qualified or deserving to serve as an Arizona Supreme Court Justice.

I have tremendous pride in my heritage, which derives from my ancestors' character and contributions to our country. My great-grandfather, John R. Lopez, Sr., served in the U.S. Army in Europe in WWI; my grandfather, John R. Lopez, Jr., served in the U.S. Army in Europe in WWII; my father, John R. Lopez III, although never deployed overseas, served in the U.S. Air Force Reserves during the Vietnam era; and my maternal grandfather, Leonard Suhler, served in the U.S. Navy as a pilot at the end of WWII. Through the generations, my family's service to our country has inspired and strengthened my appreciation for the liberties enshrined in our federal and state constitutions and underscored the necessity to preserve our freedom through the separation of powers, the integrity of our public institutions, and the rule of law.

Perhaps the greatest inspiration in my life has been my mother. Upon my parents' divorce when I was seven years old, my mother became only the second person in her family for many generations to graduate from college, and then became the first to earn an advanced degree when she received a Ph.D. in molecular biology from the University of Texas. Through her years of study, I spent countless summer and sick days attending her classes and passing the time in her laboratories as she earned her doctorate. Although we lacked material wealth during her years of study, she taught me the value of aspiration and the boundless opportunity our country affords those willing to sacrifice and take advantage of it.

Every American, regardless of race, creed, or color, offers a diverse perspective because we, as individuals, are unique. Each of us, in some way, overcomes adversity and develops insights that may enrich all of us. For some, ethnicity is a predominant factor in their worldview. That is fine, but it is not my experience. My perspective is informed by an ingrained respect for our country and the unbounded opportunity it affords individuals willing to embrace it. Our liberties, as enshrined in our federal and state constitutions, are preserved by the rule of law and are entrusted to our governmental institutions to protect. I have chosen to devote my professional life to the preservation of our liberty through the just application of the law for all citizens. I would be honored to continue that devotion as an Arizona Supreme Court Justice on behalf of all citizens in this great State.

65. Provide any additional information relative to your application or qualifications you would like to bring to the Commission's attention at this time.

During my tenure with the U.S. Attorney's Office from 2002-12, I held the following positions/credentials:

Chief Assistant U.S. Attorney (Phoenix): 5/14-12/14
Executive Assistant U.S. Attorney: 12/12-12/14
Chief of Financial Crimes and Public Integrity Section: 11/09-12/12
Deputy Appellate Chief: (11/07-11/09)
Computer Hacking and Intellectual Property Attorney (2005-07)
Top Secret (TS/SCI) security clearance
Department of Justice, Justice Leadership Institute, Foundations of Leadership, National Advocacy Center (Columbia, SC; 3/2010)

As the Chief Assistant U.S. Attorney in Phoenix, I was involved in policy and attorney recruitment and development.

As the Executive Assistant U.S. Attorney, I was involved in community outreach efforts – engagement with various communities to improve communication with federal law enforcement agencies – to the Muslim, Sikh, Hispanic and tribal communities.

As the Deputy Appellate Chief, I was responsible for conducting moot courts to prepare AUSAs for every oral argument before the Ninth Circuit.

While with the U.S. Attorney's Office, I conducted training on avoiding prosecutorial misconduct, federal appellate practice, discovery issues concerning confidential informants, IRS Revenue Agent expert witnesses, and bridging generational differences in the workplace.

66. If you were selected by this Commission and appointed by the Governor to serve, are you aware of any reason why you would be unable or unwilling to serve a full term? __No__ If so, explain.

67. If selected for this position, do you intend to serve fully, including acceptance of rotation to areas outside your areas of practice or interest? __Yes__ If not, explain.

68. Attach a brief statement explaining why you are seeking this position.

(See Attachment "B" for my brief statement explaining why I am seeking a position as an Arizona Supreme Court Justice.)

69. Attach three professional writing samples, which you personally drafted (e.g., brief or motion). The samples should be no more than a few pages in length. 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.

(See Attachments "C"-"E" for my three writing samples):

Attachment "C": An excerpt from the "Petition for Rehearing and Suggestion for Rehearing En Banc" in the Ninth Circuit Court of Appeals in U.S. v. Kenderick Begay *(CA No. 07-10487; August 7, 2009)*

Attachment "D": An excerpt from the government's brief in the Ninth Circuit Court of Appeals in U.S. v. James Joseph Everett *(CA No. 09-10051; September 14, 2009)*

Attachment "E": The government's "Motion for Reconsideration, or Alternatively, Motion to Modify Order," in U.S. District Court, District of Arizona, in U.S. v. David Steven Goldfarb *(CR-07-0260-PHX-DGC; October 24, 2008)*

70. 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. The writing sample(s) should be no more than a few pages in length. 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.

N/A

71. 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 two performance reviews.

N/A

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Attachment “A”

Name - Full	Job Code Description	User Level
MAZIARZ, JOSEPH T.	AG SECT CHF COUNSEL	AGSGOSGO-P
TELLIER, JOHN R.	AG SECT CHF COUNSEL	AGSGDLES-P
TODD, JOHN P.	AG SPCL ASST AG	AGSGOCLS-P
WALSH, ROBERT A.	AG UNIT CHF COUNSEL	AGSGOCAS-P
WILLIAMS, MARY D.	AG UNIT CHF COUNSEL	AGSGDLES-P
HARRIS, MARC H.	AG UNIT CHF COUNSEL	AGSGDLES-P
ANDERSON, JON G.	AG UNIT CHF COUNSEL	AGSGOCLS-P
SPARKS, JEFFREY L.	AG UNIT CHF COUNSEL	AGSGOCLS-P
WILSON, LINLEY S.	AG UNIT CHF COUNSEL	AGSGOCAS-P
JONES, ALICE M.	AG UNIT CHF COUNSEL	AGSGOCAS-P
HARGRAVES, SETH T.	ASST AG	AGSGDLES-P
BASKIN, MONA E.	ASST AG	AGSGDLES-P
FROEDGE, ANNE W.	ASST AG	AGSGDLES-P
HARRINGTON, BRIDGET F.	ASST AG	AGSGDLES-P
NIELSEN, JIMMY D.	ASST AG	AGSGOCLS-P
GALVIN, JEANNE M.	ASST AG	AGSGDLES-P
BRACCIO, MYLES A.	ASST AG	AGSGOCAS-P
CAMPBELL, ELIZABETH A.	ASST AG	AGSGDLES-P
ZINMAN, JANA M.	ASST AG	AGSGOCAS-P
SIMON, WILLIAM S.	ASST AG	AGSGOCAS-P
DONE, JULIE A.	ASST AG	AGSGOCLS-P
YBARRA, ELIZA C.	ASST AG	AGSGOCAS-P
KRISHNA, SUNITA A.	ASST AG	AGSGDLES-P
JARVIS, GINGER	ASST AG	AGSGOCLS-P
FRANCIS, JILLIAN B.	ASST AG	AGSGOCAS-P
ROYLE, KARIN T.	ASST AG	AGSGOCLS-P
REILLY, ANDREW S.	ASST AG	AGSGOCLS-P
PONCE, ADELE	ASST AG	AGSGOCAS-P
SMITH, CARRIE H.	ASST AG	AGSGDLES-P
KHAN, SABRINA J.	ASST AG	AGSGDLES-P
CRIST III, TERRY M.	ASST AG	AGSGOCAS-P
RAINE, MICHAEL D.	ASST AG	AGSGDLES-P
SIMPSON, DAVID A.	ASST AG	AGSGOCAS-P
HAZARD, GREGORY M.	ASST AG	AGSGOCLS-P
EASTERDAY, JASON B.	ASST AG	AGSGOCLS-P
SALTZ, MICHAEL F.	ASST AG	AGSGDLES-P
GERINGER-BAILEY, MERI	ASST AG	AGSGOCLS-P
SHINN-ECKBERG, FRANCES O.	ASST AG	AGSGDLES-P
DEROSE, CHRISTOPHER M.	ASST AG	AGSGOCAS-P
REEVES, KRISTINA B.	ASST AG	AGSGOCLS-P
RAINE, THOMAS	ASST AG	AGSGDLES-P
DONALD, SCOTT B.	ASST AG	AGSGDLES-P
LENTO, GARY N.	AG SR LITIGATION COUNSEL	AGCFPLIT-P
MCBRIDE, MELANIE G.	AG SR LITIGATION COUNSEL	AGCFPLIT-P
STEINLE III, ROLAND J.	ASST AG	AGCFPPSS
PLATTER, BONNIE N.	ASST AG	AGCFPPSS
MARTONCIK, KATHLEEN E.	ASST AG	AGCFPPSS
DAHL, CANDY	ASST AG	AGCFPCLA

REINER, BRITTANY M.	ASST AG	AGCFPPSS
ZIMMERMAN, JOSHUA R.	ASST AG	AGCFPLIT-P
MARDEROSIAN, TRAVIS C.	ASST AG	AGCFPPSS
BUNKERS, JENNIFER A.	ASST AG	AGCFPPSS
ESPINOSA, GIOCONDA A.	ASST AG	AGCFPPSS
WEIMAR, KELLY-ANN	ASST AG	AGCFPPSS
CARBONE, JOHN A.	ASST AG	AGCFPPSS
BICKETT, PAULA S.	AG SECT CHF COUNSEL	AGSGOSGO-P
RAY, KEVIN D.	AG SECT CHF COUNSEL	AGSGDEHS-P
CRAIG, THERESA M.	AG SECT CHF COUNSEL	AGSGDNRS-P
COX, CURTIS A.	AG SECT CHF COUNSEL	AGCLDEES-P
FRIES, JERRY A.	AG SECT CHF COUNSEL	AGSGDTAX-P
LAWRENCE JR, DONALD J.	AG SECT CHF COUNSEL	AGCLDBCE-P
WEINZWEIG, DAVID D.	AG SR LITIGATION COUNSEL	AGSGOSGO-P
MOORE, PENNY A.	AG UNIT CHF COUNSEL	AGCLDBCE-P
HONIG, GREGORY D.	AG UNIT CHF COUNSEL	AGSGDEHS-P
COOPER, LESLIE K.	AG UNIT CHF COUNSEL	AGSGDEHS-P
SILVERMAN, MATTHEW A.	AG UNIT CHF COUNSEL	AGCLDBCE-P
SKARDON, JAMES T.	ASST AG	AGCLDEES-P
ANDERSON, KIM S.	ASST AG	AGSGDEHS-P
HACHTEL, LAURIE A.	ASST AG	AGSGDNRS-P
KATZ, PAUL A.	ASST AG	AGSGDNRS-P
CANTRELL, JEFFREY D.	ASST AG	AGCLDEES-P
SCHWARZ, ERIC T.	ASST AG	AGSGDEHS-P
SWEENEY, KATHLEEN P.	ASST AG	AGSGOSGO-P
CORCORAN, AUBREY JOY	ASST AG	AGSGDEHS-P
LOVE, KENNETH J.	ASST AG	AGSGDTAX-P
BRENNAN, CARRIE J.	ASST AG	AGSGDNRS-P
MUNNS, CHRISTOPHER A.	ASST AG	AGSGDNRS-P
CYGAN, KIMBERLY J.	ASST AG	AGSGDTAX-P
VILLARREAL THEIS, APRIL J.	ASST AG	AGCLDBCE-P
GARRETT, NATALIA A.	ASST AG	AGSGDTAX-P
STERLING, DEBRA G.	ASST AG	AGSGDEHS-P
YOUNG, ANTHONY E.	ASST AG	AGCLDEES-P
RUDD, JOEL	ASST AG	AGSGDEHS-P
VALENZUELA, MICHAEL F.	ASST AG	AGSGOCAS-P
TEASDALE, SCOT G.	ASST AG	AGSGDTAX-P
UPDIKE, BENJAMIN H.	ASST AG	AGSGDTAX-P
ZEISE, CARL E.	ASST AG	AGCLDEES-P
INGLE, MARK	ASST AG	AGSGDTAX-P
ELLEL, JORDAN T.	ASST AG	AGSGDEHS-P
FREESTONE, SHYLA R.	ASST AG	AGCLDBCE-P
HRNICEK, MICHAEL J.	ASST AG	AGSGOFED-P
KNOBLOCH, ERIC K.	ASST AG	AGSGOCAS-P
HEATHCOTTE, BROCK J.	ASST AG	AGSGOFED-P
SLADE, EDWIN	ASST AG	AGSGDNRS-P
LAMAGNA, PATRICIA C.	ASST AG	AGSGDEHS-P
HANDY, JO-ANN A.	ASST AG	AGSGDEHS-P
MAHONEY, MACAEN F.	ASST AG	AGSGDTAX-P

CAPUTO, LOUIS F.	ASST AG	AGSGDEHS-P
DRISCOLL-MACEACHRON, JAMES	ASST AG	AGSGOSGO-P
DYLLA, CHRISTOPHER J.	ASST AG	AGCLDBCE-P
REGULA, RYAN J.	ASST AG	AGCLDEES-P
MILLER, KEITH J.	ASST AG	AGSGOFED-P
HUGHES, LINDSAY M.	ASST AG	AGCLDBCE-P
KARLSON, KARA M.	ASST AG	AGSGOSGO-P
CRANDELL, RUSTY D.	ASST AG	AGSGOFED-P
PERKINS, JENNIFER M.	MGT ATTY	AGSGOSGO-P
DRAYE, DOMINIC E.	MGT ATTY	AGSGOSGO-P
LOPEZ IV, JOHN	SOLICITOR GENERAL	AGSGOSGO-P
NORTHUP, DAWN M.	AG DIV CHF COUNSEL	AGSGDSGD-P
HARRISON, TERRENCE E.	AG SECT CHF COUNSEL	AGSGDLMS-P
NOWLAN, REX C.	AG SECT CHF COUNSEL	AGSGDACS-P
FRY, JOHN M.	AG SECT CHF COUNSEL	AGSGDELS-P
GRUBE, CHARLES A.	AG SR LITIGATION COUNSEL	AGSGDACS-P
TRYON, GEORGE M.	AG SR LITIGATION COUNSEL	AGSGDSGD-P
MCCARTHY, ERYN M.	AG UNIT CHF COUNSEL	AGSGDACS-P
ZEDER, FRED M.	AG UNIT CHF COUNSEL	AGSGDLMS-P
GAUGHAN, MICHAEL G.	AG UNIT CHF COUNSEL	AGSGDLMS-P
GOTTFRIED, MICHAEL E.	AG UNIT CHF COUNSEL	AGSGDLMS-P
FERRIS JR, CHARLES W.	ASST AG	AGSGDELS-P
PEARSON, GRANT A.	ASST AG	AGSGDACS-P
MORRISSEY, KELLEY J.	ASST AG	AGSGDLMS-P
SCHWARTZ, JONATHAN H.	ASST AG	AGSGDLMS-P
GOODWIN, MICHAEL K.	ASST AG	AGSGDELS-P
MORLACCI, MARIA A.	ASST AG	AGSGDELS-P
ODENKIRK, JAMES F.	ASST AG	AGCLDCPA-P
POLLOCK, LINDA J.	ASST AG	AGCLDCPA-P
SCHAACK, DANIEL P.	ASST AG	AGSGDLMS-P
BOWEN, JAMES B.	ASST AG	AGSGDLMS-P
BELJAN, JOTHI	ASST AG	AGSGDACS-P
HOBART, ANN	ASST AG	AGSGDELS-P
REMES, RACHEL M.	ASST AG	AGSGDELS-P
LESUEUR, LEO J.	ASST AG	AGCLDCPA-P
RAND, LUCY M.	ASST AG	AGSGDLMS-P
LINNINS, PAMELA J.	ASST AG	AGSGDACS-P
NORRIS, BENJAMIN R.	ASST AG	AGSGDACS-P
SCIARROTTA JR, JOSEPH	ASST AG	AGSGDSGD-P
CHENAL, THOMAS K.	ASST AG	AGSGDACS-P
KUNZMAN, MICHELLE L.	ASST AG	AGSGDELS-P
HARTMAN-TELLEZ, KAREN J.	ASST AG	AGSGDACS-P
BANAN, ROGER L.	ASST AG	AGSGDACS-P
VOSS, IVY N.	ASST AG	AGSGDACS-P
DAY, DIANA	ASST AG	AGSGDLMS-P
GILLILAN-GIBSON, KELLY E.	ASST AG	AGSGDACS-P
THOMPSON, AARON J.	ASST AG	AGSGDACS-P
SINGH, NEILENDRA	ASST AG	AGSGDLMS-P
REH, DEANIE J.	ASST AG	AGSGDACS-P

PIENSOOK, KHANRAT	ASST AG	AGSGDLMS-P
ELLIOTT, STEPHANIE	ASST AG	AGSGDSGD-P
MARCIANO, VALERIE L.	ASST AG	AGSGDACS-P
HEMANN, LISA	ASST AG	AGSGDLMS-P
HOSTALLERO, PAMELA A.	ASST AG	AGSGDLMS-P
CHYNOWETH, SUZANNE M.	ASST AG	AGSGDLMS-P
DYLO, JOSEPH E.	ASST AG	AGSGDLMS-P
BRACHTL, MARK C.	ASST AG	AGSGDLMS-P
GREEN, JAMES M.	ASST AG	AGSGDELS-P
MCKAY, NEIL T.	ASST AG	AGSGDELS-P
GARNER, DEBORAH L.	ASST AG	AGSGDLMS-P
JAMESON JR, WILLIAM S.	AG SECT CHF COUNSEL	AGSGDTRN-P
RASSAS, THERESA C.	AG SECT CHF COUNSEL	AGCLDDCR-P
ALLEMAN, PAULA B.	AG SECT CHF COUNSEL	AGCRMDRG-P
BARRICK, JENNIFER E.	AG SR LITIGATION COUNSEL	AGCRMDRG-P
DAILEY JR, JAMES M.	AG SR LITIGATION COUNSEL	AGCRMFRS-P
ROTHBLUM, ERIC S.	AG SR LITIGATION COUNSEL	AGCRMFRS-P
MAXIE-MULLINS, LISA	AG UNIT CHF COUNSEL	AGSGDTRN-P
SCOTFORD, REBEKAH K.	AG UNIT CHF COUNSEL	AGCLDDCR-T
KANE, SANDRA R.	ASST AG	AGCLDDCR-P
SCHLOSSER, JOHN M.	ASST AG	AGSGDTRN-P
COULSON, LESLIE A.	ASST AG	AGSGDTRN-P
REDPATH, JAMES R.	ASST AG	AGSGDTRN-P
O'DELL, STANLEY R.	ASST AG	AGSGDTRN-P
DAVIS, SUSAN E.	ASST AG	AGSGDTRN-P
ACOSTA, JOE	ASST AG	AGSGDTRN-P
PERRY, BRYAN B.	ASST AG	AGSGDTRN-P
ASCHENBACH, RON J.	ASST AG	AGSGDTRN-P
LILLIE, STEPHANIE A.	ASST AG	AGSGDTRN-P
GUILLE, MISTY D.	ASST AG	AGSGDTRN-P
BALDNER, VICTORIA A.	ASST AG	AGCRMFRS-P
KASTURI, SAVITA I.	ASST AG	AGSGDTRN-P
FERNANDEZ, JENNIFER A.	ASST AG	AGSGDTRN-P
WEINKAMER, ADRIENNE M.	ASST AG	AGSGDTRN-P
CONTI, DAVID M.	ASST AG	AGCRMDRG-P
LARSON BURGGRAF, JENNIFER M.	ASST AG	AGCLDDCR-P
CROWLEY, JASON T.	ASST AG	AGCRMDRG-P
SACCONE, NICHOLAS J.	ASST AG	AGCRMDRG-P
WOMACK, STEPHEN J.	ASST AG	AGCRMFRS-P
HERLIHY, MATTHEW T.	ASST AG	AGSGDTRN-P
BURTON, MICHELLE	ASST AG	AGSGDTRN-P
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MCGARY, MARY E.	ASST AG	AGCRMHCF-P
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MINNICK, JULIE R.	AG UNIT CHF COUNSEL	AGCFPCSS
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RHODES, JULIE M.	ASST AG	AGCFPPSS
FALGOUT, JOANN	ASST AG	AGCFPPSS
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SMITH, KEVIN R.	ASST AG	AGCFPCLA
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ADAMS, AMANDA L.	ASST AG	AGCFPPSS
FULLER, CATHLEEN E.	ASST AG	AGCFPPSS
HALL, FRANKLIN R.	ASST AG	AGCFPCSS
CORLEY, JASON D.	ASST AG	AGSGDLMS-T
SHERIDAN, TODD A.	ASST AG	AGCFPCSS
KUPEC, ROBERT F.	ASST AG	AGCFPPSS
CRANE, ALISON P.	ASST AG	AGCFPPSS
HUCKABY, LINDSAY B.	ASST AG	AGCFPCSS
VILLARREAL-REX, KRISTI L.	ASST AG	AGCFPPSS
VALENZUELA, DENISE W.	ASST AG	AGCFPPSS

WARD, PATRICIA H.	ASST AG	AGCFPPSS
GOMEZ, MAUDI	ASST AG	AGCFPPSS
HARAN, MICHAEL M.	ASST AG	AGCFPPSS
VALEROS, JENILEE M.	ASST AG	AGCFPPSS
NAVEN, TYNE R.	ASST AG	AGCFPPSS
EARP, JAMES K.	ASST AG	AGCFPPSS
OELZE, DEBORAH M.	ASST AG	AGCFPPSS
CIAFULLO, MARK A.	ASST AG	AGCFPCSS
OVERHOLT, ELIZABETH M.	ASST AG	AGCFPPSS
VINCENT, ELAINE C.	ASST AG	AGCFPCSS
ALEXANDER, RANDI	ASST AG	AGCFPPSS
MELVIN, LEILA E.	ASST AG	AGCFPPSS
NARANJO, NANSI D.	ASST AG	AGCFPPSS
JOYCE, KARI F.	ASST AG	AGCFPPSS
HILL, KENNETH J.	ASST AG	AGCFPCSS
HUFF, DANIEL R.	ASST AG	AGCFPPSS
GOLOB, ELCHONON D.	ASST AG	AGCFPCLA
ROUN, HEATHER E.	ASST AG	AGCFPPSS
LOPEZ, ERIN C.	ASST AG	AGCFPCSS
CHRISTENSEN, SCOTT A.	ASST AG	AGCFPPSS
MOSS, ELIZABETH C.	ASST AG	AGCFPPSS
HUFF, LAURA J.	ASST AG	AGCFPPSS
WALKER, DARYL R.	ASST AG	AGCFPPSS
FARRAR, ROSEMARY E.	ASST AG	AGCFPCSS
LEVINE, JONATHAN M.	ASST AG	AGCFPCLA
CHAPMAN-HUSHEK, NICHOLAS	ASST AG	AGCFPPSS
VALDEZ, ALEJANDRA	ASST AG	AGCFPCSS
SYREGELAS, ANGELA G.	ASST AG	AGCFPPSS
METELITS, RACHEL	ASST AG	AGCFPCLA
VIDRIGHIN, ANNA-MARIA	ASST AG	AGCFPPSS
HEINRICK, TRACEY L.	ASST AG	AGCFPPSS
HANSEN, ABRIENDA M.	ASST AG	AGCFPCLA
RICHTER, LAUREN J.	ASST AG	AGCFPPSS
HAMILTON, CHRISTINA M.	ASST AG	AGCFPCLA
RYAN, HILLARY A.	ASST AG	AGCFPPSS
COUSINEAU, ASHLEY S.	ASST AG	AGCFPPSS
HYNES, GREGORY M.	ASST AG	AGCFPPSS
HAWKINSON, ERIN B.	ASST AG	AGCFPPSS
HUBBARD, TARA M.	ASST AG	AGCFPPSS
PARKMAN, NATALIE A.	ASST AG	AGCFPCSS
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LEVY, ERIC J.	ASST AG	AGCFPPSS
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CASEY, DENTON A.	ASST AG	AGCFPCLA
CHAPMAN, AMY S.	ASST AG	AGCFPPSS
MAHON, AMANDA C.	ASST AG	AGCFPCSS
ANEMONE, ALEXANDRIA	ASST AG	AGCFPPSS
HUTCHESON, JONATHAN W.	ASST AG	AGCFPPSS
OLIVER, JAIMEE C.	ASST AG	AGCFPCSS
RICHARDSON, ERIN E.	ASST AG	AGCFPCSS
MCCOY, DIANE S.	ASST AG	AGCFPPSS
NYE, KIMBERLY D.	ASST AG	AGCFPPSS
SIEDARE, SABRA A.	ASST AG	AGCFPPSS
ZAWISLAK, GOSIA M.	ASST AG	AGCFPPSS
HALL, DANIEL P.	ASST AG	AGCFPPSS
MONRO, CATHERINE V.	ASST AG	AGCFPPSS
BLACKWELL, STEPHANIE	ASST AG	AGCFPPSS
SHERMAN, NEIL E.	ASST AG	AGCFPPSS
GARCIA, JENNA O.	ASST AG	AGCFPPSS
AGUILAR, ZARINA N.	ASST AG	AGCFPPSS
MANGIN, DAVID F.	ASST AG	AGCFPPSS
ARREDONDO, KARA M.	ASST AG	AGCFPPSS
HOLYA, ROBERT B.	ASST AG	AGCFPPSS
STONE, ADAM D.	ASST AG	AGCFPCSS
ENRIQUEZ, LAURA I.	ASST AG	AGCFPPSS
DICK, ADAM J.	ASST AG	AGCFPPSS
MUNLEY, JOSEPH C.	ASST AG	AGCFPPSS
KUHSE, LAURA L.	ASST AG	AGCFPPSS
JOHNSON, ELIZA B.	ASST AG	AGCFPCSS
TIBBEDEAUX, LISA M.	ASST AG	AGCFPPSS
RIVERA, MELISSA	ASST AG	AGCFPPSS
MARKLEY, JENNIFER H.	ASST AG	AGCFPPSS
NAIK, NIDHI S.	ASST AG	AGCFPPSS
REISSNER, JOEL N.	ASST AG	AGCFPPSS
WORCESTER, BROOKE A.	ASST AG	AGCFPCSS
HALE, DARLENE C.	ASST AG	AGCFPPSS
BROSH, LAURA C.	ASST AG	AGCFPPSS
QALLIAJ, MARGARET	ASST AG	AGCFPCSS
HAIGHT, RAYMOND E.	ASST AG	AGCFPCLA
BOYLE, PATRICK J.	ASST AG	AGCFPPSS
WILCOX, DANIEL J.	ASST AG	AGCFPPSS
QUALLS, AMBER J.	ASST AG	AGCFPPSS
GORDON, ERIC E.	ASST AG	AGCFPPSS
KEGLER, JEFFREY W.	ASST AG	AGCFPPSS
BARREDA, JOSHUA A.	ASST AG	AGCFPPSS
MORRIS, COLBY R.	ASST AG	AGCFPPSS
GEVERS, ALICIA	ASST AG	AGCFPPSS

MACDONALD-DOYLE, HOLLY G.	ASST AG	AGCFPPSS
MCCUTCHEON, KYLE W.	ASST AG	AGCFPPSS
JOHNSON, JANNA L.	ASST AG	AGCFPPSS
GARNER, YANCEY	ASST AG	AGCFPPSS
NIMMAGADDA, GEETHA	ASST AG	AGCFPCSS
SHREVES, TERESA E.	ASST AG	AGCFPCLA
STEPHENSON, KYLE	ASST AG	AGCFPPSS
HENRY, MELISSA W.	ASST AG	AGCFPCLA
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Attachment “B”

Personal Statement of John R. Lopez IV

My affinity and respect for the people of Arizona, its history, its culture, and its opportunity, as well as my desire to contribute to the preservation of the rule of law to ensure the liberties of our citizens, have inspired me to apply for a position as an Arizona Supreme Court Justice.

Arizona is a special place for me. I am a native Texan, and my wife is from Pennsylvania. We started our life together in Arizona more than 22 years ago. My wife earned her degree, and I received my law degree, from Arizona State University. We married in Arizona, which is now the only home our two daughters have known. Arizona offers unique opportunity for new arrivals and it embodies the attributes of a true meritocracy; many of our fellow citizens come to Arizona to pursue goals they perceive as less achievable in other parts of the country. Our laws and our culture encourage innovation, entrepreneurism, and rugged individualism. Liberty and opportunity abound in Arizona.

My diverse experience as a law practitioner has prepared me for the varied and complex matters before the Arizona Supreme Court. In my 18 years of legal experience, which I began as an Arizona Supreme Court law clerk, I have practiced law as a civil litigator and, in a limited capacity, as a white collar defense attorney; represented attorneys in State Bar disciplinary matters; served as a federal trial prosecutor; engaged in sophisticated grand jury practice; led a federal appellate practice section; contributed to an international war crimes prosecution; and now have the honor to serve as Arizona Solicitor General.

As a federal prosecutor, and as Arizona Solicitor General, I have exercised significant quasi-judicial discretion and decision-making. As a prosecutor, every criminal case commences only after a rigorous internal analysis of the legal sufficiency of the evidence as measured against the statutory elements of the offense and the likelihood of conviction. Similarly, as Arizona Solicitor General, I routinely assess the constitutionality of statutes, and conduct quasi-judicial analyses of statutory obligations through the Attorney General Opinion process. As Deputy Appellate Chief and as Arizona Solicitor General, I routinely have assessed the merits of the government's legal position to determine whether to pursue an appeal or to concede error. The correct conclusion under the law, rather than the preferred policy result, is the imperative. As Justice Antonin Scalia noted, "If you're going to be a good and faithful judge, you have to resign yourself to the fact that you're not always going to like the conclusions you reach. If you like them all the time, you're probably doing something wrong." I believe that judges, like prosecutors and other public lawyers, must surrender their personal policy predilections once they take the oath of office.

My passion for Arizona, and my gratitude for the professional opportunity it has afforded me, is exceeded only by my passion for the rule of law and justice. I seek a position as an Arizona Supreme Court Justice because I understand our courts' critical role in preserving our liberties. Our appellate courts provide the last line of defense to ensure that trial court decisions and our statutes pass constitutional muster. However, while our appellate courts must scrutinize trial court decisions and interpret statutes, I also recognize it is not the prerogative of our appellate courts to supplant their judgment for a trial court's factual findings and other exercises of discretion, to assume the prerogative of the legislature, or to remedy statutory infirmities.

Finally, from my perspective, liberty, due process, and justice are not mere abstractions. As a prosecutor, I have witnessed the impact of our legal system on defendants and victims. I have observed trial judges endeavor to make constitutionally-sound rulings without the benefit of law clerks and time for extended reflection. As an appellate practitioner, I have experienced frustration, and shared the anguish of victims, when a federal appellate court erroneously supplanted its judgment for a jury's to reverse (temporarily) just and lawful convictions. As Arizona Solicitor General, I have been involved in matters of religious liberty, the resolution of which will profoundly impact the exercise of fundamental constitutional rights. And I have listened to the pleas of survivors of Saddam Hussein's genocidal campaign against the Kurds, who asked for nothing more than to have their stories heard in court.

These experiences animate my passion for the law. I understand that the desire for liberty, due process, and justice is ingrained in all of us. As an Arizona Supreme Court Justice, my fidelity to these principles, as enshrined in our federal and state constitutions, will guide my judgments.

Attachment “C”

C.A. No. 07-10487
Published Opinion Filed June 1, 2009
(Reinhardt, Hug, Bright [8thCir.])

D. Ct. No. CR-06-626-PHX-DGC

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

KENDERICK BEGAY,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

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Date Submitted via ECF: August 7, 2009

III. STATEMENT OF COUNSEL

Pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure, the United States, with approval of the Solicitor General, presents this petition for rehearing en banc and panel rehearing. A panel vacated the defendant's first-degree murder convictions after finding the evidence insufficient to support the jury's finding of premeditation. *United States v. Begay,* No. 07-10487 (9th Cir. June 1, 2009) (attached).

Rehearing en banc is warranted because the panel's opinion is contrary to *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), and conflicts with decisions of this Court and other circuits. The evidence shows that the defendant flagged down the victims' car, walked over to speak with the occupants, walked back to his truck to retrieve a rifle from under a seat, walked back to the car, shouldered the rifle, fired 8 or 9 shots through the passenger window, hitting one victim 6 times (all without apparent provocation), walked back to his truck, placed the weapon under a seat, did not answer when passengers asked what he was doing, and drove away, later telling two of his passengers to keep quiet about what happened. Sufficient evidence existed for a rational juror to conclude that the defendant acted with premeditation. The panel's contrary opinion fails to view the evidence in the light most favorable to the jury's verdict, fails to credit the reasonable inferences the jury could draw from that

evidence, and fails to view the evidence as a whole. It relied too heavily on surmising less culpable explanations for the defendant's conduct, which the jury was free to consider and rationally to reject. Rehearing en banc is warranted.

V. ARGUMENTS

A. THE EVIDENCE OF PREMEDITATION WAS SUFFICIENT.

Although citing the *Jackson* standard (Slip op. 6495), the panel failed to view the evidence in the light most favorable to the government, failed to affirm even though "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," *Jackson,* 443 U.S. at 319, and failed to adhere to the rule that "[c]onflicting evidence is to be resolved in favor of the jury verdict[] and all reasonable inferences are to be drawn in favor of the government." *United States v. Corona-Verbera*, 509 F.3d 1105, 1117 (9th Cir. 2007) (internal quotations omitted). Rather, it picked apart the evidence, improperly analyzing each piece in isolation rather than looking at the totality of the circumstances. It also failed to follow this Court's rule that "the government's evidence need not exclude every reasonable hypothesis consistent with innocence." *United States v. Talbert*, 710 F.2d 528, 530 (9th Cir. 1983); *see also United States v. Mares*, 940 F.2d 455, 458 (9th Cir. 1991) ("The relevant inquiry is not whether the evidence excludes every hypothesis except guilt, but whether the jury could reasonably arrive at its verdict.") (citations omitted). The opinion should be vacated.

Unlike the panel's apparent holding here, courts have not required direct, affirmative evidence – as opposed to a reasonable inference – that the defendant was

calm and unagitated at the time of the killing in order to prove premeditation. *See, e.g., United States v. Treas-Wilson*, 3 F.3d 1406, 1409-10 (10th Cir. 1993) (affirming first-degree murder conviction where there were no eyewitnesses to murder, but evidence showed that defendant broke into house seeking beer, stumbled across child victim, inflicted one injury inside house, and then dragged boy outside to kill him and dispose of the body); *United States v. Shaw*, 701 F.2d 367, 394 (5th Cir. 1983) (finding premeditation where no one observed defendant's demeanor at time of shooting, but evidence showed that he fired the rifle that killed a child who was riding in a vehicle driving down the highway, that defendant was lying in wait behind trees near the highway,[3] and there was "scant explanation for the shooting save his unsupported story that he was attempting to pursue a wounded deer").

Rather, evidence that the defendant engaged in "planning activity" even as the crime is being committed (as in this case when defendant walked back to his truck to retrieve his rifle and then returned to shoot his victims) has been sufficient to show premeditation. *See Talbert*, 710 F.2d at 531 ("If the jury determined that the killer picked up the murder weapon [a bowling pin] and carried it back seventy-five feet to [the victim's] room, its finding of premeditation was justified."); *see also Treas-*

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[3] Although "lying in wait" also qualifies a murder as first degree, see 18 U.S.C. § 1111(a), the *Shaw* court specifically stated that the facts showed premeditation. 701 F.2d at 394.

Wilson, 3 F.3d at 1409 (although defendant did not enter house planning to kill, but only to search for beer, court found his manner of killing child victim showed that he developed premeditation "during the incident at issue"); *United States v. Peterson*, 509 F.2d 408, 412 (D.C. Cir. 1974) (facts that defendant while in victim's apartment "procured the butcher knife, secreted it, waited until decedent's back was turned and then stabbed him" "clearly are probative of a determination to kill reached calmly sometime before the act and of reflection upon a preconceived design to kill, turning it over in the mind").

Furthermore, the defendant's actions in leaving the victims' car and returning to his car to get the weapon, then walking back to the victims' car and shooting the rifle eight times should be seen as the equivalent of bringing the weapon to the murder scene. *See United States v. Blue Thunder*, 604 F.2d 550, 553-554 (8th Cir. 1979) ("Even in the absence of proof of motive, the jury is generally allowed to infer premeditation from the fact that the defendant brought the deadly weapon to the scene of the murder."); *see also United States v. Sinclair*, 301 Fed. Appx. 251, 255 (4th Cir. Nov. 24, 2008) (unpublished) (after being ejected from club after fight with victim, that defendant "had at least several minutes to reflect" before he obtained a gun, pulled up his hood, and went back into the club to find the victim showed premeditation), *cert. denied*, 129 S. Ct. 1655 (2009).

The jury was also entitled to conclude that defendant had planned to kill his victims, given that he was carrying a loaded rifle in his truck, did not take Clark directly home but drove around until he saw the victims' vehicle, flagged that vehicle down, and then shot the victims after only a one-minute meeting. (RT 6/26/07 132-141; ER 398-407.) The panel found that there was no evidence of planning because it inferred from the record that the defendant routinely carried a rifle – more specifically, a loaded rifle – in his truck at all times. It also speculated that he could have been driving around the Navajo reservation at 2:00 or 3:00 a.m. "in search of another party, something to eat, or simply to enjoy the night air." (Slip op. 6500.) Yet, the evidence showed that the defendant did not explain to Clark why he was driving around, and he drove until he flagged down the victims' car. The jury was entitled to conclude that he was searching for the victims. Moreover, the panel was simply speculating that the defendant always carried a rifle; indeed, Clark testified only that he had gone shooting with defendant three or four weeks before the murders and that the defendant had used the murder weapon at that time. (RT 6/26/07 140-141; ER 406-407; RT 6/27/07 9; ER 190.) The jury was entitled to infer that the defendant had planned to kill his victims, and the panel should have resolved the evidentiary inferences in favor of the government. *Corona-Verbera*, 509 F.3d at 1117.

In *United States v. Belton*, 382 F.2d 150, 152 (D.C. Cir. 1967), the court found premeditation based on the fact that the defendant, who shot his wife six times as she lay in bed, arrived at his wife's apartment with a loaded gun, thereby "permitt[ing] an inference that [he] arrived on the scene already possessed of a calmly planned and calculated intent to kill . . . ." Although the defendant had been seen with the gun on prior occasions and it had been "around the house long before" the night of the murder, this simply "added a factor for the jury to consider in determining whether to make the inference that [defendant] had premeditated and deliberated the killing, but it did not make that inference impermissible." *Id.* Likewise, the jury was permitted to infer here that the defendant's carrying of the loaded rifle, combined with his driving around after the party, turning his car around, signaling the victims to stop, and the circumstances of the shooting, showed premeditation.[4]

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[4] The panel's reliance on *Austin v. United States*, 382 F.2d 129 (D.C. Cir. 1967), overruled on other grounds by *United States v. Foster*, 783 F.2d 1082 (D.C. Cir. 1986) (en banc), is misplaced. (Slip op. 6500.) In that case, the D.C. Circuit reversed a first-degree murder conviction after finding insufficient evidence of premeditation, stating that there was no reasoned, non-speculative basis for finding that "this was not murder committed in an orgy of frenzied activity, possibly heightened by drink," given that there were no witnesses to the murder, the defendant routinely carried the murder weapon in his pocket, and there was no evidence of motive. *Id.* at 139. Here, however, there *was* a witness to the murders, and his description of the defendant's conduct and demeanor permitted an inference that the defendant acted calmly and methodically, particularly given that he walked back to his truck to retrieve the rifle after only a one-minute meeting, and walked back to the

(continued...)

The manner of killing also supported premeditation. The panel flatly discounted the many shots the defendant fired into the vehicle, stating that this evidence was "just as likely to cut against a finding of premeditation as it is to cut in favor of such a finding," suggesting a "frenzy" and lack of "cool mind." (Slip op. 6501.) Again, the panel failed to resolve this inference in favor of the government. *Corona-Verbera*, 509 F.3d at 1117. The panel suggested that the defendant may have acted in a frenzy because, despite his experience firing the rifle and his proximity to the victims, he "*missed* a number of times." (Slip op. 6500-6501) (emphasis in original). However, the panel overlooked that the jury could reasonably infer that the defendant missed because he fired a powerful rifle with significant recoil, that it was dark when he murdered the victims, and that the victim may have moved within the car to avoid being shot or as a result of the impact of the rounds. And although the defendant may have missed two or three times, there is no evidence that he missed by a wide margin. The jury was entitled reasonably to infer from the evidence that the defendant acted in a calm or methodical fashion when he shot at the victims 8 or or 9 times, striking one victim 6 times. (RT 6/26/07 139; ER 405.)

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[4](...continued)
victims' car to begin shooting. And, as explained above, the jury was not required to conclude that defendant routinely carried a loaded rifle in his truck.

Indeed, courts have consistently held that evidence of numerous stabbings or shots supports a finding of premeditation. *United States v. Free*, 841 F.2d 321, 322-323, 325 (9th Cir. 1988) (affirming first-degree murder conviction based in part on evidence that inmate defendant took a knife with him to confront the victim and stabbed him 67 times); *Musladin v. Lamarque*, 555 F.3d 830, 847-849 (9th Cir. 2009) (evidence that the defendant stepped forward and fired a second shot at his victim was "strong and independent evidence of premeditation"); *United States v. Mulder*, 273 F.3d 91, 117 (2nd Cir. 2001) (fact that defendant "fired many bullets" at victim in part supported finding of premeditation); *United States v. Brown*, 518 F.2d 821, 826-827 (7th Cir. 1975) (defendant's infliction of 21 stab wounds on victim in part supported a finding of premeditation); *United States v. Slader*, 791 F.2d 655, 658 (8th Cir. 1986) (defendant's loading and cocking of rifle in the process of shooting his victim twice in the head supported a finding of premeditation).

Finally, the panel observed that Clark testified that the defendant "was 'pretty drunk' at the time of the shooting" and that "this fact alone" supports that the murder was not premeditated. (Slip op. 6501.) However, the panel did not purport to find that the evidence of intoxication was such that no reasonable jury could have found that defendant was sufficiently in control of his faculties to commit first-degree murder, and the evidence of his actions before and after the murder is, at minimum,

adequate to support a contrary view. Indeed, Clark's lone remark does not specify the quantity of alcohol the defendant consumed (RT 6/26/07 129-130; ER 395-396), and the defendant's described actions and demeanor in flagging down the victims, carrying out the murders, ordering the witnesses to remain silent about the crime, and other evidence inferring deliberate actions, are inconsistent with diminished capacity. The jury was entitled to conclude that the defendant was not so intoxicated that he could not premeditate, in light of all of the evidence. *See Slader*, 791 F.2d at 657-658 (although defendant may have been intoxicated, evidence that he loaded the gun and cocked it at least two times in the course of shooting his wife and himself shows premeditation).

In finding "no evidence" of premeditation, the panel made the same mistake that other panels of this Court have made in finding insufficient evidence to support a conviction or lack of reasonable suspicion to support a *Terry* stop: it examined the evidence piece-by-piece, determined that there were non-incriminating explanations for each piece of evidence standing alone, and thus wrongly concluded that the evidence as a whole was insufficient. (Slip op. 6499-6501) (panel stated that certain pieces of evidence "standing alone" or "without more" were insufficient to establish premeditation); *see also United States v. Nevils*, 548 F.3d 802 (9th Cir. 2008), reh'g

granted, 2009 WL 1740771; *United States v. Arvizu*, 232 F.3d 1241 (9th Cir. 2002), rev'd, 534 U.S. 266 (2002) (forbidding a "divide and conquer" analysis).

Viewing the evidence in the light most favorable to the jury's verdict, *Jackson,* 443 U.S. at 319, and considering that "all reasonable inferences are to be drawn in favor of the government," *Corona-Verbera*, 509 F.3d at 1117, the evidence was sufficient to support the jury's first-degree murder verdict. En banc rehearing is warranted.

VI. CONCLUSION

For the foregoing reasons, the government respectfully asks this Court to grant its petition for rehearing en banc.

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Attachment “D”

C.A. No. 09-10051

D. Ct. No. 06-00795-PHX-JAT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JAMES JOSEPH EVERETT,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF OF APPELLEE

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Date Submitted via ECF: September 14, 2009

VI. SUMMARY OF ARGUMENTS

A. The U.S. Supreme Court's *Santos* decision does not require reversal of the money laundering convictions. The *Santos* decision is a plurality opinion, is limited to the facts of that case and, therefore, applies only where the predicate specified unlawful activity in a money laundering case consists of a gambling offense under 18 U.S.C. § 1955. Moreover, even if *Santos* applied in this case, Defendant's money laundering convictions should stand because Defendant's laundered funds were in the nature of profits, rather than expenses, because he used them to support a comfortable lifestyle while he simultaneously defrauded his creditors.

B. This Court should affirm Defendant's money laundering convictions because, even if Defendant's post-petition law firm revenue could not become part of his Chapter 7 bankruptcy estate, Defendant's concealment of his income or assets available to repay his creditors (although acquitted by the jury on Count 7) rendered the laundered funds proceeds of unlawful activity. Moreover, the government proved that Defendant used $55,492.75 he held *prior* to filing bankruptcy to make lease and escrow payments on the Doubletree Ranch house. Consequently, even if this Court concludes that the district court's "associate earnings" instruction was erroneous, any such error was harmless, at least with respect to Defendant's money laundering of the

$55,492.75 he concealed from the bankruptcy trustee when he filed his Chapter 7 bankruptcy petition.

C. The district court properly instructed the jury concerning "alter ego" because the instruction correctly stated the law. The district court properly explained to the jury that "a corporation is an alter ego when there is such unity of interest and ownership that the separate personalities of the corporation and its owner cease to exist" and that Defendant was not required to disclose his interest in Lott & Sires' assets unless it found that Lott & Sires was Defendant's alter ego *and* to observe the corporation would "work an injustice." Defendant was not entitled to an instruction that included a subjectively exhaustive list of factors to determine whether Lott & Sires was Defendant's alter ego.

In any event, even if the district court erred in not providing such an exhaustive list of factors, any error was harmless because the government presented overwhelming evidence that Lott & Sires was simply a sham corporation that served no business purpose and was formed exclusively to facilitate Defendant's covert purchase of the Doubletree Ranch house in order to defraud his creditors.

D. There was sufficient evidence to support the jury's finding that Defendant fraudulently failed to disclose his interest in Lott & Sires' assets because Lott & Sires was his alter ego. Lott & Sires was a sham corporation; Defendant formed it within

months of filing his bankruptcy petition, Lott & Sires' "director" was a nominee officer who served no function, the corporation served no business purpose, and was set up for the sole purpose to facilitate and conceal Defendant's lease/purchase of an expensive house during the pendency of his bankruptcy in which he sought to discharge over $400,000 in debt. There was absolute unity of purpose and identity between Defendant and Lott & Sires because the corporation did nothing more than serve as a vehicle to provide a place for Defendant to live in style at the expense of his creditors and the integrity of the bankruptcy system.

E. Even if this Court were to reverse Defendant's money laundering convictions, Defendant's bankruptcy fraud convictions should stand because there was no risk of prejudicial spillover; (1) the evidence offered to prove the money laundering convictions was not so inflammatory that it would cause the jury to convict on the remaining counts; (2) all of the evidence offered to prove money laundering was admissible to prove the remaining bankruptcy fraud counts; and (3) the evidence of Defendant's bankruptcy fraud charged in the remaining counts was overwhelming.

Defendant owned prior to filing his bankruptcy petition and fraudulently concealed during the pendency of his bankruptcy.

C. The District Court Properly Instructed the Jury Concerning "Alter Ego," Because the Instruction Correctly Stated the Law.

(Defendant's Argument IX)

1. Standard of Review.

A district court's formulation of jury instructions is reviewed for an abuse of discretion. *Dearing*, 504 F.3d at 900. Whether a jury instruction misstates an element of the crime is reviewed *de novo*. *United States v. Peterson*, 538 F.3d at 1070. Jury instructions should be "viewed as a whole in the context of the entire trial to determine if they were misleading or inadequate to guide the jury's deliberations." *Perez*, 989 F.2d at 1114. However, where a defendant fails to properly object to a jury instruction, review is for plain error.[18] *See, e.g., Klinger*, 128 F.3d at 710 (a defendant must object with adequate specificity, including stating distinctly the matter to which the defendant objects, as well as the particular grounds of the objection).

2. Argument.

[18] Defendant concedes that he failed to timely present an alternative instruction concerning alter ego, and the district court held that Defendant waived his right to further challenge the alter ego instruction. (Op. Br. at 37.) (RT 5/9/08 1153-54; SER 486 (a), (b).) This Court should review Defendant's challenge to the alter ego instruction for plain error.

Defendant argues that his convictions on Counts 1, 2, 3 and 6 for his failure to disclose his interest in Lott & Sires' assets should be reversed because the district court's jury instruction defining "alter ego" (1) did not include the statement that "the mere fact that it is a one-man corporation does not mean the corporation is the alter ego of that one man;" and (2) the instruction failed to supply the jury with adequate guidance on how to determine whether Lott & Sires was Defendant's alter ego.[19] (Op. Br. at 33-38.) Defendant's argument fails as a matter of law.

Under Arizona law, a corporation is a separate legal entity and an individual who owns stock in a corporation does not own the assets of the corporation as an individual, unless the corporation is the alter ego or business conduit of a person. *Dietel v. Day*, 492 P.2d 455 (Ariz. App. 1972); *see also Nelson v. Adams USA, Inc.*, 529 U.S. 460, 471 (2000) (A corporation is a sham, not because it is owned by one person, but because it had no business or corporate purpose) (citation omitted); *See, e.g., In re Levine*, 107 B.R. 781, 787 (Bankr. S.D. Fla. 1989) (Failure to disclose bank

[19] Defendant's challenge to his Counts 1, 2, 3 and 6 convictions arises from his claim, first asserted in a pretrial motion to dismiss the indictment, that he was not legally required to disclose his interest in Lott & Sires' corporate assets because, as a stockholder in the corporation, he did not personally own Lott & Sires' corporate assets. (CR 19.) The district court properly denied Defendant's motion because the government alleged that Lott & Sires was Defendant's alter ego and, thus, Defendant was required to disclose his ownership interest in each of Lott & Sires' assets, such as bank accounts and the Doubletree Ranch lease purchase agreement, because a finding of alter ego rendered the assets Defendant's personal property. (CR 52.)

accounts and shell corporations controlled by debtors, through which they transferred assets, demonstrated debtors' intent to defraud creditors); *In re Topper*, 85 B.R. 167 (Bankr. S.D. Fla. 1988) (Debtor provided false oath when he failed to disclose his beneficial interest in a corporation that he had no ownership in, but his wife was record shareholder of 50% of the common stock); *In re Silver*, 367 B.R. 795, 816-17 (Bankr. D.N.M. 2007); *cf In re Aubrey*, 111 B.R. 268, 273 (9th Cir. BAP 1990) (Debtors who engage in a game of "hide and seek" with assets, and benefit themselves to the detriment of their creditors, establish their requisite intent to defraud creditors.).

The district court instructed the jury concerning Defendant's obligation to disclose his interests in a corporation as follows:

> The general rule is that a corporation is a separate legal entity and an individual who owns stocks in a corporation does not own the assets of the corporation. Therefore, generally, an individual filing bankruptcy is not required to list assets owned by a corporation in which he is a stockholder, but is only required to list the interest in the corporation itself. However, there is an exception to this general rule when the corporation is the alter ego or business conduit of the individual.
>
> As a result, an individual filing bankruptcy must list the assets of a corporation if:
>
> One, the corporation is an alter ego or business conduit of the defendant; and two, to observe the corporation would work an injustice.
>
> A corporation is an alter ego when there is such unity of interest and ownership that the separate personalities of the corporation and its owner cease to exist.

(RT 5/9/08 1265; SER 496.)

Defendant's chief defense at trial to the charges that he failed to disclose his interest in Lott & Sires' assets was that he was not required to disclose his interest in Lott & Sires because his law firm owned the Nevada corporation. Defendant now concedes that the government presented sufficient evidence to prove that Defendant, not his law firm, owned Lott & Sires. (Op. Br. at 36.) However, Defendant contends that the jury was misled because they were not expressly instructed that "the mere fact that it is a one-man corporation does not mean the corporation is the alter ego of that one man" or otherwise given an exhaustive list of factors to guide them in their determination whether Lott & Sires was Defendant's alter ego, i.e., whether there was such unity of interest and ownership that the separate personalities of the corporation and the Defendant ceased to exist. (Op. Br. at 37.)

Defendant's argument fails for three reasons. First, the district court's "alter ego" instruction correctly stated the law and Defendant was not entitled to a further instruction that a one-man corporation does not mean that the corporation is the alter ego of the single stockholder or an exhaustive list of factors to guide their alter ego determination. Second, the district court's instruction precluded the jury from convicting Defendant of Counts 1, 2, 3 and 6 merely based upon a finding that Lott & Sires was Defendant's alter ego because he was the sole stockholder. To the

contrary, the "alter ego" instruction plainly required that the jury *also* find that to observe the corporation would work an injustice. (RT 5/9/08 1265; SER 496.) Third, Defendant misapprehends the government's alter ego theory concerning Defendant's ownership of Lott & Sires. Although Defendant suggests that the only evidence that Lott & Sires was Defendant's alter ego centers on Defendant's exclusive ownership of the corporation (Op. Br. at 35), this evidence was offered merely to prove that Defendant, not his law firm, owned Lott & Sires.

With respect to evidence of absolute unity between Lott & Sires and Defendant, and that observance of the corporation would work an injustice, the evidence established this point conclusively. First, Lott & Sires was not a viable corporation; it had no real officers, hired no employees, performed no services, and served no corporate function.[20] (RT 4/30/08 332; SER 34; Tr. Ex. 38; SER 310-11.) Second,

[20] Defendant's reliance on *Ize Nantan Bagoura, Ltd. v. Scalia*, 577 P.2d 725 (Ariz. App. 1978), and *Bass v. Shuman*, 259 P.2d 561, 562 (9th Cir. 1958), for the proposition that it was reversible error for the district court to not include an instruction explaining that his sole ownership of Lott & Sires did not compel a finding of alter ego is misplaced. Unlike this case, *Ize Nantan* and *Bass* examined whether a finding of alter ego was warranted under circumstances where the subject corporation was a true, viable entity with a business purpose. Here, Lott & Sires was no more than a sham or shell corporation because it did not serve a business purpose. Defendant's suggestion that the district court erred by not directing the jury to consider whether Lott & Sires' "initial capitalization was adequate," whether "funds were improperly co-mingled," or whether "corporate niceties were observed," is untenable. (Op. Br. at 38.) There was no basis for such an instruction because there was no evidence that Lott & Sires was a true corporation, and arguably there was (continued...)

Lott & Sires' sole purpose was to facilitate the lease/purchase of the Doubletree Ranch home, which Defendant concealed from the bankruptcy court and trustee, with funds from a secret law firm account that Defendant even concealed from his accountant. (RT 5/1/08 431-32; SER 97 (a), (b).) Third, only after Defendant had obtained a discharge in bankruptcy, did he transfer his interest in the Doubletree Ranch house into his own name. (RT 5/6/08 680; SER 353; RT 5/1/08 530-33; SER 152-55.) Fourth, in May 2004, in support of his personal mortgage application, Defendant listed his Lott & Sires Nevada First bank account (#5440) as his personal asset. (Tr. Ex. 27; SER 307-08.) Finally, Defendant concealed his interest in Lott & Sires by falsely stating that the corporation was his landlord on the Doubletree Ranch house lease/purchase agreement (RT 5/6/08 645; SER 318; Tr. Ex. 2; SER 221), failing to list an address or any other contact information for Lott & Sires in his bankruptcy schedules (RT 5/6/08 676; SER 349), failing to list his interest in Lott & Sires bank accounts (RT 5/6/08 667-69; SER 340-42), and even failing to disclose his National Bank of Arizona personal accounts which listed the Doubletree Ranch house as his address. (RT 5/6/08 669-673; SER 342-46.)

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[20](...continued)
barely even a pretense that Lott & Sires was legitimate. Defendant simply used Lott & Sires, a shell corporation, as a conduit to purchase and conceal a $1,100,000 house from the bankruptcy trustee and his creditors.

Plainly, even if the district court erred in not instructing the jury that sole ownership in a corporation does not equate to a finding of alter ego, any such error is harmless because the overwhelming evidence demonstrated that Lott & Sires was Defendant's alter ego.[21] Lott & Sires' only purpose was to conceal Defendant's lease/purchase of the Doubletree Ranch house, in which he lived, from the bankruptcy court and trustee. Defendant's contention that the government failed to demonstrate a clear unity of ownership and interest where Defendant formed Lott & Sires for the sole purpose of leasing/purchasing a house for his exclusive use is untenable.

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[21] An error in the jury instructions is subject to harmless error review. *Neder v. United States*, 527 U.S. 1,15 (1999) (finding that a jury instruction that erroneously omitted an element of the offense was harmless error where the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error). The test for determining whether such an error is harmless is "whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Id.* (citing *Chapman v. California*, 386 U.S. 18,24 (1967)).

VIII. CONCLUSION

For the foregoing reasons, the judgment of conviction and sentence should be affirmed.

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s/ John R. Lopez IV

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UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF ARIZONA

United States of America, Plaintiff, v. David Steven Goldfarb, et al., Defendants.	CR-07-0260-PHX-DGC **UNITED STATES' MOTION FOR RECONSIDERATION, OR ALTERNATIVELY, MOTION TO MODIFY ORDER**

The United States of America, through undersigned counsel, hereby files its Motion for Reconsideration of, in part, or alternatively, to modify, the Court's October 9, 2008, Order denying Defendant's motion to dismiss the indictment for misconduct. Specifically, the government requests that the Court reconsider or modify its Order to clarify that the prosecutor did not engage in "prosecutorial misconduct," and that the contested paragraphs in the

/ / /

government's plea agreement, while unenforceable as written, do not constitute "prosecutorial misconduct."

Respectfully submitted this 24th day of October, 2008.

DIANE J. HUMETEWA
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District of Arizona

s/ John R. Lopez IV

JOHN R. LOPEZ IV
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MEMORANDUM OF POINTS AND AUTHORITIES

I. BACKGROUND

A. Defendants' Motion to Dismiss the Indictment.

Defendant moved to dismiss the indictment on the grounds that the government engaged in prosecutorial misconduct by allegedly interfering with his ability to interview several cooperating co-defendants. Defendant based his argument on provisions contained in paragraphs 2.g[1] and 2.f[2] of the plea agreements between the government and the cooperating defendants.

B. The Court's Order denying the Motion to Dismiss the Indictment, but finding the plea agreement constitutes "prosecutorial misconduct."

On October 9, 2008, this Court denied Defendant's motion to dismiss the indictment because, although it concluded that the provisions in the plea agreement improperly interfered with Defendant's ability to interview cooperating witnesses outside the prosecutor's presence, any such prejudice could be remedied by the government's notice to the cooperating witnesses that they were free to communicate with Defendant and his counsel without the government being present. (Order at 6.)

While the Court held that the prosecutor's conduct was not "outrageous or flagrant misbehavior," and that the prosecutor affirmatively sought to facilitate Defendant's access to cooperating defendants before the Court ruled on Defendant's motion to dismiss the indictment (Order at 6), the Court expressly held that the provisions in the plea agreement constitute "prosecutorial misconduct." (Order at 4-5.) By implication, the Court's Order may be interpreted to conclude that the prosecutor engaged in "prosecutorial misconduct," and that any

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[1] Paragraph 2.g of the plea agreement provides:

> [Cooperating defendant] agrees to notify the United States Attorney's Office of any contacts with any co-defendants or subjects or targets of the investigation, or their counsel, and agrees to provide prior notice of, and an opportunity for the government to be present at, any interviews between the [cooperating] defendant and any individual not employed by the government regarding any matters related to this case or any other investigation.

[2] Paragraph 2.f of the plea agreement provides:

> [Cooperating defendant] shall not reveal that [cooperating] defendant is cooperating, or any information derived therefrom, to any third party without prior consent from the United States Attorney's Office.

prosecutor who included these provisions in cooperation plea agreements prior to the Court's October 9, 2008, Order, may also have engaged in "prosecutorial misconduct."[3]

II. ANALYSIS

The government requests that the Court reconsider its finding, or modify its October 9, 2008, Order, to the extent that it held that the prosecutor engaged in prosecutorial misconduct by entering into plea agreements containing paragraphs 2.g and 2.f with the cooperating defendants. Similarly, the government requests that the Court modify its Order to the extent that it implies that any prosecutor who included these provisions in cooperation plea agreements prior to the Court's October 9, 2008, Order also may have engaged in "prosecutorial misconduct."

The government submits that the prosecutor did not engage in "prosecutorial misconduct" because (1) any *potential* interference with Defendant's access to witnesses in this case is distinguishable from the majority of the cases finding *actual* misconduct; (2) it is not improper for a prosecutor merely to request to be present at defense counsel's interview of a witness as the prosecutor intended; and (3) the provisions in the plea agreement have been standard in the District of Arizona for at least 14 years and have never resulted in a finding of prosecutorial misconduct.

A. The prosecutor's conduct in this case is distinguishable from the majority of the cases finding misconduct.

While the Court has concluded that paragraphs 2.g and 2.f are unenforceable, the prosecutor's conduct in this case does not constitute misconduct because his actions are readily distinguishable from the majority of cases finding "prosecutorial misconduct."[4] For example,

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[3] The government's concern about the Court's specific finding of "prosecutorial conduct" arises from the Department of Justice's ("DOJ") reporting requirements for misconduct. Pursuant to the United States Attorney's Manual, Chapter 1-4.120(B), any finding by a judge that a DOJ employee has engaged in "misconduct" must be reported to the employee's supervisor and DOJ's Office of Professional Responsibility.

[4] While the Court did not find the government's attempt to distinguish *Gregory* persuasive (Order at 4-5), the government maintains that the prosecutor's conduct in *Gregory* was far more serious because he actually impeded defense access to eyewitnesses in a murder trial by instructing the witnesses not to speak with the defense unless he was present. *Gregory*, 369 F.2d at 188. However, even though the Court reversed the conviction in *Gregory*, it did not make an express finding of prosecutorial misconduct.

(continued...)

in *State v. Hofstetter*, 878 P.2d 474 (Wash. Ct. App. 1994), the court held that the prosecutor engaged in misconduct when he advised cooperating defendants not to speak with defense counsel unless a prosecutor was present, and expressly threatened to withdraw the witnesses' plea agreements and, perhaps, expand their charges if they spoke with defense counsel. *Hofstetter*, 878 P.2d at 482; *see also United States v. Cook*, 608 F.2d 1175, 1180-81 (9th Cir. 1980) (finding that prosecutors' actions merely "border[ed] upon intentional misconduct" where "the government effectively hid two witnesses from defense counsel and, by stalling, frustrated pretrial investigation"); *United States v. Leung*, 351 F. Supp.2d 992, 993-95 (C.D. Cal. 2005) (finding that the government engaged in "wilful and deliberate misconduct" where it entered a plea agreement with a defendant expressly prohibiting contact with a co-defendant, and misrepresented to the court that the plea agreement was not designed to preclude contact with co-defendant's counsel).

Moreover, numerous cases finding that a prosecutor interfered with defense access to witnesses did not result in an express finding of prosecutorial misconduct. *See, e.g., United States v. Rogers*, 624 F.2d 1303, 1311 (5th Cir. 1980) (finding prosecutor's suggestion that Corps of Engineers witnesses speak with defense lawyers only if government lawyers were present to be "serious"); *United States v. Tsutagawa*, 500 F.2d 420, 423 (9th Cir. 1974) (affirming dismissal of the indictment, but finding no misconduct, where the government "placed witnesses, who may have been favorable to the [defendants], outside the power of our courts to require attendance" through pretrial deportation); *United States v. Vavages*, 151 F.3d 1185, 1190-91 (9th Cir. 1998) (expressing "concerns" where the prosecutor implied that he would charge a witness with perjury

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[4] (...continued)
Moreover, while there is not a meaningful legal distinction between eyewitnesses and cooperating defendants for purposes of determining whether interference with defense access to witnesses violates due process, there is certainly a difference between these classes of witnesses in determining whether a prosecutor acted in good faith in requesting to be present during defense interviews. For example, the genesis of paragraphs 2.g and 2.f in the plea agreement is traced, in part, to the government's attempt to address a problem with cooperating witnesses speaking with co-defendants. For the prosecutor, this communication implicated ethical rules prohibiting *ex parte* communications with represented parties. As demonstrated by the prosecutor's interpretation and application of these provisions in this case, the government did not include paragraphs 2.g and 2.f with the intent to interfere with defense counsels' access to witnesses.

and withdraw her plea agreement in an unrelated criminal case if she testified in support of defendant's alibi defense, and then in closing argument emphasized the witness' failure to testify at defendant's trial); *United States v. Peter Kiewitt Sons Co.*, 655 F. Supp. 73, 77-78 (D. Colo. 1986) (finding that it was "improper" for prosecutors to discourage witnesses otherwise willing to speak with defense counsel); *cf Kines v. Butterworth*, 669 F.2d 6, 9 (1st Cir. 1981) (a state trooper's instruction to corrections officers witnesses not to talk with defense counsel constitutes improper interference with the defendant's access to witnesses).

In this case, in addition to the government's full disclosure of its cooperating witnesses' plea agreements and statements, when the prosecutor was confronted with an allegation that the plea agreement may have impeded defense access to the cooperating witnesses, the prosecutor clarified that the government did not interpret or apply its agreement to interfere with defense access to witnesses. The prosecutor's actions are plainly distinguishable from the misconduct in *Hofstetter, Cook*, and *Leung*. In fact, the prosecutor's conduct in this case is also distinguishable from *Rogers*, *Tsutagawa*, *Vavages* and *Peter Kiewitt Sons Company* where there was no express finding of misconduct, because he did not impede defense access to witnesses, intentionally or otherwise. The prosecutor simply did not engage in any misconduct.

B. <u>The ABA Standards for Criminal Justice permit a prosecutor to request an opportunity to be present at defense counsel's interview of a witness</u>.

In its Order, the Court suggests "that a prosecutor engages in misconduct when he advises witnesses they are free to speak with defense counsel, but then requests that he be present if such interviews occur." (Order at 3) (*citing United States v. Rodgers*, 624 F.2d 1303, 1311 (5th Cir. 1980) and *State v. Hofstetter*, 878 P.2d 474, 478-79 (Wash. Ct. App. 1994)). However, as *Hofstetter* acknowledges, ABA Standards for Criminal Justice § 3.1(c), at 3/38-39 (2d ed. 1982), expressly provides that "[c]ounsel may properly request an opportunity to be present at opposing counsel's interview of a witness," so long as his or her presence is not a condition of the interview. *Hofstetter*, 878 P.2d at 396. Therefore, a prosecutor's mere request to be present at defense counsel's interview of a cooperating defendant (or any witness) is not improper.

The government does not dispute the Court's holding that it is impermissible for the government to condition a witness' interview with defense counsel on the presence of the

prosecutor. *See, e.g., Gregory v. United States*, 369 F.2d 185, 188 (D.C. Cir. 1966); ABA Standards for Criminal Justice § 3.1(c), at 3/38-39 (2d ed. 1982). However, the government maintains that it is proper for it to request notice of, and an opportunity to be present at, any interview between a cooperating defendant (or any other witness) and defense counsel, provided that the witness is free to decline the government's request without sanction. In fact, this approach is consistent with this Court's remedial action in this case. (Order at 6-7.)

In this case, the prosecutor's interpretation and implementation of the plea agreement, including paragraphs 2.g and 2.f., was substantively consistent with the Court's remedial steps; namely, that the defense be allowed unfettered access to the cooperating witnesses if the witnesses agreed to meet with the defense. With respect to paragraph 2.g, the Court recognized that the prosecutor clarified his interpretation of the plea agreement when, after the defendants filed their motion to dismiss, he sent an e-mail informing the cooperating defendants that they were entitled to meet with the remaining defendants outside of his presence. (Order at 3.) Concerning paragraph 2.g, while the Court found that the provision was written broadly enough to potentially silence cooperating defendants, the Court accepted the prosecutor's interpretation that the provision was not intended to forbid cooperating defendants from telling co-defendants what they had told the government. (Order at 5.) There plainly was no prejudice to Defendant, nor was there any evidence that the prosecutor applied paragraphs 2.g and 2.f with the intent to interfere with defense counsel's trial preparation.

The government acknowledges the Court's legal conclusions concerning the potential effect of paragraphs 2.g and 2.f concerning defendants' access to cooperating defendants. Specifically, the government recognizes that it may not condition a witness' interview with defense counsel on the presence of a government representative. As a result of the Court's Order, the government is considering the Court's ruling to determine appropriate revisions to paragraphs 2.g and 2.f. However, in this case, the government submits that the prosecutor did not engage in any misconduct because he interpreted and applied the plea agreement in good faith and in compliance with the law. Similarly, the government submits that, absent evidence to the contrary in a particular case, the Court's Order should not be read to conclude that any

other prosecutor has engaged in "prosecutorial misconduct" merely because they included paragraphs 2.f and 2.g in the government's standard cooperation plea agreement.

C. Paragraphs 2.g and 2.f have been standard provisions in District of Arizona plea agreements for 14 years without a finding of prosecutorial misconduct.

The government requests that this Court also reconsider its finding that the plea agreement provisions constitute "prosecutorial misconduct" because paragraphs 2.g and 2.f have been accepted by the district court routinely for 14 years, and have survived a rare challenge of misconduct. For example, in *United States v. Muirs*, CR-02-156-PHX-SRB, the district court denied a defendant's motion to dismiss the indictment based upon paragraphs 2.g and 2.f of the plea agreement. Upon his conviction, the defendant appealed the district court's denial of his motion to dismiss the indictment. The Ninth Circuit, in an unpublished opinion, rejected the defendant's claim that the government denied him due process by impeding his access to testifying co-conspirators through their plea agreements because there was no evidence of prejudice. *United States v. Muirs*, 145 Fed. Appx. 208, 209 (9th Cir. 2005).[5] In rejecting the defendant's argument, the Court did not address whether the plea agreement constitutes prosecutorial misconduct. *Id.* However, the Court certainly did not signal that it was inclined to find prosecutorial misconduct based upon the provisions in the plea agreement. The government has relied in good faith upon the fact that neither the district court, nor the Ninth Circuit, found that paragraphs 2.g and 2.f were improper.[6]

III. CONCLUSION

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[5] Because the unpublished *Muirs* opinion was issued before January 1, 2007, it may not be cited to this Court as precedent. *See* Ninth Circuit Rule 36-3. The government refers this Court to the *Muirs* opinion merely to demonstrate its good faith reliance to continue to include paragraphs 2.g and 2.f in its plea agreements. The government does not suggest that this Court reconsider its ruling that the provisions of the plea agreement are unenforceable based upon the unpublished *Muirs* opinion.

[6] In denying the motion to dismiss the indictment based upon paragraphs 2.g and 2.f in *Muirs*, the district court held that there was no government misconduct in "the drafting of the language of the plea agreement or in any other activity that could be shown to preclude contact. In this case, the defendants either declined contact or did not respond to [defendant's] requests for contact, and [the court doesn't] believe that the agreement to notify and permit the government to be present violates the defendant's rights to due process." Brief of United States, Plaintiff-Appellee, *United States v. Muirs*, 145 Fed. Appx. 208 (9th Cir. 2005) (No. 04-10191), 2004 WL 3493924, *7-9.

For the foregoing reasons, the government requests that the Court reconsider or modify its October 9, 2008, Order to clarify that the prosecutor did not engage in "prosecutorial misconduct," and that the contested paragraphs in the government's plea agreement, even though unenforceable, do not constitute "prosecutorial misconduct," at least if they were included in plea agreements prior to this Court's Order.

Respectfully submitted this 24th day of October, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2008, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF system for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

Alfred S. Donau III
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