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 August 8, 2017. 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: **Kent Ernest Cattani**

2. Have you ever used or been known by any other legal name? **No.** If so, state name:

3. Office Address: **1501 West Washington, Phoenix Arizona 85007**

4. When have you been a resident of Arizona? **1960 – 1976, 1986 - present**

5. What is your county of residence and how long have you resided there? **Maricopa, 43 years**

6. Age: **58**

   (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.)

Filing Date: _____

7. List your present and former political party registrations and approximate dates of each: **Republican Party, 1975 to present**

(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
[ ] 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 California at Berkeley, Boalt Hall School of Law
Berkeley, California, 1982-1986
Juris Doctorate

Brigham Young University
Provo, Utah, 1979-1982
Bachelor of Science

Mesa Community College
Mesa, Arizona, 1975-1976
General Studies

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

Undergraduate Major–Accounting
Undergraduate Minors–Economics, Business Management

I worked part-time throughout my undergraduate studies to support myself. I also participated in intramural basketball, volleyball, and racquetball.

11. List scholarships, awards, honors, citations and any other factors (e.g.,

employment) you consider relevant to your performance during college and law school.

University of California at Berkeley, Boalt Hall School of Law

Sun World Corporation Scholarship (tuition and cash)
Summer Employment:

McCormick, Barstow, Sheppard, Wayte & Carruth
Fresno, California, July 1985–August 1985
Summer Associate

Jennings, Strouss & Salmon
Phoenix, Arizona, June 1985–July 1985
Summer Associate

5K Orchards (peaches, nectarines)
Reedley, California, 1982–1985
Farm Manager

Assumed responsibility for raising elementary-school age sister and caring for handicapped parent in 1983.

Brigham Young University

Academic Scholarship (tuition)
Graduated Magna Cum Laude
Teaching Assistant, Professor Roy Garrison, 1981–1982
Spanish Instructor, Missionary Training Center, 1980–1981
Phi Kappa Phi Honor Society
Beta Gamma Sigma Honor Society

PROFESSIONAL BACKGROUND AND EXPERIENCE

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

Arizona Supreme Court
October 25, 1986

United States District Court for the District of Arizona
November 7, 1986

United States Circuit Court of Appeals for the Ninth Circuit
September 3, 1993

United States Supreme Court
June 13, 1994

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 Court of Appeals, Division I	**April 2013–present**	**Phoenix, AZ**
Arizona Attorney General's Office **Solicitor General** **Division Chief** **Section Chief** **Unit Chief** **Assistant Attorney General**	**July 1991–March 2013**	**Phoenix, AZ**
Beus, Gilbert & Morrill	**March 1989–July 1991**	**Phoenix, AZ**
Jennings, Strouss & Salmon	**June 1986–March 1989**	**Phoenix, AZ**

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.

    See Attachment A

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.

    I have been a judge on Division I of the Arizona Court of Appeals since April 2013. The court decides appeals in a wide variety of substantive areas, including civil, criminal, juvenile, family law, mental health, probate and tax. The court also reviews Industrial Commission decisions in workers'

compensation cases, Arizona Corporation Commission and the Unemployment Compensation Board decisions, and considers "special action" petitions seeking pre-judgment and emergency relief. Civil and criminal cases comprise approximately two-thirds of the court's caseload.

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

At the time of my appointment to the Court of Appeals, I was serving as Solicitor General at the Arizona Attorney General's Office, with supervisory responsibility for Civil and Criminal Appeals, Opinion Review, Ethics, Open Meetings Law, and Election Law. I had previously served (until November 2012) as Chief Counsel of the Criminal Appeals/Capital Litigation Division; when I was appointed as Solicitor General, the office combined the then-existing Solicitor General Division with the Criminal Appeals/Capital Litigation Division.

As the Criminal Appeals/Capital Litigation Division Chief Counsel, I supervised all felony appeals for the State of Arizona, federal habeas proceedings in the federal courts, and capital post-conviction proceedings in trial courts throughout the State. In addition to my supervisory responsibilities, I represented the State in criminal cases at every stage of the appellate and post-conviction process. I practiced extensively before the Arizona Supreme Court, and I briefed more than 200 cases and argued more than 100 times on behalf of the State of Arizona in state and federal appellate courts, including the Ninth Circuit Court of Appeals and the United States Supreme Court. My practice before the United States Supreme Court included first or second chair participation in 10 cases the court addressed on the merits. My most recent oral arguments prior to my appointment on the Court of Appeals included:

02/26/13	***State v. Payne***	**Arizona Supreme Court**
07/26/12	***State v. Cook***	**Ninth Circuit, Pasadena**
06/12/12	***State v. Nordstrom***	**Arizona Supreme Court**
05/10/12	***G. Lopez v. Schriro***	**Ninth Circuit, Pasadena**
11/18/11	***Wood v. Ryan***	**Ninth Circuit, San Francisco**
10/04/11	***Martinez v. Ryan***	**United States Supreme Court**
05/24/11	***State v. Beaty***	**Arizona Supreme Court**
03/17/11	***James v. Schriro***	**Ninth Circuit, San Francisco**
03/10/11	***Kemp v. Schriro***	**Ninth Circuit, Pasadena**
03/10/11	***Cook v. Schriro***	**Ninth Circuit, Pasadena**
02/15/11	***State v. Prince***	**Arizona Supreme Court**
01/19/11	***State v. Accardo***	**Arizona Supreme Court**
12/02/10	***State v. Montes***	**Arizona Supreme Court**
10/07/10	***Hurles v. Schriro***	**Ninth Circuit, Pasadena**
08/11/10	***S. Lopez v. Schriro***	**Ninth Circuit, San Francisco**
05/25/10	***State v. Gunches***	**Arizona Supreme Court**

02/25/10	***State v. Lynch***	**Arizona Supreme Court**
01/27/10	***Detrich v. Ryan***	**Ninth Circuit, Pasadena**
11/03/09	***Lambright v. Schriro***	**Ninth Circuit, Pasadena**
06/03/09	***Libberton v. Ryan***	**Ninth Circuit, Pasadena**
03/26/09	***State v. Bearup***	**Arizona Supreme Court**
03/26/09	***State v. Zaragoza***	**Arizona Supreme Court**

As an Assistant Attorney General, I provided testimony to the United States Senate and the United States House of Representatives regarding federal habeas and capital litigation issues. I also presented testimony to the Arizona Legislature regarding proposed legislation. Additionally, I was involved in drafting and reviewing national and state legislative proposals relating to a variety of criminal law and forensic science issues.

Prior to joining the Arizona Attorney General's Office, I worked as a lawyer in private practice in the areas of Commercial Litigation, Personal Injury Litigation, Education Law, Estates and Trusts, and Eminent Domain.

18. Identify all areas of specialization for which you have applied or been granted certification by the State Bar of Arizona. **None.**

19. Describe your typical clients.

As a judge, I no longer represent clients. My primary clients at the Attorney General's Office were the State of Arizona and the Director of the Arizona Department of Corrections.

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

I have served as my mother's guardian and conservator since 1985. I also served as my younger sister's guardian and conservator for over 10 years until she reached age 18.

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

As a Court of Appeals judge, I have written over 205 opinions, memorandum decisions, and decision orders. As an Assistant Attorney General, I wrote or edited hundreds of appellate briefs. During my tenure as Solicitor General and Division Chief Counsel, in addition to my own case load, I reviewed and edited appellate briefs and pleadings drafted by other attorneys for filing in trial and appellate courts throughout Arizona, as well as in federal district court, the Ninth Circuit, and the United States Supreme Court.

I authored the Attorney General's DNA Task Force Report in 2008, and I was the primary author of the Attorney General's Capital Case Commission Report in 2002. I also drafted and assisted in drafting numerous Opinions for the Attorney General's Opinion Review Committee.

I worked with members of the Arizona Legislature and with other prosecuting agencies in drafting state statutes and rules, including provisions relating to the death penalty and preservation of biological evidence. I also worked with members of the United States Senate and House of Representatives and their staffs in drafting legislation relating to federal habeas litigation. Additionally, I authored Comments to Rules Proposals submitted by other agencies and individuals. As a member of the Arizona State Bar Jury Instructions Committee, I worked with other prosecutors, as well as members of the defense bar and the judiciary, to formulate proposed jury instructions for use in trials throughout the state.

I am currently a member of the Arizona Supreme Court's Task Force on the Arizona Rules of Criminal Procedure; we are in the process of redrafting/restyling all of Arizona's criminal rules. I chair one of the four Workgroups creating/crafting initial drafts of various rules for further review by all of the members of the Task Force.

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. **Not Applicable.**

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

    Sole Counsel: **Not Applicable.**

    Chief Counsel: **Not Applicable.**

    Associate Counsel: **Not Applicable.**

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: **Not Applicable.**

    Chief Counsel: **Not Applicable.**

    Associate Counsel: **Not Applicable.**

Filing Date: _____

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. **Not Applicable.**

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: **50***

State Courts of Record: **30**

Municipal/Justice Courts: **0**

***This number reflects litigation relating to petitions for writ of habeas corpus resulting from state court criminal convictions and sentences.**

The approximate percentage of those cases which have been:

Civil: **60%**

Criminal: **40%**

The approximate number of those cases in which you were:

Sole Counsel: **50**

Chief Counsel: **20**

Associate Counsel: **10**

The approximate percentage of those cases in which:

You conducted extensive discovery[1]: **10%**

You wrote and filed a motion for summary judgment: **60%***

***This percentage includes dispositive motions in federal habeas proceedings.**

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

Filing Date: _____

You wrote and filed a motion to dismiss: **30%**

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): **20%**

You made a contested court appearance (other than as set forth in above response) **10%**

You negotiated a settlement: **0%**

The court rendered judgment after trial: **5%***

***This percentage includes judgment following a post-conviction evidentiary hearing.**

A jury rendered verdict: **0%**

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 **0**

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: **50***

Criminal: **180**

***This number represents appeals in federal habeas proceedings.**

The approximate number of matters in which you appeared:

As counsel of record on the brief: AZ **180** U.S. **50**

Personally in oral argument: AZ **60** U.S. **30**

27. Have you served as a judicial law clerk or staff attorney to a court? **No.** If so, state the name of the court and dates of service, and describe your experience.

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.

***Schriro v. Landrigan*, 550 U.S. 465 (2007)**

(1) Opinion issued on May 14, 2007, following briefing and oral argument on January 9, 2007

(2) United States Supreme Court, Chief Justice John Roberts; Opinion by Justice Clarence Thomas

(3) See Attachment B

(4) The United States Supreme Court reversed a Ninth Circuit ruling that had granted Jeffrey Landrigan an evidentiary hearing on the issue of ineffective assistance of counsel. At trial, Landrigan impeded his trial counsel's efforts to present mitigation evidence at sentencing in a capital case, objecting to presentation of testimony from family members. In post-conviction proceedings, Landrigan's new attorney argued that trial counsel was ineffective by failing to adequately investigate and develop potential mitigation evidence. The trial court rejected the post-conviction claim without conducting a hearing, on the basis that Landrigan had made clear that he did not want counsel to present any mitigation evidence.

The United States Supreme Court granted review to address the Ninth Circuit's ruling ordering an evidentiary hearing notwithstanding provisions in the federal habeas statute (28 U.S.C.A. § 2254) requiring deference to state court factual determinations and legal rulings. The United States Supreme Court held that the state court's ruling that Landrigan had not established a colorable claim of ineffective assistance of counsel was not an unreasonable application of controlling federal law and that the state court reasonably concluded that trial counsel's performance was not deficient and did not prejudice Landrigan's case.

(5) This case is of particular significance in addressing the scope of counsel's duties when a defendant in a criminal case is uncooperative during trial or sentencing. It is also significant in that it addresses the interplay between federal habeas litigation and state-court proceedings, particularly with regard to the level of deference that must be afforded state court decisions.

Schriro v. Smith, 546 U.S. 6 (2002)

(1) Per Curiam Opinion issued on October 17, 2005

(2) United States Supreme Court, Chief Justice William Rehnquist

(3) See Attachment B

(4) The United States Supreme Court held that the Ninth Circuit exceeded its authority on federal habeas review by ordering Arizona courts to conduct a jury trial on the issue of whether Robert Smith was mentally retarded and thus ineligible for the death penalty under the Supreme Court's ruling in *Atkins v. Virginia*, 536 U.S.304 (2002).

Arizona's Rules of Criminal Procedure dictate that trial judges, rather than juries, address claims raised in post-conviction proceedings. Claims relating to changes in the law (such as *Atkins v. Virginia*) can be raised in post-conviction proceedings under Rule 32.1(g) of the Arizona Rules of Criminal Procedure. Had the Ninth Circuit's ruling not been reversed, the State would have been required to impanel juries to address post-conviction claims that are routinely decided by trial judges in Arizona and in other states.

(5) The requirement imposed by the Ninth Circuit would have resulted in jury voir dire and jury trials at the post-conviction stage, which would have significantly increased the expense and delay inherent in the post-conviction process, with little or no reason to believe such a process would improve the criminal justice system.

Stewart v. Smith, 536 U.S. 856 (2002)

(1) Per Curiam Opinion issued on June 28, 2002

(2) United States Supreme Court, Chief Justice William Rehnquist

(3) See Attachment B

(4) The United States Supreme Court reversed a decision in which the Ninth Circuit ruled that Arizona's procedural default rules did not create a bar to federal review of defaulted claims. Ordinarily, the federal courts addressing a habeas corpus petition will only address claims that have first been presented in a procedurally proper manner to the state courts; the role of the federal courts is limited to determining whether the state courts properly applied the federal constitution in addressing the merits of claims raised in state proceedings. Thus, absent extraordinary circumstances, the federal courts do not generally review claims that were not fairly presented in state court proceedings.

Arizona's Rules of Criminal Procedure require that claims of error at trial or sentencing be raised on direct appeal or in a first petition for post-conviction relief, or the claims will be deemed precluded and procedurally barred from further review. Arizona's rules provide an exception for certain claims of constitutional magnitude that require an on-the-record waiver, such as the right to a jury trial or the right to counsel. The Ninth Circuit found that this exception required a "merits" review of each claim to determine whether the claim was of sufficient constitutional magnitude to require an on-the-record waiver, and thus held that claims could be considered on federal habeas review even if the claims were deemed waived in state court. The Ninth Circuit also rejected the State's suggestion that, to the extent there was any confusion about state court rules regarding preclusion, a question should be certified to the Arizona Supreme Court.

On certiorari review to the United States Supreme Court, the Court certified a question to the Arizona Supreme Court regarding the meaning of Arizona's procedural rules, then upon receiving an answer consistent with the position argued by the State, reversed the Ninth Circuit's ruling and held that Arizona's rules of preclusion should be upheld in federal court.

(5) The ruling in this case was extraordinarily significant because the Ninth Circuit's decision opened the door to federal court consideration of claims that were untimely presented or had never been presented in state court. If the Ninth Circuit's ruling had not been reversed, federal review of habeas petitions, which often spans more than 15 years in capital cases, would have been further delayed, and evidentiary hearings would have been regularly required in federal court to address claims that were procedurally defaulted in state court.

***State v. Ring*, 204 Ariz. 534, 65 P.3d 915 (2003)**
(Consolidated case involving 27 defendants)

(1) Opinion issued April 3, 2003 following briefing and oral argument

(2) Arizona Supreme Court, Chief Justice Charles Jones; Opinion by Vice Chief Justice Ruth McGregor

(3) See Attachment B

(4) The United States Supreme Court ruled in *Ring v. Arizona*, 536 U.S. 584 (2002), that Arizona's death penalty statute was unconstitutional to the extent it provided that a judge, rather than a jury, would determine whether there were aggravating circumstances rendering a defendant eligible for the death penalty. The Arizona Legislature subsequently amended the state statute to require jury sentencing in capital cases. The Arizona Supreme Court then consolidated 27 death penalty cases that were pending on direct review at the

time of the United States Supreme Court's decision in *Ring*. The consolidated proceedings addressed nine questions relating to the analysis of error under *Ring* and the applicability of Arizona's new sentencing statute to cases in which defendants had been previously sentenced by a judge, rather than a jury. Among other holdings, the Arizona Supreme Court found that *Ring* error was subject to harmless error review, and that cases in which error was not deemed harmless could be remanded for re-sentencing under the new sentencing statute without violating ex post facto and double jeopardy principles.

(5) This case addressed complex constitutional issues of statewide importance in determining how to proceed with capital case litigation following significant changes to Arizona's death penalty sentencing procedures.

***State v. Spreitz*, 202 Ariz. 1, 39 P.3d 525 (2002)**

(1) Opinion issued January 30, 2002, following briefing and oral argument

(2) Arizona Supreme Court; Opinion by Chief Justice Charles Jones

(3) See Attachment B

(4) John Spreitz raised a single claim of ineffective assistance of trial counsel on direct appeal; when he tried to raise other claims of ineffective assistance of trial counsel in a post-conviction proceeding, the claims were found precluded for failing to raise them as a single claim on appeal. The Arizona Supreme Court had previously addressed claims of ineffective assistance of counsel on direct appeal, but had urged defense attorneys not to raise such claims on direct appeal because all claims of ineffective assistance of trial counsel are considered to be one claim, and to the extent other claims are not raised with the initial claim of ineffective assistance, they may be precluded from later review if the claim asserted on appeal is denied. Nevertheless, many defense attorneys continued to raise claims of ineffective assistance of counsel on direct appeal, apparently unaware of the consequences of pursuing only one aspect of such a claim.

The Arizona Supreme Court requested briefing and argument on how to address this problem and whether the rules of preclusion should be enforced in this type of situation. The State suggested that the problem could be avoided if the Court were to decline to consider any claims of ineffective assistance of counsel on direct appeal, thereby avoiding the problem of a ruling on one claim that would preclude post-conviction litigation of other allegations of ineffective assistance that might merit evidentiary development. The Court agreed with that approach and issued an opinion advising that it would no longer address claims of ineffective assistance of counsel on direct

appeal.

(5) This case addressed a recurring problem in a practical way and ensured that the merits of all viable claims of ineffective assistance will be addressed in the appropriate forum—a post-conviction proceeding after the conclusion of direct appeal.

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.).

I have been a Court of Appeals judge since April 2013 and have authored decisions in approximately 205 cases involving civil, criminal, juvenile, family, tax, and Industrial Commission matters. I previously served as an appointed arbitrator in three Maricopa County Superior Court civil cases between 1997 and 2002. I issued orders in each case after conducting an arbitration hearing.

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.

***Scottsdale/101 Associates v. Maricopa County*, 1 CA-TX 14-0003**

(1) Opinion issued on September 30, 2015

(2) Arizona Court of Appeals, Division I, Judge Kent E. Cattani authored, Judges Lawrence F. Winthrop and Randall M. Howe concurred

(3) See Attachment C

(4) This appeal involved a challenge to the property tax classification of movie theaters located within shopping centers on state-owned land. The tax court granted summary judgment in favor of Maricopa County, concluding that the County had properly assessed the properties at the statutory rate for

shopping centers, even though the theaters also satisfied the requirements for another statutory classification (more favorable to the taxpayer) for entertainment venues on government land.

The court of appeals reversed, holding that properties within a shopping center are subject to "mixed-use" assessment. Because ambiguities in tax statutes should be resolved in favor of the taxpayer, and because the County had granted mixed-use status to at least one other type of business (day care centers) within shopping centers, the tax court erred by declining to apply mixed-use assessment status to the movie theaters.

(5) This opinion provides guidance in interpreting arguably conflicting state tax statutes and results in more equitable treatment for similarly situated taxpayers.

***City of Scottsdale v. State*, 237 Ariz. 467 (2015)**

(1) Opinion issued on June 30, 2015

(2) Arizona Court of Appeals, Division I, Judge Kent E. Cattani authored, Judges Patricia K. Norris and Patricia A. Orozco concurred

(3) See Attachment C

(4) The City of Scottsdale appealed from a superior court ruling that a state statute regulating "sign walkers" who conduct business on public thoroughfares preempted a city ordinance imposing sanctions for sign walkers. The City argued that the ruling infringed on its right—as a Charter City under Article 13, Section 2, of the Arizona Constitution—to regulate matters of local concern.

The Court of Appeals opinion upheld the lower court ruling, concluding that Charter City status does not exempt a city from complying with state statutes, and finding that A.R.S. § 9-499.13, which requires that restrictions on the use of public thoroughfares be uniform as between sign walkers and all other individuals, preempts Scottsdale's ordinance banning sign walkers. The opinion noted that the state statute does not prohibit reasonable time, place, and manner regulations, and instead prohibits ordinances that impose an outright ban on sign walkers.

(5) This opinion addressed issues of statewide importance relating to preemption and the scope of Charter City authority.

***American Power Products, Inc. v. CSK Auto, Inc.*, 253 Ariz. 509 (2014)**

(1) Opinion issued on August 5, 2014

(2) Arizona Court of Appeals, Division I, Judge Patricia K. Norris authored, Judge Samuel A. Thumma joined, and Judge Kent E. Cattani dissented

(3) See Attachment C

(4) This is a case in which I dissented from the majority decision. The majority reversed the trial court's ruling that an evidentiary hearing was not necessary to address whether a bailiff's comment in response to a question from a juror warranted a new trial. (The case involved damages for an alleged breach of contract and negligent misrepresentation.) A juror had asked the bailiff "how long deliberations typically lasted," and the bailiff responded that "an hour or two should be plenty." The majority ruled that the bailiff's statement was improper and held that the superior court did not have the facts necessary to conclude that the bailiff's statement was not prejudicial. The court ordered that the trial court conduct an evidentiary hearing, or alternatively, if it determined that an evidentiary hearing was not feasible, to set aside the verdict and order a new trial.

My dissent acknowledged that the bailiff's answer to the juror's question was inappropriate, but disagreed that the trial court abused its discretion by declining to conduct an evidentiary hearing. Neither party disputed whether the bailiff made the statement at issue, and the parties did not point to any factual dispute relating to the bailiff's statement that would need to be resolved through an evidentiary hearing. The only asserted basis for an evidentiary hearing was to inquire into whether a juror improperly applied the wrong burden of proof, which the majority acknowledged would be an improper inquiry into the juror's mental processes. Furthermore, the bailiff's answer implicitly recognized that there is not a "fixed" amount of time necessary to deliberate, and the relatively short amount of time the jury deliberated was not surprising; neither party suggested that the case was particularly complex, and counsel for the party seeking the evidentiary hearing in fact told the jurors that they only needed to review one exhibit to reach a decision. The trial court was best situated to assess whether the jurors had adequate time to deliberate given the facts of the case, and the trial court thus did not abuse its discretion by declining to conduct an evidentiary hearing or by denying the motion for new trial.

(5) The dissent highlighted the importance of deferring to factual determinations that the trial court is best situated to make. The Arizona Supreme Court granted review and reversed, adopting the dissent's view that a remand for an evidentiary hearing is unwarranted when a party requesting a hearing has not asserted the existence of material disputed facts

Johnson v. O'Connor ex rel. County of Maricopa, 235 Ariz. 85 (2014)

(1) Opinion issued on June 6, 2014

(2) Arizona Court of Appeals, Division I, Judge Randall M. Howe authored, Judge John C. Gemmill specially concurred and Judge Kent E. Cattani concurred in part, dissented in part

(3) See Attachment C

(4) The superior court issued a summons ordering an Arizona counseling center to turn over treatment records of a defendant in a Wisconsin criminal case. The court ordered that the record—including group therapy documents—be disclosed, and left it to the Wisconsin courts to determine whether any information in the documents was privileged or confidential. The majority upheld that ruling, finding that such a determination is "for the state court requesting the summons, not for the state court issuing the summons."

The concurrence/dissent acknowledged the trial court's authority to issue a summons for the treatment records, but disagreed that the court properly ordered disclosure without first determining whether the treatment records were privileged or confidential under Arizona law. The dissent points out that patients and treating professionals who engage in communications in Arizona should not be required to know the laws and rules regarding disclosure of confidential information in jurisdictions outside Arizona, and that Arizona courts are best positioned to ensure consistent application of Arizona law relating to privilege and confidentiality of communications that take place in Arizona. Thus, an Arizona court should conduct a confidentiality/privilege review before ordering the release of documents to another jurisdiction.

(5) The underlying criminal case settled in Wisconsin prior to the deadline for appealing the court of appeals' decision, thus rendering an appeal moot. Nevertheless, the dissent is significant because it details why communications made in Arizona should be subject to Arizona privilege/confidentiality law, as determined by Arizona courts, and the analysis set forth in the dissent will be useful in addressing what is likely to be a recurring issue.

Allen v. Sanders, 239 Ariz. 360 (2016)

(1) Opinion issued on May 26, 2016

(2) Arizona Court of Appeals, Division I, Judge Randall M. Howe authored, Judge Kenton D. Jones joined, Judge Kent E. Cattani dissented

(3) See Attachment C

(4) This special action arising from a capital murder case addresses the scope of a pre-trial hearing on the alleged aggravating circumstances on which the State relies to seek the death penalty. If requested, a trial court in a capital case must conduct a pre-trial hearing under *Chronis v. Steinle*, 220 Ariz. 559 (2009), to assess whether probable cause exists to support these alleged aggravating circumstances. Under *Sanchez v. Ainley*, 234 Ariz. 250 (2014), a grand jury—which is tasked with charging public offenses, not aggravating factors—may not substitute for the trial court's role in making this pre-trial determination.

Here, the capital defendants challenged the trial court's handling of the pre-trial *Chronis* hearing. The State had alleged a prior serious offense (a child abuse offense committed on a different occasion but to be tried together with the murder charge) as an aggravating circumstance. At the *Chronis* hearing, the trial court did not reassess the facts underlying the grand jury's finding of probable cause to support indictment on the child abuse offense; rather, the court considered the indictment (based on the grand jury's finding of probable cause for a public offense) to establish the existence of a prior offense, further found that the indicted child abuse offense was "serious," and thus concluded that probable cause supported the prior serious offense aggravating circumstance.

The capital defendants argued that, under *Sanchez*, the trial court erred by declining to independently assess the facts providing probable cause underlying indictment on the child abuse charge, and the court of appeals' majority opinion agreed. My dissent acknowledged that *Sanchez* restricted the grand jury's role to finding probable cause for "public offenses" (not aggravating circumstances), but concluded that the procedure employed in this case comported with that restriction. The grand jury here was asked only to find probable cause for a public offense (child abuse), and the court then determined whether that offense qualified as an aggravating circumstance (a prior "serious" offense) under Arizona law. The dissent thus concluded that the grand jury did not exceed its authority when it found probable cause for a "public offense," and the superior court properly conducted a hearing on probable cause for the aggravating circumstance (existence of the indicted offenses and that the offense is "serious"). That finding was sufficient to permit the State to move forward with the allegation of the prior serious offense aggravating circumstance.

(5) The case is now pending review in the Arizona Supreme Court. The dissenting opinion applies a common-sense interpretation of Arizona's statutes and offers a conclusion that is consistent with controlling authority and avoids duplicative, unnecessary hearings. The *Sanchez* opinion on which the majority relied was based on the importance of ensuring that the grand

jury does not exceed its statutory authority, which is to charge public offenses. In the instant case, the grand jury did not exceed its authority, and to require trial court to make the same determination is unnecessary and not required by *Sanchez* or any other authority.

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

As an Assistant Attorney General, I initiated and took responsibility for the Attorney General's efforts to collaborate with the defense bar in studying lessons learned from DNA exonerations in Arizona and in other states, and in presenting our conclusions locally and at multi-state conferences. We addressed in particular issues relating to eye-witness identification procedures, preservation of evidence, and confirmation bias.

I worked with the Arizona Justice Project to jointly apply for and obtain federal funds for a Post-Conviction DNA Project staffed by the Justice Project and the Attorney General's Office. The joint project resulted in one convicted defendant being released from prison, and by the conclusion of the project we were able to say with some degree of certainty that no one is in prison in Arizona but for DNA testing on available biological evidence.

I chaired the Attorney General's DNA Task Force from October 2005 until January 2008, and I have served on the statewide Forensic Science Advisory Committee formed in response to recommendations from the Task Force, as well as on the Arizona Forensic Science Academy Advisory Board. I also served on the Board of Directors of the National Association of Government Attorneys in Capital Litigation, the Attorney General's Opinion Review Committee, the Attorney General's Ethics Committee, the Arizona Prosecuting Attorneys' Advisory Council Ethics Committee, the Arizona Supreme Court's Capital Case Oversight Committee, and the Arizona State Bar Jury Instructions Committee.

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? **Not Applicable.** 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? **Yes.** If so, identify the nature of the case, your role, the court, and the ultimate disposition.

I was one of the plaintiffs in a lawsuit brought by several beneficiaries of the Oates Family Trust in St. George, Utah in 2006 against a Trustee who refused to provide an accounting for her tenure as co-Trustee and who spent several hundred thousand dollars of Trust funds on personal expenses while she was the Trustee. The lawsuit also sought recovery from the Trust attorney who advised beneficiaries that there was no requirement that an accounting be provided and who represented the Trustee's personal interests while simultaneously acting as attorney for the Trust. The Plaintiffs were successful in removing the Trustee and having a new independent Trustee substituted in as the Plaintiff. The new Trustee obtained a substantial settlement from the former Trustee and is currently pursuing claims against the former Trust attorneys.

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. **No.**

42. If you performed military service, please indicate the date and type of discharge. If other than honorable discharge, explain. **Not Applicable.**

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. **None.**

44. List and describe any litigation involving an allegation of fraud in which you were or are a defendant. **None.**

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. **None.**

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.

Filing Date: _____

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? **Yes.** If so, list with the citations and dates.

Cattani, K. & Klapper, M.B., *Representing the Indigent*, Arizona Attorney, February 2002 (discussing the interplay between the mechanism for appointment of post-conviction counsel in Arizona capital cases and the opt-in provisions for accelerated federal review under the Anti-Terrorism and Effective Death Penalty Act of 1996).

McMurdie, P., & Cattani, K., *Jodi Arias and the Cost of Seeking the Death Penalty*, Judicial Edge (a publication of the National Judicial College), August 2015.

I authored or co-authored two reports currently available on the Attorney General's publication website:

Arizona DNA and Forensic Science Recommendations (2007) (sole author) www.azag.gov/law_enforcment/AZ_DNA_Report2007.pdf

Capital Case Commission Final Report (2002) (primary author) www.azag.gov/CCC/FinalReport.html

Filing Date: _____

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 a judge, I recently helped organize and present at a two-day capital case training session for state court trial judges. I am currently helping organize and will present at a two-day forensic science training program for judges on December 1-2, 2016. I have spoken at national and state conferences, as well as to local organizations, on forensic science and criminal justice issues.

As an assistant Attorney General, I initiated and helped present federal habeas trainings on a national level for the National Association of Attorneys General. I also lectured extensively at national conferences for Attorneys General and their Chief Deputies, the Association of Government Attorneys in Capital Litigation, the National Association of Attorneys General Training Institute, the National District Attorneys' Association, the American Judicature Society, and the National Institute of Justice. I spoke at national conferences in Arizona, California, Colorado, Florida, Georgia, Nevada, Louisiana, North Carolina, Oklahoma, Oregon, Texas, and Washington D.C., and at statewide conferences in Arizona, Pennsylvania, and Texas.

I also lectured and taught extensively in Arizona in state and local settings. I organized and presented at an annual Capital Litigation seminar for prosecutors on behalf of the Arizona Prosecuting Attorneys' Advisory Council, and I frequently presented at other conferences for prosecutors and law enforcement officers. I also presented at Arizona Judicial Conferences and at state and federal bar conventions, and I was a featured speaker on multiple occasions at Arizona State University (for undergraduate groups and at the Sandra Day O'Connor College of Law), University of Arizona (Rogers College of Law), Chandler/Gilbert Community College, Paradise Valley Community College, and Brophy Preparatory School. Additionally, I presented to County Attorney employees, Police Chiefs, and other law-enforcement officials. My topics included Year-in-Review Summaries of State and Federal Law, Federal Habeas Litigation, The Anti-Terrorism and Effective Death Penalty Act of 1996, Appellate Practice, Death Penalty Litigation, Post-Conviction DNA Issues, Lessons Learned From Exonerations, Eye-Witness Identification Procedures, and Confession Law.

My presentations (from January 2009 through the present) include lectures and participation in the following forums:

Arizona State University (O'Connor College of Law), Tempe, AZ. Presenter regarding exonerations, post-conviction DNA issues, and the Attorney General's collaborative post-conviction DNA project with the Arizona Justice Project. (January 15, 2009)

National Institute of Justice DNA Symposium, Pensacola Beach, FL. Presenter regarding Arizona's DNA Task Force and Forensic Services Advisory Committee. (January 22-23, 2009)

Chandler/Gilbert Community College, Gilbert, AZ. Guest Lecturer on Criminal Law. (March 30, 2009)

Arizona State University (O'Connor College of Law), National Forum on Forensic Science for the 21st Century, Tempe, AZ. Presenter regarding the National Academy of Science's 2009 Report and Arizona's efforts in coordinating and addressing forensic science issues through the Attorney General's statewide Forensic Services Advisory Committee. (April 3, 2009)

Arizona State University (O'Connor College of Law), Death Penalty Class (Professor Dale Baich), Tempe, AZ. Guest Lecturer on capital litigation issues in Arizona. (April 6, 2009)

Arizona State University, Criminal Justice Class (Professor Rudy Gerber), Tempe, AZ. Guest Lecturer on issues relating to the death penalty and the criminal appeals process. (April 20, 2009)

National Association of Attorneys General Training Institute, Oklahoma City, OK. Presenter regarding Federal Habeas Litigation under the Anti-Terrorism and Effective Death Penalty Act of 1996 and Retroactivity Analysis under *Teague v. Lane*. (April 28-30, 2009)

National Association of Attorneys General State Solicitors and Appellate Chiefs Conference, Colorado Springs, CO. Facilitator of roundtable discussion of Appellate Chiefs Management Issues. (June 17-18, 2009)

Arizona Bar Convention, Scottsdale, AZ. Presenter regarding Oral Advocacy in the United States Supreme Court. (June 24, 2009)

Association of Government Attorneys in Capital Litigation, Miami, FL. Presenter regarding the Patriot Act and Emerging Issues in Federal Habeas Litigation. (July 31, 2009)

Center for American and International Law, Plano, TX. Presenter regarding Prosecutorial Misconduct and Criminal Justice Reform.

(August 17, 2009)

National Organization for Victim Assistance, Scottsdale, AZ. Presenter regarding Assisting Victims in Understanding the Death Penalty Appeals Process. (August 23, 2009)

Pennsylvania District Attorneys' Association, State College, PA. Presenter regarding Emerging Issues in Capital Litigation. (September 22, 2009)

Arizona Attorney General's Office Officewide CLE, Phoenix, AZ. Presenter regarding Federal Habeas Corpus Law. (October 9, 2009)

National Association of Attorneys General Training Institute, Austin, TX. Presenter regarding Emerging Issues in Federal Habeas Litigation. (October 14, 2009)

Arizona Prosecuting Attorneys' Advisory Council Capital Litigation Seminar, Phoenix, AZ. Presenter regarding Emerging Issues in Capital Litigation. (October 30, 2009)

Arizona State University (O'Connor College of Law), Tempe, AZ. Judged mock arguments for Appellate Advocacy Class. (February 23, 2010)

Inn of Court, Phoenix, AZ. Presented mock oral argument based on United States Supreme Court case, *Wood v. Allen*. (February 24, 2010)

Appellate Practice Institute, Phoenix AZ. Faculty Member with responsibility for grading briefs, judging mock arguments, and mentoring students. (February 27, 2010)

Center for American and International Law, Plano, TX. Presenter regarding United States Supreme Court Update, Cross-Examining DNA Experts, and Follow-up to the National Academy of Science Report. (March 8-9, 2010)

Arizona Capital Case Litigation Seminar for Judges, Prosecutors and Defense Counsel, Tempe AZ. Presenter regarding United States Supreme Court Update and Emerging Issues in Capital Litigation. (May 6-7, 2010)

National Institute of Justice and National Center for Forensic Science, Scottsdale, AZ. Participated in working group on Best Practices and Protocols for Medicolegal Death Investigations. (June 7-9, 2010)

National District Attorneys' Association Conference, Napa, CA.

Presenter regarding Appellate Advocacy. (July 12, 2010)

Arizona State University (O'Connor College of Law) Post-Conviction Clinic, Tempe, AZ. Presenter regarding Addressing Post-Conviction DNA Claims. (August 17, 2010)

Association of Government Attorneys in Capital Litigation, San Diego, CA. Presenter regarding Emerging Issues in Federal Habeas Litigation. (September 2-3, 2010)

National Institute of Justice, Washington D.C. Member of international working group addressing Perspectives on Wrongful Convictions. (September 13-14, 2010)

Arizona State Bar Seminar, Scottsdale, AZ. Presenter regarding Practicing before the Arizona Court of Appeals. (November 12, 2010)

University of Vermont Law School, South Royalton, VT. Presenter regarding United States Supreme Court Advocacy and *U.S. Chamber of Commerce v. Candelaria*. (December 3, 2010)

Arizona State University (O'Connor School of Law), Tempe AZ. Moot Court Judge. (February 22, 2011)

Federal Bar Association Conference, Phoenix AZ. Presenter regarding Adolescent Brains and Juvenile Justice. (May 12, 2011)

Arizona State Bar Court Watchers Seminar, Scottsdale, AZ. Presenter regarding Arizona Supreme Court Criminal Case Update. (May 26, 2011)

National Institute of Justice, Arlington, VA. Participant in national roundtable discussion regarding Post-conviction DNA Testing Assistance Programs. (June 2-3, 2011)

Association of Government Attorneys in Capital Litigation, New Orleans, LA. Presenter regarding Federal Habeas Law Update/Lethal Injection Issues. (July 28, 2011)

Arizona State University, Tempe, AZ. Presenter regarding Death Penalty Litigation in Arizona. (August 25, 2011)

Arizona Forensic Science Academy, Phoenix, AZ. Presenter regarding the *Frye/Daubert* Standards for Admitting Evidence/Expert Testimony. (October 28, 2011)

National Public Safety Summit on Forensic Science, Clearwater Beach,

FL. Participant as an Arizona representative. (October 17-20, 2011)

Arizona Forensic Science Advisory Committee, Phoenix, AZ. Presenter regarding Forensic Science Laboratory Problems/Solutions in Other Jurisdictions. (October 27, 2011)

Arizona Supreme Court Capital Case Training Video, Phoenix, AZ. Presenter regarding Direct Appeals and Post-Conviction Proceedings. (November 22, 2011)

University of Arizona (Rogers College of Law), Tucson, AZ. Guest Lecturer regarding Capital Litigation in Arizona. (April 9, 2012)
Appellate Practice Institute, Phoenix, AZ. Faculty Member. (April 28, 2012)

Marshall Inn of Court, Phoenix, AZ. Presenter regarding Lessons Learned From DNA Exonerations in Arizona. (May 23, 2012)

National Association of Attorneys General Solicitors and Appellate Chiefs Conference, Washington D.C. Moderator. Discussion regarding recent United States Supreme Court cases and criminal law issues. (July 12, 2012)

National Association of Crime Lab Directors, Charlotte, North Carolina. Presenter regarding state oversight of crime labs. (May 8, 2013)

Republican Lawyers Association, Phoenix Arizona. Presenter regarding Lessons Learned from DNA Exonerations. (June 14, 2013)

Arizona Attorney General's Office training seminar for summer interns. Presenter regarding Forensic Science and the Criminal Justice System. (July 9, 2013).

University of Arizona (Rogers College of Law). Presenter regarding Current Issues-Criminal Law and the Death Penalty. (November 7, 2013)
Appellate Practice Institute, Phoenix Arizona. Faculty presenter. (May 3, 2014)

International Science Institute Conference, Phoenix Arizona. Poster Presentation regarding State Forensic Science Training Programs. (September 30, 2014)

Police Chiefs Conference, Tempe, Arizona. Keynote Speaker. (November 3, 2014)

Arizona Trial Judge Training Seminar, Phoenix, Arizona. Seminar

Organizer and Presenter on Appellate Issues in Capital Cases. (November 13-14, 2014)

Arizona High School Mock Trial State Tournament, Phoenix, Arizona. Judge. (March 28, 2015)

NBI, Inc., Appellate Court Judicial Forum, Phoenix, Arizona. Panel Member on Appellate Practice. (May 8, 2015)

Arizona Prosecuting Attorneys Advisory Council Training Seminar, Phoenix, Arizona. Presenter regarding Federal Habeas Proceedings and the Death Penalty. (August 21, 2015)

CLE Presentation for Arizona Supreme Court and Court of Appeals Personnel, Phoenix, Arizona. Presenter regarding Lessons Learned from DNA Exonerations. (September 2, 2015)

Arizona State Bar Convention. Presenter regarding Criminal Jury Instructions: Controversies and Best Practices. (June 16, 2016)

Arizona State Bar Convention. Presenter - Supreme Advocate, Arizona Solicitors General Speak Frankly About Appeals, Politics, Mistakes, and Triumphs. (June 16, 20160.

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

National Association of Government Attorneys in Capital Litigation
Board of Directors, 2001–2012
Secretary/Treasurer, 2005–2012

Marshall Inn of Court
Member, 2011–present
President, 2015–2016

Have you served on any committees of any bar association (local, state or national) or have you performed any other significant service to the bar? **Yes.**

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.

I served on the American Bar Association's Arizona Death Penalty Assessment Team in 2006.

Filing Date: _____

I served on the State Bar Jury Instructions Committee for six years. I have been serving on the Arizona Supreme Court's Capital Case Oversight Committee for the past four years.

I also currently serve on the Arizona Supreme Court's Task Force on the Arizona Rules of Criminal Procedure, charged with rewriting/restyling all of Arizona's criminal rules.

I have spoken on numerous occasions at State Bar conferences and seminars.

Prior to my appointment to the court, my pro bono service included assisting in establishing and maintaining a guardianship for an elderly woman with declining mental capabilities. I also spent significant time assisting with presentations and forums, as well as moot courts and other competitions, at Arizona State University, University of Arizona, Arizona Summit Law School, Mesa Community College, Paradise Valley Community College, Chandler Community College, and Brophy College Preparatory Academy.

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

Connecting with the Community Chair, 2013-present
Responsible for coordinating the Arizona Court of Appeals bi-annual outreach program at high schools throughout the counties in Division One. The program includes classroom presentations and an oral argument in an actual case, as well as mentoring sessions and a lunch with students.

Just Serve Chair/Committee Member, Tempe Stake, LDS church, 2014-present
Help coordinate community service projects through a website that matches volunteers with volunteer opportunities.

Explorer Post Chairman/Advisor, Post 9574, 1990-2009
Organized weekly activities for 16-18 year-old Explorer Scouts focusing on career development, service projects, musical (choral) group performances, and physical fitness activities.

Tempe Cares, 2005-2008
Assisted in organizing and carrying out community clean-up events.

Member, Arizona State University Choral Union, 1993-1999
Performed with the Phoenix Symphony and the ASU Symphony.

Camelback Little League Challenger Team Coach, 1992-1996
Coached baseball team for handicapped and disadvantaged children.

Habitat for Humanity Volunteer, 2005-2007
Assisted in building homes in South Phoenix.

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

Michael C. Cudahy Criminal Justice Award for Professionalism and Integrity, State Bar of Arizona, June 2013

Schafer Award for Excellence in Capital Litigation (the National Association of Government Attorneys in Capital Litigation's top honor), July 2010

Attorney of the Year, Criminal Division, Arizona Attorney General's Office, January 2008

Asked to testify before the United States Senate and United States House of Representatives Judiciary Committees, 2005 and 2006

Statewide Impact Award, Arizona Attorney General's Office, 2003

Salt River District Award of Distinction (Explorer Scouts), 2002

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

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.

I enjoy swimming, body surfing, basketball, volleyball, waterskiing, and running; I have completed 12 marathons, and I participated on the Arizona Attorney General's Baker to Vegas Relay Team 5 times. I have played the keyboard in an amateur rock band, and I sing regularly with a small group that performs at church services, weddings, and funerals. I also enjoy reading biographies and historical fiction and non-fiction.

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.

I try to treat everyone I meet with respect and dignity, regardless of race or background. I spent two years (1976-1978) on a church mission in central Mexico, and I speak and read Spanish fluently. My circle of friends includes people from many different races, nationalities, and religious and cultural backgrounds. My grandparents and great grandparents include immigrants from Italy and Switzerland, and I value my family's varied backgrounds and religious/cultural traditions.

My parents were both educators. My father was a Chemistry Professor who became a College President and a Community College District Chancellor; my mother taught at Arizona State University and Fresno State University. I was raised in Arizona; I lived in Tucson for three years before moving to Tempe, where I attended elementary school, middle school, and high school. I graduated from Marcos de Niza High School in 1975.

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

Since my father's death in 1985, I have assumed responsibility for caring for my mother, who suffers from brain damage and complications resulting from surgery to remove a brain tumor. My mother lives with me in Tempe and requires full-time care, which I coordinate and help with during evenings and weekends. I also took responsibility for raising my younger sister from the time she was eight years of age until she graduated from college.

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 D

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 E, F and G

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.

See Attachments H and I

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.

See Attachment J

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ATTACHMENT A

Court of Appeals, Division I Judges

Chief Judge Michael J. Brown
Vice Chief Judge Samuel Anderson Thumma
Judge Margaret H. Downie
Judge John C. Gemmill
Judge Andrew W. Gould
Judge Randall M. Howe
Judge Diane Johnsen
Judge Kenton D. Jones
Judge Donn Kessler
Judge Patricia K. Norris
Judge Patricia A. Orozco
Judge Maurice Portley
Judge Peter B. Swann
Judge Jon W. Thompson
Judge Lawrence F. Winthrop

ATTACHMENT B

Schriro v. Landrigan

OPPOSING COUNSEL	PROSECUTOR
Donald B. Verrilli, Solicitor General U.S. Department of Justice 950 Pennsylvania Avenue, N.W. Washington, DC 20530-0001 202-514-2203, evelyn.m.buggs@usdoj.gov	Kent E. Cattani (argued)
Ian Heath Gershengorn U.S. Department of Justice 950 Pennsylvania Avenue, N.W. Washington, DC 20530-0001 202-514-2000, ian.gershengorn@usdoj.gov	Patricia A. Nigro Starr, Judge Maricopa County Superior Court 101 W Jefferson Street Phoenix, AZ 85003-2202 602-372-4516, starrp@superiorcourt.maricopa.gov
Elaine Goldenberg U.S. Department of Justice 950 Pennsylvania Avenue, N.W. Washington, DC 20530-0001 202-514-2000, elaine.goldenberg@usdoj.gov	
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Joshua Segal Jenner & Block LLP 1099 New York Avenue, NW, Ste. 900 Washington, DC 20001-4412 202-639-6089, jsegal@jenner.com	
Dale Baich Office of the Federal Public Defender 850 W. Adams Street, Ste. 201 Phoenix, AZ 85007 602-382-2816, Dale_Baich@fd.org	
Sylvia Lett Office of the Federal Public Defender 850 W. Adams Street, Ste. 201 Phoenix, AZ 85007 602-382-2816, Sylvia_Lett@fd.org	

Schriro v. Landrigan Con't.

OPPOSING COUNSEL	PROSECUTOR
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Schriro v. Smith

OPPOSING COUNSEL	PROSECUTOR
S. Jonathan Young Williamson & Young, P.C. PO Box 42245 Tucson, AZ 85733-2245 520-795-0525, jon@williamsonandyoung.com Robert Hirsh Office of Court Appointed Counsel 33 N Stone Avenue, 19th Floor, Ste. 1905 Tucson, AZ 85701 520-724-4465, robert.hirsh@pima.gov	Kent E. Cattani

Stewart v. Smith

OPPOSING COUNSEL	PROSECUTOR
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State v. Ring*

OPPOSING COUNSEL	PROSECUTOR
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State v. Spreitz

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ATTACHMENT C

Scottsdale/101 Associates v. Maricopa County

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Johnson/Psychological Counseling Services v. O'Connor ex rel. County of Maricopa

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ATTACHMENT D

PERSONAL STATEMENT

I believe my experience and background would enable me to make an immediate and significant contribution to the Arizona Supreme Court. I offer a unique skill set, combining experience as a Judge on the Arizona Court of Appeals with more than 22 years of service as an appellate practitioner for the State of Arizona. Of particular significance, I have been recognized as a national and state expert in the area of capital litigation, which makes up a significant portion of the Arizona Supreme Court's caseload.

As a court of appeals judge, I have written more than 205 decisions covering a wide variety of practice areas. I have enjoyed the challenge of addressing areas of the law that were outside the scope of my practice areas as a lawyer, and I believe my decisions demonstrate a high level of competence and ability as an appellate judge.

As Solicitor General, as Criminal Appeals/Capital Litigation Division Chief, and as an Assistant Attorney General for the Arizona Attorney General's Office, I authored or edited hundreds of appellate briefs. I practiced before the United States Supreme Court, the Arizona Supreme Court, and the United States Court of Appeals for the Ninth Circuit, and I have argued more than 90 times in those courts. I was counsel of record in four United States Supreme Court cases, and I assisted as second chair counsel in six other cases. I have also assisted attorneys from other states in several cases being prepared for Supreme Court review. I have extensive experience as an Arizona Supreme Court practitioner because of my responsibilities in overseeing death penalty appeals; capital cases are appealed directly to the Arizona Supreme Court, and the court conducts oral argument in each case. Additionally, I practiced extensively before the federal courts addressing federal (statutorily authorized) appeals from state court criminal convictions. That experience in federal court gives me an important perspective on how state court decisions are analyzed and reviewed after the state court appeals process is concluded.

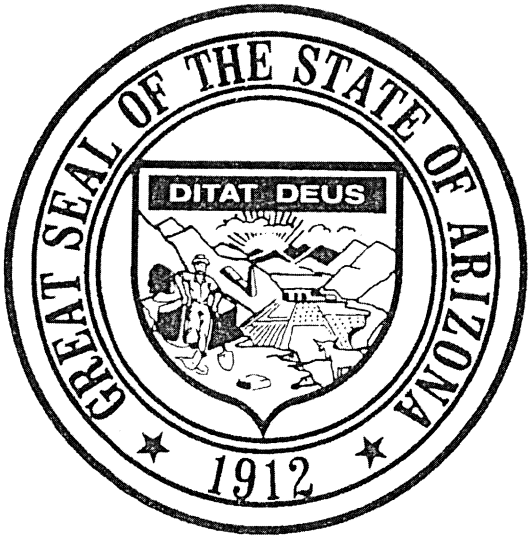
My prior administrative and supervisory responsibilities at the Attorney General's Office also provide a unique experience base for handling the administrative demands on Supreme Court Justices. As Solicitor General and Division Chief Counsel, I oversaw a staff of more than 60 attorneys and support personnel, while also maintaining my own case load. I understand the challenge of working within time and resource constraints on a number of different projects while striving to ensure that the work product produced consistently meets high standards.

My experience working with all three branches of government would provide a helpful perspective to the court. I have been involved in drafting and reviewing proposed legislation at the state and national level, with one of my career highlights being asked to testify before the United States Senate and House Judiciary Committees regarding the need for federal habeas reform. I appreciate the different roles of the three branches of government, and my experience with all three branches has helped me to understand the importance of working harmoniously for the public good.

work I have been doing. I have thoroughly enjoyed serving on the Arizona Court of Appeals, and I believe my varied experience, together with my expertise in the area of capital litigation and criminal law, would enable me to immediately contribute as a member of Arizona's highest court. I would be proud to further serve the people of Arizona as a Supreme Court Justice.

ATTACHMENT E

ARIZONA DNA AND FORENSIC SCIENCE RECOMMENDATIONS



OFFICE OF THE ATTORNEY GENERAL
TERRY GODDARD

2007

I. Introduction

Extraordinary developments in DNA technology over the past several years have dramatically increased the available pool of evidence that can be subjected to DNA testing. This increasing volume of evidence, together with expanded databases containing identifying information from convicted felons, has created a tremendous resource for law enforcement to help solve crimes and to protect the innocent. These improvements in DNA technology have created a need to reevaluate how crime labs operate and whether state and local policies and procedures take advantage of this technology.

Although crime laboratories in Arizona are generally held in high regard, the available resources for labs throughout the state have not kept pace with the increased demand for DNA services. Additionally, state-wide improvements in DNA lab operations are difficult to effectuate because there is no mechanism in place to ensure a cohesive state-wide approach to processing DNA evidence. Some laboratories in Arizona are owned and operated by the state, while others are owned and operated by city police departments. Because the various laboratories do not share a common funding source or a common supervising agency, there is a need for better coordination of efforts among the labs and for more uniform policies regarding information sharing.

Arizona Attorney General Terry Goddard invited representatives from state and city crime laboratories, the Maricopa County Medical Examiner's Office, local law enforcement departments, the prosecution and defense community, the judiciary, and victims' advocacy groups to participate in a state-wide DNA and Forensic Technology Task Force.[1] The group was asked to consider concerns raised in previous audits of state and local laboratories, including backlogs and funding problems, as well as other issues, such as information and equipment sharing among state and local laboratories, and statewide coordination of efforts to ensure that Arizona takes advantage of available funding for state and local DNA programs.

Based on recommendations from the Task Force, Attorney General Goddard recommends that a permanent state-wide Forensic Services Advisory Committee be established under the auspices of the Attorney General's Office, with support from the Arizona Criminal Justice Commission (ACJC), to facilitate statewide planning and coordination of efforts among state and local laboratories. ACJC is a legislatively created entity charged with helping coordinate criminal justice systems improvements throughout the state; ACJC currently helps coordinate meetings of laboratory directors and assists some of the laboratories with grant requests.

The Advisory Committee should include representatives of law enforcement agencies that currently operate laboratories, as well as law enforcement agencies that do not have their own laboratories. Additional committee members, as outlined in Appendix B, should include laboratory directors, a representative of an organization representing victims' families, a retired Superior Court or Appellate Court judge, and a forensic

[1] Task Force members are listed in Appendix A.

scientist from a national organization such as the American Society of Crime Lab Directors or the National Forensic Science Technology Center. A Chairperson should be appointed to a two-year term.

Attorney General Goddard recommends that the proposed Forensic Services Advisory Committee be given authority to establish and monitor performance measures and to work with lab directors to coordinate long-term planning, including equipment sharing and specialization by state and local laboratories. The Advisory Committee should also be given authority to consider and address questions or concerns from law enforcement agencies that do not have their own crime lab and from the public regarding lab operations.

II. Background – A History of DNA Processing in Arizona

There are eight full-service forensic laboratories that process DNA evidence in Arizona. The Arizona Department of Public Safety currently operates four state forensic laboratories. Additionally, the cities of Phoenix, Tucson, Mesa and Scottsdale have their own forensic labs operated under the direction of the police departments in those cities. The Maricopa County Medical Examiner operates a forensic laboratory but does not process DNA. All of the state and local crime laboratories in Arizona are accredited.

The supervision of forensic laboratories around the state is not centralized. Because state and local labs have different funding sources, they are accountable to different supervisory entities and are operated independently. State labs are authorized to perform services for any state or local law enforcement agency in the state; city labs generally focus on the needs of their own city law enforcement agencies, although they may also provide assistance to other jurisdictions that do not have crime labs.

Arizona's system of DNA processing is similar to that in place in many other states. (See Appendix C.) Almost all states have state-operated laboratories, either under the direction of the Governor's Office or the Attorney General's Office, and many states also have local laboratories operating under the direction of local law enforcement agencies. Twenty-eight states have one agency that supervises all laboratories within the state. Four states have placed operation and control of all laboratories under the supervision of one state agency independent from law enforcement. Other states use organizations similar to ACJC to coordinate crime lab operations. Several states have created or are considering DNA commissions or task forces to address DNA issues and to facilitate state-wide coordination of efforts. Many states do not have any formal mechanism for addressing state-wide concerns.

III. The Need for State-Wide Coordination of Efforts

A. Funding Issues

The development of crime laboratories throughout the state does not reflect a systematic analysis of regional needs and priorities. The creation of local labs in various

cities throughout the state resulted from inadequacies in funding for DPS labs, coupled with a need for localized services for individual law enforcement agencies. This has created a patchwork system of DNA processing in which procedures vary from city to city within otherwise homogenous regional areas. Because the various laboratories have different funding sources and are thus answerable to different agencies, state-wide coordination of efforts can be problematic.

Increasingly sophisticated (and costly) equipment, together with an increased capability to evaluate smaller evidence samples, has heightened the need for cooperation among the various labs. The geographic proximity of multiple law enforcement agencies makes inter-agency cooperation essential in solving crimes and providing necessary laboratory services. State and local laboratories should work together to create short-term and long-term planning goals to better meet the forensic science needs of the state. Of particular significance are funding needs—the current framework may result in funding decisions by cities independent from state funding decisions for overlapping services. Additionally, the labs compete at times against one another for federal funding, and if one lab does not expend awarded federal funds, the total allotment to the state can be reduced. Centralized planning for funding would help prevent such problems.

B. Performance Measures

In the past, the various labs have used different performance measures and different methods for assessing case backlogs. Greater uniformity in both areas is necessary to measure results and provide documentation necessary to qualify for available grant monies. Greater uniformity would also help ensure that state and local monies are well-spent, and would give better context to laboratory funding requests.

C. Grant Requests

Greater coordination of efforts by state and local laboratories, as well as state and local law enforcement agencies, is necessary to ensure that Arizona takes advantage of grants available from the federal government. Federal grant monies for forensic science laboratories are increasingly tied to statewide requirements for processing DNA and preserving biological evidence. The proposed Advisory Committee would work with the various laboratories and with the Arizona Legislature to take steps needed to ensure compliance with federal mandates tied to grant funding, where such compliance is consistent with public policy in Arizona.

D. Backlog Reduction

Backlog concerns relating to offender profiles and case processing have prevented Arizona from taking full advantage of available DNA technology.

(1) Offender Profiles

The development and expansion of databases that contain DNA profiles at the local, state and national levels have greatly enhanced law enforcement's ability to use DNA to solve cold cases and current, unsolved cases. Convicted offender databases store hundreds of thousands of potential suspect DNA profiles, against which DNA profiles developed from crime scene evidence can be compared. DNA profiles entered into the national database have enabled law enforcement to solve previously unsolved crimes and, in some cases, to exonerate prisoners who were wrongly convicted of a crime.

In Arizona, the state DPS laboratories are responsible for processing convicted offender samples for inclusion in state and national databases. Since 1993, convicted sex offenders in Arizona have been required to provide DNA samples (generally swabs taken from the inside of the mouth) to law enforcement officers. Burglars and murderers were added to the list in 2000; drug offenders were added in 2003; and as of January 1, 2004, all felons were required to submit a sample within 30 days of sentencing. As of January 1, 2008, suspects arrested for specific crimes, primarily violent offenses and dangerous crimes against children, will be required, pursuant to A.R.S. § 13-610(K), to submit DNA samples.[2] The expanded categories of individuals required to submit DNA samples have significantly taxed the state's ability to analyze the samples and enter the profiles into the national database. Although a significant percentage of available DNA samples have been analyzed and entered into the system, thousands of samples have yet to be analyzed and entered into the DNA database by DPS. The proposed Forensic Services Advisory Committee would work with DPS to ensure that adequate funds are secured to eliminate the offender profile backlog.[3]

(2) Case Processing

Case backlogs reflect pending investigations involving DNA evidence that has yet to be analyzed and entered into state and national DNA databases. Backlogs hinder investigations, particularly in cases in which there is no known suspect, because laboratories must prioritize their work, with cases scheduled for trial given first priority. When state and local laboratories are only able to process the most serious pending cases

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[2] A person who is required to submit a sample based on an arrest for a specified crime under A.R.S. § 13-610(K) may, if charges are dropped or if subsequently acquitted of the charges, petition the superior court in the appropriate county to have his or her DNA profile and sample expunged from the state DNA system. A.R.S. § 13-601(M).

[3] The legislation expanding the database to include arrestee DNA profiles includes a funding mechanism—an additional assessment to be levied on every fine, penalty and forfeiture imposed and collected by the courts for criminal offenses and on any civil penalty imposed for a violation of Motor Vehicle or Fish and Game statutes. A.R.S. § 12-116.01

involving known suspects, crimes that could be solved remain on hold. Backlogs prevent law enforcement officers from taking advantage of improved DNA technology to solve not only sexual assault cases and cases involving blood evidence, but also other types of cases where there may be evidence such as saliva, skin cells or hair samples. Given high recidivism rates for many types of criminals, such as burglars, a decrease in case backlogs will not only solve crime, it will help prevent other crimes from being committed.

State and local laboratories in Arizona have historically used different measures in providing backlog data. This lack of uniformity in measuring backlogs has made it difficult to assess the severity of the backlog problem and the effectiveness of any remedial measures that may be taken. Task Force participants have agreed on a more uniform method of measuring backlogs, and the proposed Forensic Services Advisory Committee should monitor and assess backlog concerns at the various labs throughout the state. The Advisory Committee should work with the laboratories to make backlog reduction a priority and to help secure additional funding, where necessary, to eliminate backlogs.

IV. Transparency and Accountability

Although processes are in place at the local level to investigate complaints against laboratories, there is currently no central independent agency or entity to which the general public can address questions relating to perceived problems at a state or local laboratory. The proposed Forensic Services Advisory Committee would fill this void and establish a mechanism for addressing questions and/or complaints from the public relating to laboratory operations.

State and local laboratories are accredited by the American Society of Crime Laboratory Directors-Laboratory Accreditation Board (ASCLD-LAB), and all of Arizona's full-service crime labs have received this accreditation. To be accredited, laboratories must meet a comprehensive series of standards covering personnel qualifications, scientific methods and protocols, scientific equipment, laboratory facilities and quality control/assurance procedures. Additionally, all DNA Labs in Arizona are members of Combined DNA Index System (CODIS), and must comply with the Quality Assurance Standards for Forensic DNA Testing Laboratories, as a condition of membership.

Crime Labs undergo yearly facility audits and external audits. Additionally, the National Forensic Science Technology Center (NFSTC) conducts periodic Grant Program Assessment (GPA) audits, and all of the Arizona crime labs underwent such an assessment during 2007.

Arizona has thus far avoided issues of severe laboratory mismanagement and other crises that have plagued some states. *See e.g.* Fourth Report of the Independent Investigator for the Houston Police Department of Crime Laboratory and Property Room, http://www/hpdlabinvestigaton.org. However, Arizona's laboratories face hurdles and

challenges that could lead to problems in the future, and there is a need for greater transparency and accountability relating to laboratory operations.

The proposed Forensic Sciences Advisory Committee should review and monitor the results of audits and/or investigations of Arizona's Crime Laboratories, and should work with the various laboratories to ensure that adequate funding sources are secured to ensure high quality laboratory operations.

V. Expanding the State DNA Database and Sharing Information Among State and Local Laboratories

Task Force members addressed several legal issues relating to the use of DNA evidence as an investigative and evidentiary tool. Of particular interest was whether the statewide DNA database should be expanded to include DNA profiles from all arrestees, and whether lawfully obtained profiles available to one law enforcement agency should be made available to other law enforcement agencies. Based on Task Force recommendations, Attorney General Goddard recommends further study and discussion before seeking to expand the statewide database. Attorney General Goddard recommends, however, that lawfully-obtained DNA profiles be shared among the various law enforcement agencies throughout the state.

A. Expanding the State Database

DNA profiles are stored and searched at three levels. The Combined DNA Index System (CODIS) is a computer network that connects forensic DNA laboratories at the national, state, and local levels. The National DNA Act of 1994 specifies that the following types of information can be put into the national system (NDIS):

1. DNA identification records of persons convicted of crimes;
2. Analyses of DNA samples recovered from crime scenes;
3. Analyses of DNA samples recovered from unidentified human remains;
4. Analyses of DNA samples voluntarily contributed from relatives of missing persons.

Under federal law, DNA profiles of *suspects* may not be stored in NDIS. Although state and local labs are bound by federal law and regulations in determining the categories of DNA data that may be uploaded into NDIS, state and local labs may look to state law and state regulations to determine what may be stored and searched at the state level. States may choose to store and search information that cannot be stored and searched at the national level. Several states, in addition to Arizona, have chosen to include some types of arrestee DNA profiles in their state databases. *See, e.g.* Cal. Penal Code § 296, 297, La. Rev. Stat. Ann. § 15:609, Tex. Gov't Code Ann. § 411.1471, Va. Code Ann. § 19.2-310.2:1.

As noted previously, Arizona began collecting DNA samples from convicted sex offenders in 1993. The expansion of the database has greatly increased its utility. The expansion of the database to include all felons was particularly significant because of the high percentage of felony offenders who engage in other criminal activity. Criminals rarely limit themselves to one crime, and an expanded database that includes all felons is an important tool for solving crime and preventing future crimes.

Because of the continuing backlog of offender profiles that have yet to be entered into the state and national systems, Arizona has not taken full advantage of the expanded database. Until the backlog has been eliminated, there is little utility in further expanding the state database.

Task Force members did not reach a consensus on whether consideration should be given to expanding the state database to include all persons who have been arrested for a crime, but who do not fall within A.R.S. § 13-610(K). Those who disagreed with expanding the database cited privacy issues and a concern that such a database would unfairly affect individuals who are improperly arrested for a crime they did not commit. Task Force members who favored an expansion to an all-arrestee database noted that fingerprints are currently taken from all people arrested of a crime, and that the fingerprints become part of a database regardless whether the individual is ultimately convicted of a crime. Because a DNA profile, like a fingerprint profile, simply identifies an individual without providing any other information about the person, the DNA profile should be treated the same as a fingerprint profile.

Task Force members who favor an all-arrestee database acknowledged a need to increase public confidence that privacy concerns have been properly addressed. Although a DNA profile (which is essentially a string of numbers) does not contain any type of information that could be used to learn about the person's medical or genetic history, the sample from which the profile was derived could be used for that purpose. Crime labs should continue their current practice of keeping DNA samples separate from identifying information relating to the person from whom the sample was obtained, and should ensure that there are institutional safeguards in place to preclude the use of DNA samples for anything beyond providing an identifying profile.

B. Sharing Information

There is no current statewide policy concerning the use of lawfully obtained DNA profiles, in particular with regard to whether DNA profiles may be shared with law enforcement agencies throughout the state when the profile has been obtained from a suspect who has not previously been convicted of a crime. Currently, that information is used within the agency that obtained the profile, but is not being shared with other agencies throughout the state.

The current practice of limiting a sample's use to the agency that obtained the profile limits the utility of the sample. If, for example, the Phoenix Police Department has a legally-obtained sample from a suspect in a crime committed in Phoenix, that

sample is available to the Phoenix Police Department through its crime lab for other investigations within the city. If, however, the Mesa Police Department is investigating a similar crime committed in Mesa, the lawfully obtained sample kept in the Phoenix laboratory is not made available to the Mesa Police Department unless the sample is one that is required to be placed in the statewide database.

Arizona courts have not addressed the propriety of sharing this type of information among state and local law enforcement agencies. However, decisions from other states have upheld the use of DNA profiles from arrestees or suspects in investigating unrelated case. *See Smith v. State*, 744 N.E.2d 437 (Ind. 2001) (holding that there is no statutory impediment to storing DNA profile records of an arrestee in Indiana whose DNA was lawfully seized); *Washington v. State*, 653 So. 2d 362 (Fla. 1995) (DNA samples lawfully taken from a suspect can be used to investigate an unrelated case); *Bickley v. State*, 489 S.E.2d 167 (Ga. Ct. App. 1997); *Wilson v. State*, 752 A.2d 1250 (Md. Ct. Spec. App. 2000); *People v. King*, 232 A.D. 2d 111 (N.Y. App. Div. 1997).

State and local crime laboratories have been reluctant to share such information based on perceived liability issues related to privacy concerns. Those privacy concerns, however, appear to be unwarranted. As previously noted, although a DNA sample may be used to obtain personal information relating to a person's genetic make-up or disease potential, a forensic DNA profile is simply a series of numbers, and like a fingerprint, is only useful for identification purposes. Use of a DNA profile is thus comparable to use of a fingerprint profile and does not implicate privacy concerns beyond those present in compiling a fingerprint database.

Attempts to deal with problems such as terrorism and crime on a national level have highlighted the need for inter-agency sharing of information. Given the overlapping jurisdiction of state and local laboratories, and given the proximity in location from one city to the next in Arizona, cooperation and sharing of information among the various law enforcement agencies within the state is critical. Information that is available to law enforcement officers within one Arizona jurisdiction should be made available to other jurisdictions within the state. Accordingly, if a DNA sample has been lawfully obtained, either from a crime scene or by consent or court order, the profile derived from the sample should be made available to other law enforcement agencies.

RECOMMENDATIONS

A statewide Forensic Services Advisory Committee should be formed under the auspices of the Arizona Attorney General and the Arizona Criminal Justice Commission to establish and monitor performance measures among state and local laboratories, to develop a more uniform system of reporting data, and to work with laboratory directors to coordinate long-term regional and statewide planning, including equipment sharing and regional specialization by state and local laboratories. The advisory committee should also be given authority to consider and address questions or concerns from law enforcement and the public regarding lab operations.

State and local laboratories should share lawfully obtained DNA profiles with other state and local laboratories. If a DNA sample has been lawfully obtained, either from the crime scene or by consent or court order, the profile derived from the sample should be made available to other law enforcement agencies.

ATTACHMENT F

237 Ariz. 337
Court of Appeals of Arizona,
Division 1.

GENERAL MOTORS CORPORATION, a Delaware corporation; DMB Mesa Proving Grounds, LLC, a Delaware limited liability company, Plaintiffs/Appellees,
v.
MARICOPA COUNTY, Defendant/Appellant.

No. 1 CA–TX 13–0004. | May 28, 2015.

Synopsis

Background: Automobile manufacturer and landowner appealed county's valuation of land operated as automobile proving ground at nearly $100 million more than the value of the land determined by a jury in the tax court for the previous tax year, during which the land was also used as an automobile proving ground but was owned by manufacturer. The Arizona Tax Court, No. TX2007–000663, Dean M. Fink and Christopher Whitten, JJ., granted manufacturer and landowner summary judgment, applying previous year's valuation pursuant to statute, and denied county's subsequent motion for summary judgment based on manufacturer's and landowner's alleged failure to timely pay a subsequent year's taxes. County appealed.

Holdings: The Court of Appeals, Cattani, J., held that:

[1] courts had authority to hear valuation appeal despite alleged failure to timely pay subsequent year's taxes, and

[2] land did not change uses and thus, previous year's jury-determined valuation applied.

Affirmed.

Attorneys and Law Firms

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Helm Livesay & Worthington, Ltd. By Roberta S. Livesay, Raushanah Daniels, Tempe, Counsel for Defendant/Appellant.

Presiding Judge KENT E. CATTANI delivered the opinion of the Court, in which Judge LAWRENCE F. WINTHROP and Judge PETER B. SWANN joined.

OPINION

CATTANI, Judge:

¶ 1 Arizona Revised Statutes ("A.R.S.") § 42–16002(B)(1) [1] provides that a tax valuation or classification determined in a successful tax appeal "rolls over" to the next tax year unless "[t]here is new construction, a structural change or a change of use on the property." In this appeal, we address the tax court's ruling that a "change of use" under the statute does not include a new owner's intent to redevelop the property for other uses. For reasons that follow, we affirm, concluding that a changed use under § 42–16002(B) must be a physical, objectively verifiable or demonstrable use or activity on the property itself, not just a change in ownership or of purpose, plan, or intent. We also affirm the tax court's ruling that, under A.R.S. § 42–16210, a valuation appeal may be pursued even if taxes that come due while the appeal is pending are not timely paid.

FACTS AND PROCEDURAL BACKGROUND

¶ 2 General Motors Corp. ("GM") operated a motor vehicle research and development desert proving ground on several parcels totaling approximately 3,200 acres in Mesa. In a prior tax appeal, GM challenged Maricopa County's valuation of the proving ground property for, as relevant here, the 2007 tax year. *See Gen. Motors Corp. v. Maricopa County,* TX2005–050340 (Ariz.Tax Ct.). A jury found that the full cash value of the property as of January 1, 2006 (the valuation date for the 2007 tax year, *see* A.R.S. § 42–11001(18)) should be reduced to $89,000,961.

¶ 3 In December 2006, GM sold the property to DMB Mesa Proving Grounds LLC ("DMB") for $265,000,000 pursuant to a sale-leaseback agreement under which GM, as DMB's tenant through 2009, would continue to operate the property as an automotive proving ground for at least two years. During the lease term, DMB retained the right to pursue zoning adjustments and to take other steps in anticipation of redeveloping the property for other purposes.

¶ 4 As of January 1, 2007, the County set the property's full cash value at $187,824,386 for the 2008 tax year. GM and DMB (collectively "Taxpayers") appealed that valuation to the tax court and moved for summary judgment, arguing that, under § 42-16002(B), the full cash value for the 2007 tax year determined by the jury ($89,000,961) should apply to the 2008 tax year as well. The County opposed, arguing that the sale to DMB had created "a change of use on the property," bringing the property within an exception to the rollover provision. *See* A.R.S. § 42-16002(B)(1).[2] The tax court ruled in favor of Taxpayers, and the County timely appealed.

¶ 5 While the tax appeal was pending, the County discovered that Taxpayers had not ***843** paid the second half of the 2010 taxes owed on the proving ground property until July 15, 2011, after the May 1 delinquency date had passed. *See* A.R.S. § 42-18052(B). At the County's request, this court stayed the appeal and revested jurisdiction in the tax court to address the County's contention that Taxpayers' failure to timely pay the 2010 property taxes required dismissal of the appeal. The tax court denied the County's motion for summary judgment on that ground, and the County filed an amended notice of appeal from that judgment as well. We have jurisdiction under Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1) and -2101(A)(1).

DISCUSSION

¶ 6 The County argues—as it did before the tax court—that Taxpayers' appeal should have been dismissed because Taxpayers failed to timely pay property tax while the appeal was pending. Additionally, the County argues that the court should not have applied the rollover statute in determining the property's 2008 valuation because there was a "change of use on the property."

I. Standard of Review.

[1] ¶ 7 We review de novo the tax court's ruling on a motion for summary judgment. *Staples v. Concord Equities, L.L.C.*, 221 Ariz. 27, 29, ¶ 8, 209 P.3d 163, 165 (App.2009). Summary judgment is appropriate if "there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a); *see also Orme Sch. v. Reeves*, 166 Ariz. 301, 305, 802 P.2d 1000, 1004 (1990).

[2] ¶ 8 We review statutory interpretation and jurisdictional rulings de novo as issues of law. *Orme Sch.*, 166 Ariz. at 305, 802 P.2d at 1004; *Sempre Ltd. P'ship v. Maricopa County*, 225 Ariz. 106, 108, ¶ 5, 235 P.3d 259, 261 (App.2010). The primary goal in statutory interpretation is to effectuate the Legislature's intent. *Id.* at ¶ 9, 235 P.3d 259. To do so, we look first to the plain language of the statute itself. *Sempre*, 225 Ariz. at 108, ¶ 5, 235 P.3d at 261. We consider the statute as a whole, including its context within a broader statutory scheme. *Id.; see also State ex rel. Ariz. Dep't of Revenue v. Capitol Castings*, 207 Ariz. 445, 447, ¶ 9, 88 P.3d 159, 161 (Ariz.2004). We construe tax statutes liberally in favor of the taxpayer and against the government. *See Capitol Castings*, 207 Ariz. at 447, ¶ 10, 88 P.3d at 161.

[3] [4] ¶ 9 The County argues that the rollover statute should be strictly construed against the taxpayer because it provides a benefit not available to all taxpayers. But although "tax deductions, subtractions, exemptions, and credits are to be strictly construed," *Ariz. Dep't of Revenue v. Raby*, 204 Ariz. 509, 511-12, ¶ 16, 65 P.3d 458, 460-61 (App.2003), the rollover statute does not provide relief from or diminution of tax liability. Rather, it functions as a valuation (or classification) statute. *See* A.R.S. § 42-16002(B) (determining property valuation or classification in light of result of prior year's tax appeal). As such, it is subject to liberal construction. *See Staples*, 221 Ariz. at 29, ¶ 9, 209 P.3d at 165 (applying liberal construction to interpretation of rollover statute).

II. Delinquent Tax Statutes.

[5] ¶ 10 All parties agree that Taxpayers timely paid their 2008 property taxes (those challenged in this valuation appeal). The County argues, however, that under A.R.S. § 42-11004, Taxpayers' failure to timely pay the 2010 taxes deprives the courts of authority to hear the 2008 valuation appeal.

¶ 11 Section 42-11004 provides:

> A person on whom a tax has been imposed or levied under any law relating to taxation *may not test the validity or amount of tax*, either as plaintiff or defendant, if any of the taxes:
>
> 1. Levied and assessed in previous years against the person's property have not been paid.

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2. That are the subject of the action are not paid before becoming delinquent.

3. Coming due on the property during the pendency of the action are not paid before becoming delinquent.

(Emphasis added). This statute does not apply, however, because a valuation appeal is *844 not an action to "test the validity or amount of tax" within the meaning of this provision. *See RCJ Corp. v. Ariz. Dep't. of Revenue*, 168 Ariz. 328, 331, 812 P.2d 1146, 1149 (Tax Ct.1991); *Scottsdale Princess P'ship v. Maricopa County*, 185 Ariz. 368, 378, 916 P.2d 1084, 1094 (App.1995) (distinguishing between refund action and challenges to classification or valuation).

¶ 12 The statutory scheme bears out the distinction by providing that valuation appeals may only be brought under Chapter 16 of Title 42 (A.R.S. §§ 42-16001 to -16259), not under Chapter 11:

> Any taxpayer who is dissatisfied with the valuation or classification of the taxpayer's property may appeal to court *only* in the time and manner prescribed in chapter 16 of this title.

A.R.S. § 42-11005(D) (emphasis added).

¶ 13 Chapter 16 in turn provides a specific payment requirement applicable to valuation appeals. This requirement (under § 42-16210) applies only to the property taxes challenged in the appeal—not prior years or years that come due while the appeal remains pending:

A. All taxes levied and assessed against property for the year on which an appeal has been filed by the property owner shall be paid before they become delinquent.

B. If the taxes are not paid before becoming delinquent, the court shall dismiss the appeal except [if the taxes are paid within a grace period].

¶ 14 The County suggests that applying § 42-16210 and not § 42-11004 to valuation appeals will harm the public treasury by allowing property owners to delay paying future taxes during the pendency of an appeal. But by its terms, § 42-16210 does not have any effect on property owners' ongoing obligation to timely pay property taxes. And this court has recently reaffirmed the distinction between the statutes, noting that " § 42-16210(B) [is] the statute requiring timely payment for all actions brought under Chapter 16—not § 42-11004." *Sonoran Peaks, LLC v. Maricopa County*, 236 Ariz. 399, 402, ¶ 11, 340 P.3d 1107, 1110 (App.2015); *see also RCJ Corp.*, 168 Ariz. at 333, 812 P.2d at 1151 (holding that only the payment requirement of the predecessor statute to § 42-16210, not those of the statutory predecessor to § 42-11004, applied to valuation appeals).

¶ 15 Taxpayers here brought a Chapter 16 valuation appeal. Under § 42-16210, timely payment of the challenged taxes —the 2008 tax year, but not of subsequent years—was a prerequisite to suit. Accordingly, the tax court did not err by declining to dismiss the appeal based on Taxpayers' delinquent payment of 2010 taxes.

III. Rollover Statute.

¶ 16 The County argues that the tax court erred in its interpretation of the rollover statute, and thus erroneously determined that the 2007 valuation of the proving ground property determined in a prior tax appeal rolled over as the 2008 valuation as well.

[6] ¶ 17 As relevant here, the rollover statute provides:

B. If a review or administrative appeal pursuant to article 2, 3 or 4 of this chapter [16] or a judicial appeal pursuant to article 5 of this chapter results in a reduction of the valuation or a change in the classification of property, in the next year the valuation or classification of property shall be the valuation or classification that was determined by the review or appeal unless either:

1. There is new construction, a structural change or a change of use on the property.

....

A.R.S. § 42-16002(B). The parties agree that the first two provisions in subsection (1) do not apply, as there was neither new construction nor a structural change on the property. The only dispute is whether there was "a change of use on the property" between the 2007 and 2008 tax years.

¶ 18 During the 2007 tax year, GM owned and operated the property as an automotive proving ground. During the 2008 tax year, GM still operated the proving ground on the property, but as a tenant; the property was owned by DMB, which intended to develop the property at some point in the future. The question is whether this sale-leaseback—which

left GM's physical use of the property *845 unchanged—established a change of use on the property.

¶ 19 "Use" is not defined in the rollover statute. Accordingly, we look to the language and context of the statute to construe the intended meaning of "change of use."[3] The tax court reasoned that the language of the statute "focuses on the objective use to which the property is put" and that a change of use—like new construction or a structural change—"should be equally verifiable by reference to the property, not to its owner." We agree.

¶ 20 This interpretation reads the three triggering changes of § 42-16002(B)(1) in parallel. New construction on the property creates a physical change. A structural change on the property similarly contemplates a physical modification. In this context, "a change of use" should also be understood to refer to a physical use. *See Estate of Braden v. State*, 228 Ariz. 323, 326, ¶ 13, 266 P.3d 349, 352 (2011) ("[A] statutory term is interpreted in context of the accompanying words."). This is also consistent with the statutory language referencing "a change of use *on* the property." Construing "use" as a physical, objectively verifiable use or activity ensures that the relevant use remains tied to occurrences on the property itself, rather than to the owner's subjective purpose or plan.

¶ 21 Interpreting "use" as an objectively verifiable, physical use or activity on the property promotes clarity. An owner may have many, even contradictory or rapidly changing, subjective intents for the property. For example, even while GM owned the property, at some point GM's plans for the property changed—it offered the property for sale—although the property's demonstrable use as a proving ground remained constant. Tying the change of use to physical, objectively verifiable activity on the property allows a concrete determination of "use" independent of an owner's subjective and sometimes ill-defined "purpose."

¶ 22 Moreover, contrary to the County's argument, this interpretation does not ignore the owner's use of the property by focusing solely on the tenant's activities. Rather, it tracks the statute's terms by focusing directly on the property itself. Regardless whether the owner or a tenant occupies the property, it is the activities conducted on the property that define the physical, objective use of the land. The owner ultimately controls the use of the property, as it did here, for example, by the terms of a lease agreement, and the owner remains legally responsible for the payment of property taxes. *See Circle K Stores, Inc. v. Apache County*, 199 Ariz. 402, 407, ¶ 13, 18 P.3d 713, 718 (App.2001).

¶ 23 Although the ownership of the proving ground property changed—and although DMB's purpose in holding the land may have been different than GM's—the property continued to be used as an automotive proving ground through the 2008 tax year. Because there was no change of use on the property, the rollover provision applied, and the tax court did not err by granting Taxpayers' motion for summary judgment and ordering that the 2008 full cash value be set at $89,000,961.

III. Attorney's Fees.

¶ 24 Taxpayers seek an award of attorney's fees under A.R.S. § 12-348(B)(1), which authorizes a discretionary award of fees to a taxpayer that prevails in its challenge to assessment or collection of taxes. In our discretion, we award Taxpayers their reasonable attorney's fees, as limited by § 12-348(E), upon compliance with ARCAP 21. As the prevailing parties, Taxpayers are entitled to an award of costs upon compliance with ARCAP 21.

*846 CONCLUSION

¶ 25 The judgment is affirmed.

All Citations

237 Ariz. 337, 350 P.3d 841

Footnotes

1 Absent material revisions after the relevant date, we cite a statute's current version.

2 The County also filed a cross-motion for summary judgment, arguing that the full cash value should be adjusted upward to $265,000,000, the price DMB paid to buy the land in December 2006. In granting Taxpayers' motion, the tax court denied the County's motion for summary judgment, and that denial is not a subject of this appeal.

3 Although the statute determines valuation or classification in certain circumstances, it does not provide a valuation method or classification criteria, and it therefore is neither a standard valuation or classification statute. Thus, the various

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definitions of "use" for those purposes are not dispositive. *See, e.g., Krausz v. Maricopa County*, 200 Ariz. 479, 28 P.3d 335 (App.2001) (distinguishing between owners' and tenants' use of property for classification purposes); *Hayden Partners Ltd. P'ship v. Maricopa County*, 166 Ariz. 121, 800 P.2d 987 (App.1990) (describing relevant intended use for certain classification purposes).

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ATTACHMENT G

237 Ariz. 467
Court of Appeals of Arizona,
Division 1.

CITY OF SCOTTSDALE, an Arizona municipal corporation, Plaintiff/Appellant,
v.
STATE of Arizona, Defendant/Appellee,
Jim Torgeson and Sign King LLC, Intervenor–Defendants/Appellees.

No. 1 CA–CV 14–0798. | June 30, 2015.

Synopsis

Background: City filed declaratory judgment action seeking to clarify validity of local ordinance that imposed a ban on "sign walkers" on city sidewalks. The Superior Court, Maricopa County, Robert H. Oberbillig, J., granted state's motion for summary judgment. City appealed.

[**Holding:**] The Court of Appeals, Cattani, J., held that state statute prohibiting outright municipal bans on "sign walkers" regulated a matter of statewide interest and preempted municipal ordinance banning "sign walkers" from conducting business on municipal sidewalks, notwithstanding city's right, as charter city under state constitution, to regulate matters of local concern.

Affirmed.

Attorneys and Law Firms

*937 Scottsdale City Attorney's Office By Robert B. Washburn, Lori S. Davis, Scottsdale, Counsel for Plaintiff/Appellant.

Arizona Attorney General's Office By David D. Weinzweig, Robert L. Ellman, Phoenix, Counsel for Defendant/Appellee.

Goldwater Institute By Clint Bolick, Kurt M. Altman, Jared Blanchard, Phoenix, Counsel for Intervenor–Defendants/Appellees.

Judge KENT E. CATTANI delivered the opinion of the Court, in which Presiding Judge PATRICIA K. NORRIS and Judge PATRICIA A. OROZCO joined.

OPINION

CATTANI, Judge:

¶ 1 The City of Scottsdale appeals the superior court's ruling that a state statute preempts a city ordinance imposing sanctions for sign walkers who conduct business on public thoroughfares, including sidewalks. For reasons that follow, we conclude that the state statute regulates a matter of statewide interest and preempts the municipal ordinance notwithstanding the City's right—as a charter city under Article 13, Section 2, of the Arizona Constitution—to regulate matters of local concern. Accordingly, we affirm the superior court's grant of summary judgment against the City.

FACTS AND PROCEDURAL BACKGROUND

¶ 2 Arizona Revised Statutes ("A.R.S.") § 9–499.13, as amended in 2014, [1] prohibits outright municipal bans on sign walkers, *i.e.*, persons who wear, hold, or balance a sign:

> A. ... [A]s a matter of statewide concern, all municipalities shall allow the posting, display and use of sign walkers. Except as provided by subsection B of this section, municipalities may adopt reasonable time, place and manner regulations relating to sign walkers.
>
> B. A municipality that adopts reasonable time, place and manner regulations relating to sign walkers may not restrict a sign *938 walker from using a public sidewalk, walkway or pedestrian thoroughfare.
>
> C. This section may be enforced in a private civil action and relief, including an injunction, may be awarded against a municipality. The court shall award reasonable attorney fees to a party that prevails in an action against a municipality for a violation of this section.
>
> D. For the purposes of this section, "sign walker" means a person who wears, holds or balances a sign.

¶ 3 Scottsdale Revised Code ("S.R.C.") § 16–353(c), which was enacted prior to A.R.S. § 9–499.13, imposes a ban on sign walkers:

> No person shall have, bear, wear or carry upon any street, any advertising banner, flag, board, sign, transparency,

> wearing apparel or other device advertising, publicly announcing or calling attention to any goods, wares, merchandise, or commodities, or to any place of business, occupation, show, exhibition, event or entertainment. The provisions of this subsection do not apply to the wearing of apparel without remuneration for doing so or business identification on wearing apparel.

S.R.C. § 16–351 defines "street" to include "all that area dedicated to public use for public street purposes and includes roadways, parkways, alleys and sidewalks."

¶ 4 In May 2014, the City filed a declaratory judgment action seeking to clarify the validity of the local ordinance. The City argued that because it is a charter community under the Arizona Constitution, the State is precluded from interfering with the City's right to control local matters, including the regulation of its sidewalks, the safety of city inhabitants, and municipal aesthetics.

¶ 5 Sign King LLC and its owner, Jim Torgeson, (collectively, "Sign King") moved to intervene, asserting that the Scottsdale ordinance infringes on their free speech rights under the First Amendment; Article 2, Section 6, of the Arizona Constitution; and A.R.S. § 9–499.13.[2] The superior court granted the motion to intervene, and the City and the State (joined by Sign King) subsequently filed motions for summary judgment.

¶ 6 Following briefing and oral argument, the superior court granted the State's motion, finding that "the state has demonstrated a matter of sufficient statewide concern and a desire to preempt the 'sign spinner' field." The court further found that "the valid local municipal interests of regulating a city's own sidewalks, aesthetics, and safety are not purely local matters to which the city has a sovereign right to regulate in a manner inconsistent with the state law."

¶ 7 The City timely appealed. We have jurisdiction under Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12–120.21(A)(1) and –2101(A)(1).

DISCUSSION

¶ 8 The City argues that the superior court erred by holding that A.R.S. § 9–499.13 preempts S.R.C. § 16–353(c). As it did below, the City asserts that its municipal ordinance regulates an issue of local concern and is valid under the City's charter community authority.

I. Standard of Review.

[1] ¶ 9 We review de novo a decision granting summary judgment, and we will affirm if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(a); *Williamson v. PVOrbit, Inc.*, 228 Ariz. 69, 71, ¶ 11, 263 P.3d 77, 79 (App.2011). We also review de novo the superior court's resolution of issues of statutory interpretation, including whether a state statute preempts a city ordinance. *Korwin v. Cotton*, 234 Ariz. 549, 554, ¶ 8, 323 P.3d 1200, 1205 (App.2014); *City of Tucson v. Rineer*, 193 Ariz. 160, 162, ¶ 2, 971 P.2d 207, 209 (App.1998).

II. Governing Principles.

A. Preemption.

[2] [3] ¶ 10 When an issue affects both state and local interests, a municipality may ***939** address the issue by enacting and enforcing relevant laws unless specifically preempted by state law. *Coconino County v. Antco, Inc.*, 214 Ariz. 82, 90, ¶ 24, 148 P.3d 1155, 1163 (App.2006). A municipal ordinance is preempted by state law when: "(1) the municipality creates a law in conflict with the state law, (2) the state law is of statewide concern, and (3) the state legislature intended to appropriate the field through a clear preemption policy." *State v. Coles*, 234 Ariz. 573, 574, ¶ 6, 324 P.3d 859, 860 (App.2014).

¶ 11 The City acknowledges that its sign walker ordinance conflicts with A.R.S. § 9–499.13, and the City does not dispute that the Arizona Legislature intended to appropriate the field relating to the regulation of sign walkers on public sidewalks. The City's argument thus focuses on whether the state law addresses a matter of statewide concern (the second prong of the preemption test) and on whether the City's status as a charter city supersedes legislative authority in addressing such matters.

B. Charter City Authority.

[4] ¶ 12 Article 13, Section 2, of the Arizona Constitution provides that cities or towns of at least 3,501 residents may

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"frame a charter for [their] own government consistent with, and subject to, the Constitution and the laws of the state." Under this authority, charter communities may regulate matters of strictly local concern without state interference or oversight. *City of Scottsdale v. Scottsdale Associated Merchs., Inc.*, 120 Ariz. 4, 5, 583 P.2d 891, 892 (1978). On issues of statewide scope or relevance, however, the Arizona Legislature retains plenary power and charter cities must yield. *See id.* ("Charter cities have certain rights and privileges in local matters to legislate free from interference by the legislature. When the subject of legislation is a matter of statewide concern the Legislature has the power to bind all throughout the state including charter cities.") (citations omitted).

III. State Preemption of the City's Sign Walker Ban.

[5] ¶ 13 The City asserts that its ordinance addresses matters of local concern only and is thus an appropriate exercise of the City's charter community authority. The State counters that the ordinance, like A.R.S. § 9-499.13, addresses matters of statewide concern, namely police powers of the state, zoning and sign regulation, and aesthetics. Intervenors further assert a statewide concern relating to freedom of speech, arguing that the ordinance's outright ban on sign walkers is not a reasonable time, place, or manner regulation on speech.

¶ 14 A.R.S. § 9-499.13(A) evidences the Legislature's view that sign walker advertising is a matter of statewide importance: "[A]s a matter of statewide concern, all municipalities shall allow the posting, display and use of sign walkers." The legislative history of the bill further explains:

> The legislature finds, determines and declares that:
>
> 1. In a traditional public forum, freedom of speech is a fundamental right that must be protected from unreasonable abridgment by municipal regulation and enforcement.
>
> 2. Public sidewalks, walkways and pedestrian thoroughfares within a municipality are traditional forums and have immemorially been held in trust for the use of the public, and time out of mind, have been used for the purposes of assembly, communicating thoughts between citizens and discussing public questions.
>
> 3. It is the public policy of this state that equal access to public sidewalks, walkways and pedestrian thoroughfares is fundamental to the exercise of free speech and expression. Notwithstanding reasonable time, place and manner regulations, the use of public sidewalks, walkways and pedestrian thoroughfares must be uniform as between sign walkers and all other individuals.
>
> 4. Municipal regulations of time, place and manner that target sign walkers and prevent the equal use of public sidewalks, walkways and pedestrian thoroughfares by sign walkers violate the public policy of this state and are void.

2014 Ariz. Sess. Laws, ch. 97, § 2 (2d Reg. Sess.). Although not controlling in a preemption ***940** analysis, such a statement of legislative intent is entitled to deference. *See City of Tucson v. State*, 229 Ariz. 172, 178, ¶ 34, 273 P.3d 624, 630 (2012).

¶ 15 A.R.S. § 9-499.13 applies in all municipalities in Arizona with equal force. It does not prescribe different rules for different places, but instead operates uniformly from community to community. Thus, the statute is a general law that should be applied statewide. *See* 6 McQuillin, *The Law of Municipal Corporations* § 21:30 (3d ed. 2005) ("[O]rdinarily, a general law enacted by the legislature and applicable alike to all cities is paramount and supreme over any conflicting charter provision.").

¶ 16 Relying on *City of Tucson v. Arizona Alpha of Sigma Alpha Epsilon* ("*Arizona ASAE* "), 67 Ariz. 330, 195 P.2d 562 (1948), and *McMann v. City of Tucson*, 202 Ariz. 468, 47 P.3d 672 (App.2002), the City nevertheless asserts that its local ordinance addresses "matters of strictly local municipal concern," and is thus protected from state legislative interference. In *Arizona ASAE*, the Arizona Supreme Court concluded that the sale of municipal real estate is purely a matter of local concern. 67 Ariz. at 336, 195 P.2d at 566. Similarly, in *McMann*, this court held that leasing municipally owned real property (like selling such property) is not a matter of statewide concern. 202 Ariz. at 472, ¶ 10, 47 P.3d at 676. But selling and leasing property owned by a municipality do not implicate the police powers of the state and differ significantly from regulating public activity and criminalizing conduct occurring on public property. There is no general statewide interest in how a sale or lease of municipal real estate is carried out because only those who live in the municipality and who have a financial interest in how the municipality is operated are affected by the sale/lease. In contrast, criminalizing conduct (with its attendant consequences) based on public activity on publicly owned walkways affects everyone who uses the walkway, regardless whether they are residents of the municipality.

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¶ 17 Arizona courts have rejected municipal ordinances that conflict with state statutes in other areas, particularly when such ordinances involve the police powers of the state. For example, in *Coles,* this court concluded that A.R.S. § 36–2031, which expressly prohibits local governments from criminalizing public drunkenness, preempted Scottsdale City Code § 19–8(a), which criminalized public drunkenness. 234 Ariz. at 575, 577, ¶¶ 8–9, 17, 324 P.3d at 861, 863. This court held that the adoption of the state statute "signaled the Legislature's determination that alcoholism should be treated as a disease and not criminalized unless a person under the influence of alcohol engages in specified activities such as driving or operating other types of vehicles or equipment," and that in prohibiting criminal sanctions for certain conduct, the Legislature had addressed an issue of statewide importance. *Id.* at 577, ¶ 17, 324 P.3d at 863; *see also State ex rel. Baumert v. Municipal Court,* 124 Ariz. 159, 160–61, 602 P.2d 827, 828–29 (App.1979) (invalidating city ordinance criminalizing indecent exposure based on a definition that differed from state statutory definition of indecent exposure).

[6] ¶ 18 The City acknowledges our holding in *Coles,* but argues that it is distinguishable on the basis that "[n]o argument was made or decided regarding whether public intoxication was a purely local concern governed by charter sovereignty." But charter sovereignty, by its own terms under the Arizona Constitution, requires that a charter be "consistent with, and subject to, ... the laws of the state." Ariz. Const. art. 13, § 2. Thus, charter sovereignty does not exempt a municipality from complying with a state law that addresses an issue of statewide concern. *See Strode v. Sullivan,* 72 Ariz. 360, 364, 236 P.2d 48, 51 (1951) ("This provision conferring upon a qualified city power to frame a charter for its own government is not an enabling act conferring carte blanche authority or plenary power to adopt any legislation that it might desire.").

¶ 19 Courts have similarly rejected municipal ordinances that conflict with state provisions in areas that do not involve criminal sanctions. For example, in *Levitz v. State,* 126 Ariz. 203, 204–05, 613 P.2d 1259, 1260–61 (1980), the Arizona Supreme Court held that *941 the regulation of advertising signs is not purely a local matter and that a charter city's advertising sign regulation is not exempt from State regulation requirements. *See also Scottsdale Associated Merchs.,* 120 Ariz. at 5, 583 P.2d at 892 (invalidating a Scottsdale ordinance that conflicted with Arizona law on a sign-regulation issue).

¶ 20 The City argues that *Levitz* and the zoning cases on which it relied, *see* 126 Ariz. at 204–05, 613 P.2d at 1260–61, are distinguishable because of the nature of zoning ordinances regulating the size and location of signs. But if ordinances regulating sign location and size are subject to a preemption analysis, it follows that ordinances prohibiting entirely a category of signs, albeit mobile, are also subject to a preemption analysis.

[7] ¶ 21 The City further argues that the ordinance should be upheld because it does not violate the First Amendment. But even assuming arguendo that the ordinance would otherwise be a valid speech restriction, the First Amendment does not bar legislative action providing greater protections of speech than required under either the federal or state constitutions. *See Mountain States Tel. & Tel. Co. v. Ariz. Corp. Comm'n,* 160 Ariz. 350, 354, 773 P.2d 455, 459 (1989) (noting that the First Amendment to the United States Constitution provides only a protection against government action that *restricts* speech and does not prevent a state from granting to its citizens greater protections than are required under the federal constitution).

¶ 22 Finally, although the City argues that the state statute prevents reasonable time, place, and manner restrictions on sign walkers, we find no such prohibition; to the contrary, the statute expressly allows reasonable time, place, and manner regulations. *See* A.R.S. § 9–499.13(A) ("Except as provided by subsection B of this section, municipalities may adopt reasonable time, place and manner regulations relating to sign walkers."). The state statute simply prohibits outright bans on sign walkers and requires that rules regulating conduct on public thoroughfares be uniform as between sign walkers and all other individuals. *See* A.R.S. § 9–499.13(B) ("A municipality that adopts reasonable time, place and manner regulations relating to sign walkers *may not restrict a sign walker from using* a public sidewalk, walkway or pedestrian thoroughfare.") (emphasis added).

CONCLUSION

¶ 23 A.R.S. § 9–499.13 preempts local ordinances that impose a blanket prohibition on sign walkers conducting business on public sidewalks and thoroughfares. Accordingly, we affirm the superior court's order granting the State's motion for summary judgment.

All Citations

237 Ariz. 467, 352 P.3d 936, 716 Ariz. Adv. Rep. 19

Footnotes

1 Absent material revisions after the relevant date, we cite a statute's current version.

2 Prior to the initial enactment of § 9–499.13 in 2008, Sign King was cited for violating the ordinance and unsuccessfully challenged the ordinance on federal constitutional grounds.

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ATTACHMENT H

237 Ariz. 401
Court of Appeals of Arizona,
Division 1.

ARIZONA BANK & TRUST, an Arizona corporation, Plaintiff/Appellee,

v.

JAMES R. BARRONS TRUST, T–Group, LLC, an Arizona limited liability company; Creative Real Estate Investments # 1, Inc., an Arizona corporation; James R. Barrons and Laura Barrons, husband and wife; Daniel S. Warren and Stacey L. Warren, husband and wife; Thomas J. Tierney and Patricia Tierney, Defendants/Appellants.

No. 1 CA–CV 13–0096. | May 28, 2015.

Synopsis

Background: Lender that foreclosed on deeds of trust and purchased loan properties for less than amount owed brought action against guarantors to recover the deficiencies under the terms of written guaranties. The Superior Court, Maricopa County, No. CV2010–032706, Mark H. Brain, J., granted summary judgment in favor of lender, and guarantors appealed.

Holdings: The Court of Appeals, Cattani, J., held that:

[1] in an apparent matter of first impression, guarantors were not precluded from contractually waiving their statutory anti-deficiency protections;

[2] guarantors executed a valid waiver of their statutory anti-deficiency protections; and

[3] no evidence existed to demonstrate that guarantors' waiver of their statutory anti-deficiency protections were not knowing and voluntary.

Affirmed.

Attorneys and Law Firms

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Goldman & Zwillinger, PLLC By Scott H. Zwillinger, Scottsdale, Counsel for Defendants/Appellants.

Ryley Carlock & Applewhite By William Scott Jenkins, Jr., Charitie L. Hartsig, Naomi E. Thurston, Phoenix, Counsel for Amicus Curiae Arizona Bankers Association.

Presiding Judge KENT E. CATTANI delivered the opinion of the Court, in which Judge MARGARET H. DOWNIE and Judge MICHAEL J. BROWN joined.

OPINION

CATTANI, Judge:

¶ 1 This case addresses whether Arizona Revised Statutes ("A.R.S.") § 33–814(G), which precludes an action to recover a deficiency on a qualifying residential deed of trust, applies to guarantors in the same manner in which it applies to borrowers.[1] This court previously held that anti-deficiency protections under § 33–814(G) apply to and cannot be waived by borrowers; we left unanswered, however, whether guarantors are protected by § 33–814(G) as well and, if so, whether guarantors can waive that protection. We now hold that, assuming § 33–814(G) applies to guarantors, the protections *1101 afforded under the statute can be prospectively waived. Because the guarantors in this case entered written agreements expressly waiving anti-deficiency protections, we affirm the superior court's grant of summary judgment in favor of the lender.

FACTS AND PROCEDURAL BACKGROUND

¶ 2 In mid–2005, TDJ Land Investments, LLC ("TDJ") purchased several vacant lots of real property ("Subdivision"). Arizona Bank & Trust ("AZ Bank") financed TDJ's purchase and development of the Subdivision with a business loan secured by a promissory note and a blanket construction deed of trust on all lots within the Subdivision. Several individuals and entities (collectively, "Guarantors")[2] executed written, unconditional loan

guaranties, which expressly waived any protection under anti-deficiency statutes:

> Guarantor also waives any and all rights or defenses based on suretyship or impairment of collateral including, but not limited to, any rights or defenses arising by reason of (A) any "one action" or "anti-deficiency" law or any other law which may prevent [AZ Bank] from bringing any action, including a claim for deficiency, against Guarantor, before or after [AZ Bank's] commencement or completion of any foreclosure action, either judicially or by exercise of a power of sale ... or (F) any defenses given to guarantors at law or in equity other than actual payment and performance of the indebtedness.

¶ 3 AZ Bank later provided TDJ two additional loans for the construction of specific homes within the Subdivision. Both loans specified that they were secured by the previously-executed guaranties. TDJ defaulted on both of these loans, and Guarantors failed to bring the loans current. AZ Bank foreclosed on the deeds of trust and purchased the loan properties at trustee's sales with credit bids for less than the amount owed, leaving deficiency balances of several hundred thousand dollars.

¶ 4 AZ Bank sued Guarantors to recover the deficiency under the terms of the written guaranties.[3] The superior court granted summary judgment in favor of AZ Bank on Guarantors' liability for the deficiencies, reasoning in part that Guarantors had waived any protection provided by § 33–814(G). After the parties stipulated to the loan properties' fair market values, the court entered judgment in favor of AZ Bank.

¶ 5 Guarantors timely appealed. We have jurisdiction under Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12–120.21(A)(1) and –2101(A)(1).

DISCUSSION

¶ 6 Guarantors argue that the superior court erred by denying their cross-motion for summary judgment and by granting summary judgment in favor of AZ Bank. Guarantors assert that (1) as a matter of public policy, the anti-deficiency protections under § 33–814(G) apply to guarantors as well as borrowers and cannot be waived; (2) their generic waivers signed as part of a previous business loan did not waive anti-deficiency protections under § 33–814(G); and (3) whether the purported waivers were made knowingly and voluntarily is a question of fact that precludes entry of judgment.

¶ 7 Summary judgment is appropriate if there are no genuine issues as to any material fact and the moving party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(a); *Orme Sch. v. Reeves*, 166 Ariz. 301, 305, 802 P.2d 1000, 1004 (1990). We review de novo the superior court's grant of summary judgment, viewing the facts in the light most favorable to the party against whom judgment was entered. *United Bank of Ariz. v. Allyn*, 167 Ariz. 191, 193, 195, 805 P.2d 1012, 1014, 1016 (App.1990). We also address de novo issues of statutory interpretation—in this case the interpretation of the ***1102** anti-deficiency provisions of § 33–814(G). *See BMO Harris Bank, N.A., v. Wildwood Creek Ranch, LLC*, 236 Ariz. 363, 365, ¶ 7, 340 P.3d 1071, 1073 (2015). "We interpret statutes to give effect to the legislature's intent, looking first to the statutory language itself." *Baker v. Univ. Physicians Healthcare*, 231 Ariz. 379, 383, ¶ 8, 296 P.3d 42, 46 (2013).

I. A Guarantor Can Waive Anti–Deficiency Protections Under A.R.S. § 33–814(G).

[1] ¶ 8 The Arizona Legislature crafted the deed of trust framework in 1971 to provide an alternative to judicial foreclosures. *BMO Harris Bank*, 236 Ariz. at 365, ¶ 8, 340 P.3d at 1073. Under this framework, foreclosure occurs extra-judicially through a trustee's sale. *Id.;* A.R.S. § 33–807. Following a trustee's sale, the statutes limit the lender's ability to recover a deficiency judgment on deeds of trust that finance certain single or two-family residences:

> If trust property of two and one-half acres or less which is limited to and utilized for either a single one-family or a single two-family dwelling is sold pursuant to the trustee's power of sale, no action may be maintained to recover any difference between the amount obtained by sale and the amount of the indebtedness and any interest, costs and expenses.

A.R.S. § 33–814(G). Here, the parties agree that the properties at issue are of the type described in this statutory provision, but they disagree on whether the statute protects guarantors as well as borrowers, and if so, whether a guarantor can prospectively waive the statutory protections.

¶ 9 For purposes of our analysis we assume, without deciding, that the "no action" provision in § 33-814(G) precludes an action against anyone, including a guarantor, to recover the difference between the amount owed on the borrower's indebtedness and the fair market value of the property securing the residential deed of trust. We thus address whether this statutory protection can be waived.

[2] ¶ 10 Preliminarily, contract provisions are enforceable unless they are prohibited by law or are contrary to identifiable public policy. *CSA 13-101 Loop, LLC, v. Loop 101, LLC,* 236 Ariz. 410, 411, ¶ 6, 341 P.3d 452, 453 (2014). Arizona law values the private ordering of commercial relationships and seeks to protect bargained-for expectations. *Id.* Accordingly, the contractual terms between AZ Bank and Guarantors evidencing a bargained-for guaranty expressly waiving anti-deficiency protections should be upheld unless the terms are contrary to a legislative enactment or a public policy concern that clearly outweighs the parties' interest in enforcing agreed-upon contractual terms. *See id.* (citing Restatement (Second) of Contracts § 178) (1981).

¶ 11 In *Parkway Bank & Trust Co. v. Zivkovic,* this court held that § 33-814(G) precludes recovery of any type of deficiency from a *borrower* notwithstanding the borrower's express written agreement in the original deed of trust to waive anti-deficiency protections. 232 Ariz. 286, 290, ¶ 16, 304 P.3d 1109, 1113 (App.2013). *Parkway* left unanswered, however, whether the statute precludes recovery from a *guarantor* under an express written guaranty prospectively waiving anti-deficiency protections. *Id.* at 291 n. 5, ¶ 17, 304 P.3d at 1114 n. 5.

¶ 12 In *Parkway,* this court noted the "significant public policy concerns" addressed through the anti-deficiency statutes:

> The statutes were intended to "protect [ ] consumers from financial ruin" and "eliminat[e] ... hardships resulting to consumers who, when purchasing a home, fail to realize the extent to which they are subjecting assets besides the home to legal process." The anti-deficiency statutes "allocate the risk of inadequate security" to lenders, "thereby discouraging overvaluation of the collateral." Additionally, "[i]f inadequacy of the security results, not from overvaluing, but from a decline in property values during a general or local depression, [the anti-deficiency statutes] prevent the aggravation of the downturn that would result if defaulting purchasers were burdened with large personal liability."

***1103** 232 Ariz. at 290, ¶ 16, 304 P.3d at 1113 (quoting *Helvetica Servicing, Inc. v. Pasquan,* 229 Ariz. 493, 496, 500-01, ¶ ¶ 9, 30, 277 P.3d 198, 201, 205-06 (App.2012)).

¶ 13 Although some of these policy concerns arguably apply as between a lender and a guarantor, individuals who guarantee loans do not appear to be the type of consumers the Legislature intended to protect, primarily because a guarantor who is not the borrower does not face the risk of losing a home to foreclosure in the wake of a default. *See Baker v. Gardner,* 160 Ariz. 98, 101, 770 P.2d 766 (1988) (noting legislative intent to protect consumers who fail to realize the extent to which they are subjecting assets besides their home to legal process and prevent artificial deficiencies resulting from market swings); *see also Long v. Corbet,* 181 Ariz. 153, 159, 888 P.2d 1340, 1346 (App.1994) (declining to extend anti-deficiency protections to someone who guaranteed a business loan and noting that "[t]he purpose of Arizona's anti-deficiency statutes is to protect 'homeowners' from deficiency judgments").

¶ 14 Moreover, Arizona courts have recognized significant differences between guarantors and borrowers, and this court has held in particular that "[a] guaranty may provide for greater liability than that of the principal debtor." *Provident Nat'l Assurance Co. v. Sbrocca,* 180 Ariz. 464, 466, 885 P.2d 152, 154 (App.1994) (citation omitted) (concluding that guarantors of a nonrecourse loan could be held liable to a lender based on their agreement to unconditionally guarantee what would otherwise be a nonrecourse promissory note). Thus, a guarantor may remain liable even if a lender has no further recourse against a borrower.

¶ 15 Prohibiting a guarantor from waiving anti-deficiency protections would be inconsistent with the basic purpose of a guaranty. If a guarantor could never be held liable for a deficiency on a residential real estate loan of the type contemplated under § 33-814(G), a guaranty on such a loan would be substantively meaningless following a trustee's sale. Unlike the homeowner/debtor, a guarantor risks nothing other than the funds to cover a deficiency. Thus, if § 33-814(G) cannot be waived by a guarantor, there would be no financial downside (other than a potential blemish on a credit report) for failing to pay the guaranteed amount. Such a guaranty would be illusory, and there would be little or no reason for lenders to seek loan guaranties or to proffer loans that would not otherwise be available without a guaranty.

¶ 16 We note that, unlike § 33–814(G), a separate portion of the anti-deficiency statute that provides "fair market value" protections following a trustee's sale specifically references guarantors. *See* A.R.S. § 33–814(A) (limiting the deficiency amount to be recovered from borrowers and guarantors under a foreclosed deed of trust by requiring an offset for the fair market value of the property or the sales price at the trustee's sale, whichever is higher). In *CSA 13–101 LOOP,* relying in part on the express statutory reference to guarantors, the Arizona Supreme Court concluded that the fair market value protection in subsection (A) applies to and cannot be waived by guarantors. 236 Ariz. at 414–15, ¶¶ 22–24, 341 P.3d at 456–57. But the absence of any such reference to guarantors in subsection (G)—particularly in light of the express reference to guarantors in subsection (A)—suggests the Legislature did not intend that subsection (G) would apply in the same manner with regard to guarantors. *See Anderson v. Valley Union High School,* 229 Ariz. 52, 59, ¶ 21, 270 P.3d 879, 886 (App.2012) (noting that "[t]he legislature is capable of saying what it means" and finding that the absence of terminology used in a related statute suggests an intentional choice not to use it in a different context) (citation omitted).

¶ 17 Moreover, the substance of such transactions also shows why the fair market value protection of subsection (A) applies to guarantors differently than the "no action" provision of subsection (G). Without subsection (A)'s fair market value protection, lenders would obtain a windfall if the sales price at a trustee's sale were lower than the fair market value of the property and the lender nevertheless collected from a guarantor a deficiency amount calculated using the sales price. In contrast, there is no windfall to lenders if guarantors are permitted to waive the "no action" protection under subsection ***1104** (G). If a borrower under a deed of trust defaults and the lender recovers a deficiency from a guarantor (limited to the amount based on the fair market value under subsection (A)), the lender is simply made whole. Accordingly, although the fair market value protection of subsection (A) applies to guarantors and cannot be waived, we decline to apply the "no action" provision of subsection (G) to guarantors in the same manner.

¶ 18 Finally, we note that other states have similarly found that guarantors can waive anti-deficiency protections, even if debtors cannot. *See, e.g., Bank of Okla., N.A. v. Red Arrow Marina Sales & Serv., Inc.,* 224 P.3d 685, 698 (Okla.2009) ("As the specially protected beneficiaries of the anti-deficiency statute, mortgage debtors cannot contract away that statute's protection. The guarantor is not so constrained."); *O'Brien v. Ravenswood Apts., Ltd.,* 169 Ohio App.3d 233, 862 N.E.2d 549, 556, ¶ 30 (2006) ("In light of this clear waiver language, we hold that the guarantors were precluded from raising any defenses under [Ohio anti-deficiency statutes]"); *Valley Bank v. Larson,* 104 Idaho 772, 663 P.2d 653, 655 (1983) ("A guarantor may legally contract to waive a defense provided by anti-deficiency judgment statute."). We are unaware of any court that has concluded that a guarantor cannot waive anti-deficiency protections of the type contemplated under § 33–814(G).

¶ 19 Guarantors rely on two cases from other jurisdictions in which anti-deficiency protections have been extended to guarantors. *See First Interstate Bank of Nev. v. Shields,* 102 Nev. 616, 730 P.2d 429 (1986), and *Gen. Motors Acceptance v. Smith,* 399 So.2d 1285 (La.Ct.App.1981). But those cases involve only the applicability of fair market value protections similar to those set forth in § 33–814(A). *See First Interstate Bank of Nevada,* 730 P.2d at 431; *Gen. Motors Acceptance,* 399 So.2d at 1287. Thus, the cases on which Guarantors rely are unavailing. [4]

¶ 20 In sum, we do not find a compelling public policy reason that outweighs the parties' interest in enforcing an express contractual provision guaranteeing payment of the debt at issue, anti-deficiency provisions notwithstanding. Accordingly, we decline to extend *Parkway* beyond its application to borrowers, and we thus hold that a guarantor can waive the anti-deficiency protections set forth in § 33–814(G).

II. Guarantors Executed a Valid Waiver.

[3] ¶ 21 Guarantors argue that they did not waive anti-deficiency protections because the waiver at issue did not reference § 33–814(G) and was issued as part of a prior loan that was not subject to anti-deficiency protections. Guarantors further assert that there is a question of fact regarding whether they knowingly and voluntarily waived such protections.

[4] ¶ 22 We disagree with Guarantors' assertion that the signed guaranties did not waive anti-deficiency protections under § 33–814(G). In this context, waiver is "the express, voluntary, intentional relinquishment of a known right." *Am. Cont'l Life Ins. Co. v. Ranier Constr. Co.,* 125 Ariz. 53, 55, 607 P.2d 372, 374 (1980). Although the guaranties were originally signed in conjunction with a prior transaction, the promissory notes securing the two loans expressly provided that each of the previously signed guaranties would secure

these loans as well. Moreover, each of the guaranties expressly provided that Guarantors waived "any and all rights or defenses based on suretyship or impairment of collateral including, but not limited to, any rights or defenses arising by reason of (A) any 'one action' or 'anti-deficiency' law or any other law which may prevent [AZ Bank] from bringing any action, including the claim for deficiency, against Guarantor." Even absent a specific reference to § 33-814(G), this language explicitly referencing anti-deficiency provisions was sufficient to show an express waiver of any anti-deficiency protection.

*1105 [5] ¶ 23 Nor did Guarantors present a genuine issue of material fact as to whether this waiver was knowing and voluntary. They did not submit any evidence supporting their assertion that they did not know what rights they were waiving, and, in addition to the explicit reference to anti-deficiency law within the waiver provision, the guaranties included a written acknowledgment providing that each Guarantor "warrants and agrees that each of the waivers set forth above is made with Guarantor's full knowledge of its significance and consequences and that, under the circumstances, the waivers are reasonable and not contrary to public policy or law." The guaranties themselves thus show a knowing, voluntary waiver, and absent any evidence to the contrary, the superior court properly granted AZ Bank summary judgment on this issue. *See Wells Fargo Bank, N.A. v. Allen*, 231 Ariz. 209, 213, ¶¶ 17-18, 292 P.3d 195, 199 (App.2012).

III. Attorney's Fees and Costs.

¶ 24 AZ Bank seeks an award of its attorney's fees and costs on appeal under the terms of the guaranties. As the prevailing party on appeal, AZ Bank is entitled to such fees and costs, subject to compliance with ARCAP 21.

CONCLUSION

¶ 25 The parties' bargained-for expectations contemplated that Guarantors would be liable for the loan deficiency after sale of the security. Given the absence of an express legislative provision addressing the enforceability of such a guaranty, and given Guarantors' express waiver of any arguably applicable provisions in § 33-814(G), we affirm the superior court's ruling granting summary judgment to AZ Bank and denying Guarantors' cross-motion for summary judgment.

All Citations

237 Ariz. 401, 351 P.3d 1099, 713 Ariz. Adv. Rep. 25

Footnotes

1 Absent material revisions after the relevant date, we cite a statute's current version.

2 Specifically, Guarantors are the Barrons Family Trust, T-Group, LLC, Creative Real Estate Investments # 1, Inc., James R. Barrons, Laura E. Barrons, Daniel S. Warren, Stacey L. Warren, Thomas J. Tierney, and Patricia R. Tierney.

3 AZ Bank also sued TDJ to recover the deficiencies, but the parties later agreed to dismiss the claims against TDJ because recovery was precluded by the anti-deficiency provisions of § 33-814(G).

4 We note that Arizona is one of only 12 states that have this type of anti-deficiency protection. States that do not extend anti-deficiency protections to borrowers necessarily do not extend such protections to guarantors. Thus, a ruling that a guarantor cannot waive anti-deficiency protections under § 33-814(G) would reflect a "minority within a minority" position and would result in Arizona being the only jurisdiction in the United States to adopt such a rule.

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ATTACHMENT I

235 Ariz. 85
Court of Appeals of Arizona,
Division 1.

Samuel C. JOHNSON, III, Petitioner,
v.
The Honorable Karen L. O'CONNOR, Judge of the Superior Court of the State of Arizona, in and for the COUNTY OF MARICOPA, Respondent Judge, State of Arizona, Real Party in Interest.
Psychological Counseling Services, Ltd., Petitioner,
v.
The Honorable Karen L. O'Connor, Judge of the Superior Court of the State of Arizona, in and for the County of Maricopa, Respondent Judge, State of Arizona, Real Party in Interest.

Nos. 1 CA-SA 14-0035, 1 CA-SA 14-0036. | June 6, 2014. | As Amended June 6, 2014.

Synopsis

Background: Psychological counseling provider and its client brought special action challenging jurisdiction of the Superior Court, Maricopa County, Karen L. O'Connor, J., to issue summons under the Uniform Act to Secure the Attendance of Witnesses From Without a State in Criminal Proceedings, ordering provider's custodian of records to testify and produce client's treatment records, without first determining whether the records were protected from disclosure.

Holdings: The Court of Appeals, Howe, J., held that:

[1] although issue was moot, Court would hear case;

[2] as a matter of first impression, Uniform Act authorizes issuance of subpoena for production of documents; and

[3] trial court properly declined to consider whether treatment records were privileged or protected by medical record privacy laws.

Jurisdiction accepted, relief denied, and remanded.

Gemmill, J., specially concurred, with statement.

Cattani, J., concurred in part, dissented in part and filed opinion.

Attorneys and Law Firms

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Osborn Maledon, PA By Larry A. Hammond, Anne M. Chapman, Anna H. Finn, Phoenix, Snell & Wilmer, LLP By Brett W. Johnson, Sara J. Agne, Phoenix, Counsel for Petitioner Psychological Counseling Services, Ltd.

Maricopa County Attorney's Office By E. Catherine Leisch, Andrea L. Kever, Phoenix, Counsel for Real Party in Interest.

Judge RANDALL M. HOWE delivered the opinion of the Court, in which Presiding Judge JOHN C. GEMMILL specially concurred and Judge KENT E. CATTANI concurred in part, dissented in part.

OPINION

HOWE, Judge.

*87 ¶ 1 Psychological Counseling Services, Ltd., ("PCS") located in Arizona, provided counseling to Samuel C. Johnson. The Maricopa County Superior Court has issued a summons under the Uniform Act to Secure the Attendance of Witnesses From Without a State in Criminal Proceedings ("the Uniform Act" or "the Act"), codified in A.R.S. §§ 13-4091 to -4096, ordering PCS's custodian of records ("custodian") to testify and to produce Johnson's treatment records in a Wisconsin criminal proceeding against Johnson. PCS and Johnson seek review of the superior court's order. They make various arguments that the superior court had no authority to issue the summons, but argue primarily that the superior court erred in issuing it without first determining whether the treatment records were protected from disclosure under Arizona's medical records privacy statutes and psychologist-client privilege.

¶ 2 We hold that the superior court properly issued the summons and correctly declined to consider whether the treatment records are privileged or protected by medical record privacy laws. Whether evidence sought under the Uniform Act is privileged or protected from disclosure is a

determination for the state court requesting the summons, not for the state court issuing the summons.

FACTS AND PROCEDURAL HISTORY

¶ 3 During Johnson's treatment with PCS, Johnson made statements that led the treating psychologists to reasonably believe that a minor in Wisconsin had been abused. PCS reported those statements to authorities, as A.R.S. § 13-3620 requires.

¶ 4 In February 2012, once criminal proceedings against Johnson had begun in Wisconsin, the Racine County Circuit Court for the State of Wisconsin issued a certification pursuant to the Uniform Act to secure documents and a witness for Johnson's trial. The documents requested included Johnson's medical records, including those records that involved group therapy sessions. On behalf of the Wisconsin court, the State of Arizona presented the certification to the Maricopa County Superior Court and asked it to issue a summons ordering PCS's custodian to appear, testify, and produce documents in the Wisconsin court. The superior court ordered the custodian to appear before it and show cause why a summons should not issue. Under A.R.S. § 13-4092(B), the superior court was required to issue the summons if it found after a hearing that the custodian was a "material and necessary" witness, that compelling his attendance and testimony would not cause an "undue hardship," and that the laws of Wisconsin would protect the custodian from arrest or service of process. It also *88 **221 ordered PCS to outline the medical records at issue and any privilege concerns for an in camera review. The court later declared the issue moot, however, after finding no reason to send the records or custodian to Wisconsin because no hearing or trial date had been set.

¶ 5 On July 19, 2013, the circuit court sent a second certification stating that a criminal prosecution against Johnson was pending and again requesting that the custodian appear, testify, and produce documents for a trial set for January 6, 2014. The certification noted that PCS's custodian could send Johnson's treatment records in lieu of personally appearing. After receiving the certification, the superior court again issued an order to show cause. The superior court vacated its order, however after it learned that the January 6 trial date had been vacated.

¶ 6 On December 17, 2013, the circuit court issued a third certificate, repeating its request for the appearance of PCS's custodian with Johnson's treatment records—or the submission of the records in lieu of the custodian's appearance —at a hearing scheduled for March 26, 2014. The hearing's purpose was to review the records requested. The superior court issued a third order to show cause.

¶ 7 Johnson and PCS made several arguments why the court should not issue a summons. They argued that (1) the superior court was collaterally estopped from considering the certification because another superior court had denied the earlier certification for the lack of a trial date; (2) the current certification did not set forth a trial date and the case was currently pending review before the Wisconsin Supreme Court; and (3) the Uniform Act does not allow for subpoenas of documents. They also argued that, if the court issued the summons, the court must determine whether the requested records were protected under the psychologist-client privilege, because if the records were protected, the custodian would not be a material witness under the Uniform Act.

¶ 8 The State objected to Johnson's involvement in the matter, arguing that Johnson had no standing to object to the issuance of the summons. The State noted that although Johnson could object to the admission of the records based on psychologist-client privilege, the venue to resolve that issue was Wisconsin.

¶ 9 The court applied the Uniform Act and found that PCS's custodian was a material and necessary witness and that the custodian would be protected from arrest and service of process in Wisconsin. The court also found, however, sending the custodian to Wisconsin would be an undue hardship because the court was uncertain whether the hearing would occur, given that a proceeding was occurring in the Wisconsin Supreme Court.

¶ 10 The State moved for reconsideration, arguing that the March 26 hearing was still set to occur. The State attached a letter from a Wisconsin circuit court judge explaining that the March hearing would occur and that he would review the requested documents in camera. PCS and Johnson opposed this motion, arguing that because a trial date still had not been set, the request for the custodian did not comply with the Uniform Act. The State moved to strike Johnson's pleading, repeating its argument that Johnson lacked standing in the proceeding.

¶ 11 The court granted the motion for reconsideration, finding that the certification satisfied the Uniform Act's requirements. The court noted that it had already found that PCS's custodian was a material and necessary witness and that the custodian would be protected from arrest and service of process, and stated that it would now find that sending the custodian to Wisconsin would not be an undue hardship because the hearing would occur. The court also granted the State's motion to strike Johnson's pleadings in the matter. The court recognized that the Arizona Supreme Court had held in *Tracy v. Superior Court (Navajo Nation)*, 168 Ariz. 23, 43–44, 810 P.2d 1030, 1050–51 (1991), that matters of professional privileges should be resolved in the state requesting the summons, not in the state issuing the summons. Because Johnson had to pursue the privilege issue in the Wisconsin courts, the superior court ruled that he had no ***89 **222** standing to object to the issuance of the summons and that the court had no duty to review the records in camera to determine whether they were privileged. The superior court consequently issued a summons directing the custodian to produce the requested records and appear before the Wisconsin court at the hearing on March 26, 2014, or in lieu of personal appearance, to send the requested documents to the Wisconsin court.

¶ 12 PCS and Johnson separately petitioned for special action review of this order. This Court consolidated the special actions and stayed the order until further review. This Court heard oral argument on March 26, 2014.

MOOTNESS

[1] [2] ¶ 13 Because the summons was issued for a March 26 hearing and that date has since passed, whether the superior court erred in issuing it is moot. This Court will nevertheless consider moot issues when they have great public importance or are capable of repetition yet evade review. *Slade v. Schneider*, 212 Ariz. 176, 179 ¶ 15, 129 P.3d 465, 468 (App.2006). The Uniform Act's application to medical and psychological records is an issue of great public importance. It is also likely to recur in future cases, even in the litigation of this case. This Court learned after argument that Johnson's criminal trial is scheduled for July 14, 2014, and the Racine County Circuit Court may again request the records through the Uniform Act. This Court will therefore consider the issues presented and provide guidance.

JURISDICTION

[3] ¶ 14 We accept special action jurisdiction. PCS and Johnson have no adequate remedy by appeal because the custodian is ordered to produce documents regarding a client's medical records. Special action review is appropriate when a party is ordered to disclose what it believes is privileged information. *Blazek v. Superior Court*, 177 Ariz. 535, 536, 869 P.2d 509, 510 (App.1994).

DISCUSSION

¶ 15 Johnson and PCS present several arguments that the superior court erred in issuing a summons for PCS's custodian to appear before the Wisconsin court. Because these arguments involve questions of statutory interpretation and application, we review them de novo. *Obregon v. Indus. Comm'n*, 217 Ariz. 612, 614 ¶ 9, 177 P.3d 873, 875 (App.2008).

¶ 16 Arizona adopted the Uniform Act in 1937. *Tracy*, 168 Ariz., at 29, 810 P.2d at 1036. Because the Uniform Act is codified under Title 13 of the Arizona Revised Statutes—Arizona's Criminal Code—the Act must be interpreted "in a manner that will further effective criminal prosecution." *Id.* at 35, 810 P.2d at 1042. The Uniform Act also must be "so interpreted and construed as to effectuate its general purpose to make uniform the law of the states which enact it." A.R.S. § 13–4095.

¶ 17 The Uniform Act provides in relevant part that if a judge of a court of record in another state "certifies under the seal of such court that there is a criminal prosecution pending in such court ... that a person being within this state is a material witness in such prosecution ... and that his presence will be required," then a superior court judge in the Arizona county in which the person resides "shall fix a time and place for a hearing, and shall make an order directing the witness to appear at a time and place certain for a hearing." A.R.S. § 13–4092(A). At the hearing, the superior court shall accept the certificate as "prima facie evidence of all the facts stated therein" and determine whether (1) the witness is material and necessary, (2) no undue hardship results to the witness by attending and testifying in the prosecution or grand jury investigation, and (3) the laws of the state in which the prosecution is pending will give the witness protection from arrest and the service of civil and criminal process. A.R.S.

§ 13-4092(B). If those requirements are satisfied, the court shall issue a summons directing the witness to attend and testify in the court where the prosecution is pending. *Id.*

¶ 18 Here, the superior court followed this procedure. A judge of a Wisconsin court of *90 **223 record certified that a criminal prosecution was pending and that the testimony of the custodian was material and his presence required, and the superior court consequently held a hearing pursuant to § 13-4092(A). At the hearing, the superior court determined that the custodian was a material witness, no undue hardship would result from the custodian traveling to Wisconsin to appear and testify, and the custodian would have protection from arrest and service of process. Based on these findings, the superior court issued a summons requiring the custodian to appear before the Wisconsin court or to produce the requested records in lieu of attendance.

¶ 19 Many of the issues the petitioners raise are easily resolved. Although the parties argued about whether the March 26, 2014, hearing would occur and whether the Wisconsin Supreme Court's consideration of the criminal proceedings removed the circuit court's jurisdiction to conduct the hearing, the Wisconsin circuit court reaffirmed the hearing date after the Wisconsin Supreme Court's review. At the time the superior court considered the certification, the Wisconsin court had set a hearing for March 26, 2014, and that order remained in force.

[4] [5] ¶ 20 We also reject the argument that the superior court was collaterally estopped from considering the December 17, 2013, certification because it had previously found that Wisconsin's February 2012 certification was moot for lack of a trial date. Collateral estoppel—or issue preclusion—precludes a party from "relitigating an issue identical to one he has previously litigated to a determination on the merits in another action." *State ex rel. Winkleman v. Ariz. Navigable Stream Adjudication Comm'n,* 224 Ariz. 230, 244 ¶ 33, 229 P.3d 242, 256 (App.2010) (quoting *Hawkins v. State,* 183 Ariz. 100, 103, 900 P.2d 1236, 1239 (App.1995)). The issues in the two proceedings are not identical, however. The issue in the first proceeding was whether the February 2012 certification was sufficient when no trial date or hearing had been set in Wisconsin. The issue in the current proceeding is whether the December 17, 2013, certification was sufficient when a hearing date of March 26, 2014, had been specified. The superior court's ruling that the February certification was moot for lack of a trial date did not mean that the superior court could not consider a future certification when —as happened here—the Wisconsin court set another date for trial or hearing. The superior court thus was not estopped from considering the December 17 certification. [1]

[6] ¶ 21 Petitioners also argue the superior court could not issue a summons that also served as a subpoena for the production of documents. The Uniform Act makes no mention of producing documents; it only addresses the use of a summons to order witnesses in one state to testify in another state. A.R.S. § 13-4091(3) (Summons is defined as "a subpoena, order, or other notice requiring the appearance of a witness."). All of the states that have confronted this issue —except one—have held that in view of the Uniform Act's purpose and the broad construction of the word "subpoena," the Uniform Act authorizes the issuance of a subpoena duces tecum—a subpoena only for documents. *See Ex parte Simmons,* 668 So.2d 901 (Ala.Crim.App.1995); *CMI, Inc. v. Ulloa,* 73 So.3d 787 (Fla.Dist.Ct.App.2011); *Davenport v. State,* 289 Ga. 399, 711 S.E.2d 699, 701 (2011); *Application of a Grand Jury of State of New York,* 8 Mass.App.Ct. 760, 397 N.E.2d 686, 688 (1979); *In re Grand Jury Investigation,* 57 Md.App. 804, 471 A.2d 1141, 1147 (1989); *Wyman v. State,* 125 Nev. 592, 605, 217 P.3d 572 (2009); *but see In re Grothe,* 59 Ill.App.2d 1, 208 N.E.2d 581, 586 (1965) (holding that the Uniform Act did not permit production of documents) (overruling by state statute recognized in *Grand Jury Investigation,* 471 A.2d at 1147). No Arizona court has considered this issue. But given the Legislature's direction in § 13-4095 that the Uniform Act should be interpreted uniformly with the same law enacted in other states, and the statutory overruling of the only authority *91 **224 holding that the Uniform Act does not permit a subpoena for the production of documents, we agree the Uniform Act allows such a subpoena.

¶ 22 The central issue in this case, however, is whether the superior court should have considered the arguments that the records were protected under Arizona's medical records privacy laws and psychologist-client privilege before issuing the subpoena. A review of the applicable statutes and precedent shows that the records may be disclosed without violating Arizona's medical records privacy laws and that whether the records are privileged is for the Wisconsin courts to determine.

[7] ¶ 23 PCS argues that Arizona's medical records privacy statute, A.R.S. § 12-2292, precludes the disclosure of medical records that may be subpoenaed under the Uniform Act. This is not accurate. Of course § 12-2292(A) deems all medical

records and payment records privileged and confidential, but also allows disclosure "as authorized by state or federal law." Certain Arizona statutes do require disclosure. Section 12–2294(A) requires a health care provider to disclose medical records or payment records and "the information contained in medical records or payment records ... when ordered by a court or tribunal of competent jurisdiction," even without the patient's authorization. Section 12–2294.01 requires a health care provider to release medical records pursuant to a subpoena if it is accompanied by a court or tribunal order requiring the release of the records to a third party.

¶ 24 Under these statutes, PCS is required to disclose the records that pertain to its treatment of Johnson when ordered by a court of competent jurisdiction and must respond to a subpoena requiring the release of the records. The Maricopa County Superior Court is a "court of competent jurisdiction," and the court issued the necessary subpoena under the Uniform Act. Nothing in these privacy statutes precludes PCS from disclosing the medical records.

[8] ¶ 25 Johnson and PCS also maintain that the records are protected from disclosure under A.R.S. § 32–2085(A), which provides that a psychologist may not divulge information that is received "by reason of the confidential nature of the psychologist's practice." The confidential relations and communication between a client and a psychologist are protected on the same basis as relations and communications between a client and an attorney. *Id.* The superior court correctly declined to consider the applicability of the privilege to the records, however, because that is a question for the Wisconsin court to resolve.

¶ 26 The Arizona Supreme Court considered in *Tracy* whether the Arizona court must determine if evidence sought under the Uniform Act is protected under a constitutional or statutory privilege before issuing a subpoena. 168 Ariz. at 27, 43, 810 P.2d at 1034, 1050. Tracy, who was involved in a land transaction in the Navajo Nation, challenged a superior court order under the Uniform Act to appear and testify before the district court of the Navajo Nation in a criminal trial. *Id.* at 25, 810 P.2d at 1032. Tracy claimed that his testimony would not be material under the Uniform Act because he would invoke his constitutional right against self-incrimination. *Id.* at 27, 810 P.2d at 1034. Accountants and attorneys involved in the matter argued that compelling their attendance before the Navajo court would be an undue hardship because that court "might not recognize the Arizona statutory privileges for attorney-client and accountant-client relationships." *Id.* at 43, 810 P.2d at 1050.

¶ 27 Our supreme court rejected these arguments. The court held that a witness could not circumvent the Uniform Act by claiming an intent to invoke the privilege against self-incrimination, but must invoke the privilege in the proceeding when called to testify because "the privilege is a matter to be ruled on by the court conducting the trial." *Id.* at 27, 810 P.2d at 1034. The same rule applied to the statutory professional privileges: "Quite simply, the professional privileges are a matter for the requesting jurisdiction to rule on and are not appropriately addressed to the state court issuing the subpoena." *Id.* at 43, 810 P.2d at 1050. The court recognized that the professional privileges ***92 **225** are not constitutionally mandated and that "the laws of each jurisdiction may appropriately vary." *Id.* The court further noted that professional privileges "contravene the fundamental principle that 'the public has a right to every man's evidence,' and they are therefore strictly construed and weighed against other policy considerations." *Id.* (quoting *Trammel v. United States,* 445 U.S. 40, 50, 100 S.Ct. 906, 63 L.Ed.2d 186 (1980)). For that reason, the supreme court held that "we need not consider whether the courts of the Navajo Nation recognize the attorney-client or accountant-client privileges as those privileges exist in Arizona." *Id.*

¶ 28 Based on the supreme court's clear directive in *Tracy,* the superior court understandably—and correctly—held that whether Johnson's treatment records are protected under the psychologist-client privilege should be resolved in the Wisconsin court and that Johnson consequently had no standing to object to the issuance of the summons. The psychologist-client privilege is a statutorily created professional privilege, just like the attorney-client and accountant-client privileges. *See Ulibarri v. Superior Court,* 184 Ariz. 382, 387, 909 P.2d 449, 454 (App.1995). The superior court was bound to apply *Tracy,* and this Court is likewise bound. *See State v. Sullivan,* 205 Ariz. 285, 288 ¶ 15, 69 P.3d 1006, 1009 (App.2003) ("[W]e are constrained by the decisions of our supreme court and are not permitted 'to overrule, modify, or disregard them.' ") (quoting *City of Phoenix v. Leroy Liquors,* 177 Ariz. 375, 378, 868 P.2d 958, 961 (App.1993)).

[9] ¶ 29 PCS argues that *Tracy* is not controlling because it did not address privileges and privacy laws pertaining to medical records. Although the physician-patient and related privileges are undoubtedly important,

nothing distinguishes those privileges from the professional privileges *Tracy* addressed. The physician-patient privilege is not constitutionally required and it did not exist at common law. *Benton v. Superior Court,* 182 Ariz. 466, 469, 897 P.2d 1352, 1355 (App.1994). It has never been an absolute privilege, and it must be strictly construed. *Id.* The public policy of apprehending and prosecuting criminals often trumps the policy of the privilege. *See* A.R.S. § 13-3620(A) (any of the listed healthcare professionals (including psychologist) must report injury or abuse of minor to appropriate authorities); A.R.S. § 13-3620(K)(1) (no privilege except attorney-client privilege applies in any "[c]ivil or criminal litigation or administrative proceeding in which a minor's neglect, dependency, abuse, child abuse, physical injury or abandonment is an issue"); *State ex rel. Udall v. Superior Court,* 183 Ariz. 462, 466, 904 P.2d 1286, 1290 (App.1995) (holding that the physician-patient privilege did not shield the medical records of a mother charged with murdering her infant); *Benton,* 182 Ariz. at 468, 897 P.2d at 1354 ("We conclude that the privilege does not apply under the circumstances of this case because the public's interest in protecting victims outweighs the privacy interest reflected in the physician-patient privilege."). This is in keeping with *Tracy*'s recognition that professional privileges are strictly construed and weighed unfavorably against other policy considerations. 168 Ariz. at 43, 810 P.2d at 1050. *Tracy* applies with full force to the psychologist-client privilege.

¶ 30 Even were *Tracy* not controlling authority, however, it states the correct rule, for several reasons. First, *Tracy*'s holding is consistent with the Uniform Act's purposes. The Uniform Act was enacted to "require [ ] reciprocal cooperation among jurisdictions for the enforcement of witness attendance orders," and it must be interpreted to "further effective criminal prosecution." *Id.* at 35, 810 P.2d at 1042. Reserving the resolution of privilege issues for the requesting state reduces the procedural hurdles in obtaining a witness or evidence from another state, which increases cooperation among the states and furthers criminal prosecutions.

¶ 31 Second, *Tracy*'s holding is consistent by analogy with other uniform law statutes. Under the Uniform Criminal Extradition Act, codified in A.R.S. §§ 13-3841 to -3870.02, when a state submits the proper documentation for the extradition of a criminal suspect who resides in Arizona, the documentation "becomes prima facie evidence that the constitutional and statutory requirements for extradition have been met," and ***93 **226** the Arizona courts can review only whether (1) the documents on their face are in order, (2) the person has been charged with a crime in the requesting state, (3) the person residing in Arizona is the person named in the documentation, and (4) the person is a fugitive. *Golden v. Dupnik,* 151 Ariz. 227, 229, 726 P.2d 1096, 1098 (App.1986). Arizona courts cannot inquire into the person's guilt or innocence. A.R.S. § 13-3860.

¶ 32 The same principles apply to the Uniform Act. Once the requesting state presents the proper documentation under § 13-4092(A), which an Arizona court must accept as "prima facie evidence of all the facts stated therein," the court is limited to determining whether the requirements of § 13-4092(B) are met. The court has no interest in whether and to what extent the testimony or evidence in question is admissible in the requesting state court.

¶ 33 Third, *Tracy's* holding is consistent with conflict of laws principles that apply to privileges. The Restatement (Second) of Conflicts of Laws § 139(2) (1971) provides that the admission of evidence will be governed by the privilege law of the jurisdiction trying a matter, and not by the privilege law of the state that "has the most significant relationship" with the evidence, "unless there is some special reason why the forum policy favoring admission should not be given effect." Under this principle, the admission of Johnson's treatment records should be governed by Wisconsin—not Arizona—privilege law.

¶ 34 This does not mean that Johnson's treatment records are not privileged or should be admitted in evidence. This means only that whether and the extent to which the records are privileged is for the Wisconsin court to determine under Wisconsin law. Johnson and PCS will be free to contest that issue in that forum. [2] But Arizona has no authority under the Uniform Act to withhold the records because they may be privileged under Arizona law.

¶ 35 Other state courts have considered whether states issuing summons under the Uniform Act can decide privilege issues. Some agree with *Tracy. See, e.g., Codey v. Capital Cities, Am. Broadcasting Corp.,* 82 N.Y.2d 521, 605 N.Y.S.2d 661, 626 N.E.2d 636, 642 (1993) ("[T]he courts of the demanding jurisdiction are better qualified [to determine privilege questions], both because of their superior familiarity with local law and because of their direct access to the parties or the facts in the underlying controversy."); *In re Rhode Island Grand Jury Subpoena,* 414 Mass. 104, 605 N.E.2d 840, 845 (1993) (expressly agreeing with *Tracy).* Two

do not. *Holmes v. Winter*, 22 N.Y.3d 300, 980 N.Y.S.2d 357, 3 N.E.3d 694, 703–05 (2013); *People v. Marcy*, 91 Mich.App. 399, 283 N.W.2d 754, 757 & n. 4 (1979). But the courts that do not agree do so because they believe that the strength of the privileges involved in those cases outweigh any other interest. *See Holmes*, 3 N.E.3d at 703–05 (a divided court held that New York's interest in its journalist shield law overrode the general rule that privilege issues should be decided by the requesting state); *Marcy*, 283 N.W.2d at 757 & n. 4 (polygrapher's privilege is Michigan policy that Michigan courts are bound to enforce; polygrapher may lose polygrapher's license if forced to testify in requesting ***94 **227** state). PCS and Johnson make a similar argument, maintaining that Arizona has a strong policy interest in enforcement of its psychologist-client privilege statute because the privilege encourages clients to be honest with their psychologists, which furthers treatment. If the privilege is not honored, PCS and Johnson argue, clients will be deterred from disclosing the information necessary for successful treatment.

¶ 36 But weighty as this interest is, the Arizona Legislature and appellate courts have determined that the need to protect the victims of crime—particularly minor victims of physical or sexual abuse—weighs even more heavily. *See* A.R.S. § 13-3620; *Benton*, 182 Ariz. at 468, 897 P.2d at 1354. Thus, nothing argues against applying the accepted rule recognized in *Tracy* that privilege issues should be decided in the state that has requested the evidence.

¶ 37 Johnson and PCS can nevertheless argue to the Wisconsin court that it should honor Arizona's privilege because Johnson and PCS relied on the confidentiality of that privilege in seeking and providing treatment. Although conflict of law principles provide that the privilege law of the state trying a matter controls, a court may deviate from that principle if "countervailing considerations" exist. Restatement (Second) of Conflict of Laws § 139, cmt. d (1971). A court "will be more inclined to give effect to a privilege if it was probably relied on by the parties." *Id.* Johnson and PCS will have authority to argue that Wisconsin should apply Arizona law in deciding whether the treatment records are privileged from disclosure. But the resolution of that argument is for the Wisconsin court.

¶ 38 The superior court did not err in declining to consider whether the treatment records were privileged under Arizona law in determining whether to issue the summons under the Uniform Act. The superior court made no other error and properly issued the summons.

CONCLUSION

¶ 39 For these reasons, we accept jurisdiction but deny relief. The stay previously entered in this case is lifted, and we remand this matter to the superior court for further proceedings consistent with this opinion.

GEMMILL, Judge, Specially Concurring.

¶ 40 Because I conclude that the Arizona Supreme Court's opinion in *Tracy v. Superior Court (Navajo Nation)*, 168 Ariz. 23, 810 P.2d 1030 (1991), controls our decision in this case, I concur in the denial of special action relief and agree substantially with the reasoning of Judge Howe's opinion.

CATTANI, Judge, Concurring in Part, Dissenting in Part.

¶ 41 I agree that the superior court had authority to issue a summons that also served as a subpoena for producing documents. I respectfully disagree, however, with the majority's conclusion that the superior court properly ordered disclosure of records—including group therapy documents—without first determining whether PCS's client records are privileged or confidential under Arizona law. *See* A.R.S. § 12–2292(A) ("Unless otherwise provided by law, all medical records ... and the information contained in medical records ... are privileged and confidential."). In my view, communications that take place in Arizona are subject to Arizona law, and Arizona courts should apply that law before ordering the release of privileged or confidential documents sought for use in a prosecution in another jurisdiction.

¶ 42 The Uniform Act to Secure the Attendance of Witnesses From Without a State in Criminal Proceedings, as codified in Arizona in A.R.S. §§ 13–4091 to –4096, does not by its terms require disclosure of privileged or confidential communications without first determining whether the law of the jurisdiction in which the communications occurred precludes disclosure. As noted in the majority opinion, other states have in fact chosen to undertake such an analysis before ordering disclosure under the Uniform Act, and there has been no suggestion that this approach violates any provision of the Act.

¶ 43 Implicitly acknowledging that the Act does not preclude the requested privilege/confidentiality review, the majority bases its ruling on an interpretation of the Arizona *95 **228 Supreme Court's decision in *Tracy v. Superior Court*, 168 Ariz. 23, 810 P.2d 1030 (1991), which the majority concludes has provided a "clear directive" mandating that the question of whether Johnson's treatment records are confidential or protected under the psychologist-client privilege is an issue to be resolved in the Wisconsin courts. But *Tracy* involved only a request under the Act that witnesses be ordered to testify in a foreign jurisdiction notwithstanding their stated intent to assert privileges against self-incrimination or relating to the attorney-client or accountant-client relationship were they to be called to testify in the foreign jurisdiction. *Id.* at 26–27, 810 P.2d at 1033–34. *Tracy* did not involve a request for production of *records*, and it did not address whether records of communications that took place in one jurisdiction should be reviewed for privilege or other confidentiality concerns under the laws of that jurisdiction before being sent to another jurisdiction. *See id.*

¶ 44 In *Tracy*, the Navajo Nation prosecuted its former Chairman and his son for an alleged conspiracy with several non-Indian businessmen to buy land and then sell it to the Navajo Nation at a profit. *Id.* at 26, 810 P.2d at 1033. Prior to filing a complaint, a special prosecutor recommended that the Navajo Tribal Council enact the Uniform Act, which the Council did. *Id.* A tribal court thereafter issued certificates under the Act seeking to compel the attendance of Tracy and other Maricopa County residents to testify at trial. *Id.* Tracy was a principal in Tracy Oil & Gas Co., which had optioned a ranch in Northern Arizona for $26,250,000, then sold the ranch several months later to the Navajo Nation for $33,400,000. *Id.*

¶ 45 After a Maricopa County Superior Court judge signed orders compelling Tracy and the others to appear in tribal court, they sought special action relief. *Id.* at 26–27, 810 P.2d at 1033–34. After this court declined to accept jurisdiction, the Arizona Supreme Court granted review to address, among other issues, whether the Navajo Nation is a state or territory within the meaning of the Uniform Act, and whether Tracy and the other petitioners would face hardship under A.R.S. § 13–4092(B) because "they [intended to] claim privileges that will not be recognized by the Navajo District Court and hence will risk being jailed unless they 'waive those rights.' " *Id.* at 27, 810 P.2d at 1034.

¶ 46 The Arizona Supreme Court concluded after extensive analysis that the Navajo Nation is a qualifying "territory" under the Uniform Act. *Id.* at 27–39, 810 P.2d at 1034–46. The court also addressed Tracy's claim that he would sacrifice his Fifth Amendment privilege against self-incrimination if haled into tribal court because that constitutional provision does not bind Indian tribes. Our supreme court reasoned that "[a] witness cannot circumvent the Uniform Act by claiming his *intent* to assert the privilege [against self-incrimination] before the questions are actually posed in the proceeding to which the privilege will pertain." *Id.* at 27, 810 P.2d at 1034. The court further stated its belief that "when testifying in tribal court, Tracy will enjoy a federally imposed privilege against self-incrimination that is substantially coextensive with the fifth amendment privilege." *Id.* at 41, 810 P.2d at 1048.

¶ 47 Finally, the court addressed the other petitioners' assertion that they (lawyers and accountants to the parties involved in the land transaction) should not be required to testify because "the Navajo District Court might not recognize the Arizona statutory privileges for attorney-client and accountant-client relationships." *Id.* at 43 & n. 20, 810 P.2d at 1050 & n. 20. Citing a Maryland case, *In re Cal. Grand Jury Investigation*, 57 Md.App. 804, 471 A.2d 1141, 1145 (1984), the court stated that, "[q]uite simply, the professional privileges are a matter for the requesting jurisdiction to rule on and are not appropriately addressed to the state court issuing the subpoena." *Tracy*, 168 Ariz. at 43, 810 P.2d at 1050. The court further noted that professional privileges "are not based on any constitutional mandate, [and] the laws of each jurisdiction may appropriately vary," and concluded that "[w]e do not believe that petitioners face any undue hardship by having the Navajo District Court rule on the merits of their privilege arguments at the time the testimony is sought." *96 **229 *Id.* at 43–44, 810 P.2d at 1050–51.[3]

¶ 48 The majority urges that the above-quoted language from *Tracy* regarding professional privileges encompasses the issues raised in this case. But that discussion only addresses in-court *testimony*, and not the production of documents. *See id.* at 26–27, 810 P.2d at 1033–34. That distinction is important because, if a witness is ordered to appear in court, the witness retains the right and ability to disclose or decline to disclose information, and can choose to invoke a privilege and remain silent, albeit at the risk of being found in contempt. In contrast, if a court orders that documents be disclosed, once the documents are released, the information cannot be recalled, and the holder of a privilege does not have the

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option of "remaining silent." That distinction is particularly important in this case, where privileged and confidential communications include information from third parties who participated in group therapy sessions with Johnson, and whose confidential communications run the risk of disclosure without any opportunity to assert a right to "remain silent."

¶ 49 Furthermore, *Tracy*'s holding did not specifically address whether communications that occurred in Arizona are subject to disclosure if the "foreign" jurisdiction's privilege and confidentiality laws differ from Arizona's. Although *Tracy* noted broadly that the "laws [relating to professional privileges] of each jurisdiction may appropriately vary," *id.* at 43, 810 P.2d at 1050, it is not clear whether the communications or activities at issue in that case took place in Arizona (outside of tribal land), and the opinion in fact can be read to suggest that Tracy's conduct took place on the Navajo reservation. *See id.* at 26, 810 P.2d at 1033 ("The Navajo District Court does not have jurisdiction to prosecute non-members of the Navajo tribe, *even for crimes committed in Indian Country,* so Tracy is not the subject of any pending or prospective tribal prosecution." (emphasis added)). Assuming Tracy's conduct took place on the reservation, the Arizona Supreme Court's broad statement regarding professional privileges suggests only that Arizona citizens are not entitled to the protections of Arizona law for activity that occurred on tribal land.

¶ 50 Unlike *Tracy,* in the instant case, there is no question that the communications at issue took place in Arizona and not in the requesting state (Wisconsin). Accordingly, we are faced with issues not specifically addressed in *Tracy:* does the law of the state in which the communications took place govern whether the communications are privileged or confidential, and if so, which state should determine how to apply that law?

¶ 51 As to the issue of which state's law governs whether the communications are privileged or confidential, the Maryland case on which the Arizona Supreme Court relied in *Tracy* in its discussion of professional privileges is instructive and compels the conclusion that the site of the communication is dispositive. *See id.* at 43, 810 P.2d at 1050. In *In re California Grand Jury Investigation,* a Maryland court responded to a request from a California court seeking a subpoena to require a Maryland reporter to testify in a California proceeding. 471 A.2d at 1142–43. The Maryland court issued the subpoena after rejecting the reporter's assertion that the Maryland Press Shield Law should be applied to protect from disclosure the reporter's discussions with an informant. *Id.* at 1145. But the Maryland court rejected the reporter's assertion not because the court was willing to defer interpretation of Maryland law to the California court, but rather because the communications at issue took place in California and not in Maryland. *Id.* (holding that the reporter "will have to look to California law for protection, because whatever occurred between [the reporter] and [his source] took place in California, not Maryland"). Applying that same logic here dictates that the law of the jurisdiction in which the communications took place determines ***97 **230** whether the communication is privileged and/or confidential.

¶ 52 Because the law of the jurisdiction where the communications took place governs, courts from that jurisdiction are best situated to address whether the communications are privileged and/or confidential under the law of that jurisdiction. In fact, to leave the analysis to another jurisdiction could lead to inconsistent interpretations and applications of the law of the jurisdiction where the communications took place.

¶ 53 Here, Arizona courts are the appropriate forum in which to apply and interpret Arizona law governing psychotherapist-patient privilege and confidentiality. Accordingly, the superior court should have reviewed the documents sought by subpoena to determine whether they include privileged and/or confidential information, and if so, whether the documents should be redacted before being sent to the requesting jurisdiction.

¶ 54 Although my colleagues acknowledge a "weighty" interest in enforcing Arizona's psychologist-client privilege statute, they nevertheless assert that the Arizona Legislature and appellate courts have determined that the need to protect the victims of crime—particularly minor victims of physical or sexual abuse—weighs even more heavily. But to the extent legislative pronouncements regarding privilege and confidentiality issues are seen to conflict with legislative pronouncements under the Uniform Act, the more specific privilege and confidentiality provisions control, rather than the general provisions of the Act. *See Lange v. Lotzer,* 151 Ariz. 260, 261, 727 P.2d 38, 39 (App.1986). Moreover, the majority's position reads too much into the Legislature's adoption of the Uniform Act, since the Act itself does not require a state to ignore its privilege/confidentiality concerns. And the Act obviously does not change the degree to which victims of crime are protected in cases involving crimes committed in Arizona. The majority points to nothing in the Act or its legislative history that would suggest that

the Legislature intended greater protections for victims of crimes committed in other states than for victims of crimes committed in Arizona.

¶ 55 Requiring the superior court to undertake a privilege/confidentiality review before sending documents to another state would simply ensure that Arizona-specific provisions (as adopted by the Legislature or by Arizona courts) relating to privilege and confidentiality are applied to communications that take place in Arizona. In contrast, the majority's position abrogates the responsibility to interpret Arizona legislative and judicial pronouncements regarding privilege and confidentiality to courts of another state, which may or may not apply Arizona law, and even if the foreign state chooses to apply Arizona law, the foreign state may or may not interpret it in the same way that Arizona courts would interpret it.

¶ 56 The Wisconsin trial judge who will review the records after they are sent from Arizona has indicated that "the information requested from Arizona, if relevant and compliant with Wisconsin evidentiary rules, is admissible at the trial in this matter." That statement does not indicate, however, whether Wisconsin evidentiary rules require application of the law of the jurisdiction where communications took place in addressing privilege/confidentiality issues. But regardless whether the Wisconsin court intends to apply Arizona law, and regardless whether Wisconsin law regarding patient/client privilege is substantially similar to Arizona law, in my view, the documents memorializing communications that took place in Arizona are subject to Arizona law, which should be interpreted by Arizona courts.

¶ 57 Furthermore, leaving to a foreign jurisdiction the decision whether and how to apply Arizona privilege and confidentiality concerns places Arizona patients and treating professionals in an untenable position in which there is uncertainty as to what types of communications are protected from disclosure. Patients and treating professionals who engage in communications in Arizona should not be required to know the laws and rules regarding disclosure of confidential information in jurisdictions outside Arizona. *See* Restatement (Second) of Conflict of Laws § 139(2) cmt. d (1971) (courts should consider "fairness to the parties"—particularly reliance on local privilege or strict confidence *98 **231 —in determining whether law of the state where the communication took place should trump forum law). Leaving unanswered the question of what law governs the scope of confidentiality is unfair to patients and treating professionals—and could in fact discourage patients from seeking counseling. *State v. Wilson*, 200 Ariz. 390, 393, ¶ 5, 26 P.3d 1161, 1164 (App.2001) (noting that a major purpose behind the Arizona Legislature's enactments furthering patient privacy and extending testimonial privileges to written medical records is to "encourag[e] full and frank disclosure of medical history and symptoms by a patient to his doctor").

¶ 58 Finally, there is no inherent unfairness in having an Arizona court review documents relating to Arizona communications for privilege and confidentiality concerns under Arizona law before ordering disclosure of the documents to another jurisdiction. Significantly, the communications at issue would have remained private but for a provision in Arizona law (A.R.S. § 13-3620) that imposes a duty on certain categories of individuals (including mental health professionals) to immediately report to law enforcement instances of child abuse of which they become aware. But that provision does not eliminate other privilege and confidentiality concerns that may require that information in records detailing alleged child abuse be redacted before the records are disseminated or otherwise made public. *See Wilson*, 200 Ariz. at 395, ¶ 11, 26 P.3d at 1166 (declining to carve out a broad "crime-fraud exception" to a defendant's right to assert the physician-patient privilege); *Benton v. Superior Court*, 182 Ariz. 466, 468, 897 P.2d 1352, 1354 (App.1994) (holding that before medical records may be disclosed without the patient's consent in a criminal case, the court must balance "the public's interest in protecting victims" with "the privacy interest reflected in the physician-patient privilege"). In sum, when Arizona law is used to obtain otherwise confidential information, the parameters set forth under Arizona law for disclosure of that confidential information should also be applied.

¶ 59 In my view, the request for disclosure of documents reflecting communications that took place in Arizona should be treated the same as if the request were made by Arizona prosecutors seeking disclosure of documents in an Arizona case. I would thus accept jurisdiction and reverse the superior court's finding that the court is not required to undertake a privilege/confidentiality review before ordering that the documents at issue be disclosed for use in a Wisconsin prosecution.

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Footnotes

1 Johnson and PCS also argue that the "law of the case" doctrine bars the superior court from considering the December 17 certification. But that doctrine is inapplicable for the same reason: the question at issue and the facts are not the same in both proceedings. *See State v. Johnson*, 229 Ariz. 475, 482 ¶ 22, 276 P.3d 544, 551 (App.2012).

2 The dissent expresses concern that once the superior court issues the summons and the medical records are sent to Wisconsin, the records are disclosed and "the information cannot be recalled," which will necessarily defeat any privilege Johnson or the other group therapy patients may have in the medical records. (Dissent, ¶ 48.) But the issuance of the summons does not necessarily disclose the records in a way that vitiates their privilege. The purpose of the March 26, 2014, hearing was for the Racine County Circuit Court to review the records in camera to determine their admissibility. If the court had determined that the records were privileged under Wisconsin law, the records would not have been disclosed, and Johnson's and the other patients' interest in the privacy of those records would have been maintained. Moreover, because the records as they pertain to Johnson's fellow group therapy patients are likely irrelevant to the issues in Johnson's criminal trial, the risk to the fellow group therapy patients that their records would have been disclosed and admitted was likely nonexistent. *See* Wis. Stat. § 904.02 ("Evidence which is not relevant is not admissible."). Moreover, if a health care provider is concerned that medical records will be disclosed merely by complying with a summons issued under the Uniform Act, it may ask the superior court to seal the records until the receiving state determines whether the records are privileged.

3 The Arizona Supreme Court also quoted this court's order declining jurisdiction, which noted that, although the Navajo Nation might not have initially been an intended participant in the Uniform Act, "a majority of this court considers the Navajo Tribal Courts to now provide those safeguards and procedures recognized by courts of other states, including the constitutional protection against self-incrimination and the statutory privilege associated with attorney/accountant/client communication." *Tracy*, 168 Ariz. at 27, 810 P.2d at 1034 (citation omitted).

End of Document

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ATTACHMENT J

ARIZONA COMMISSION ON JUDICIAL PERFORMANCE REVIEW

Appellate Courts

Name of Judge: Total Surveys: 186 Assignment: Appellate Cycle: Retention Election

APP-04 Hon. Kent Cattani	ATTORNEY UN	PO	SA	VG	SU	63 Valid	59 Mean	PEER JUDGE/JUSTICE UN	PO	SA	VG	SU	14 Total	Mean	SUP COURT JUDGE UN	PO	SA	VG	SU	41 Total	Mean	STAFF UN	PO	SA	VG	SU	5 Total	4 Mean
Section I: Legal Ability	**3**	**7**	**5**	**12**	**37**	**63**	**3.2**	**0**	**0**	**2**	**4**	**8**	**14**	**3.4**	**0**	**0**	**8**	**8**	**23**	**39**	**3.4**							
Legal reasoning ability	3	6	5	14	36	64	3.2	0	0	2	3	9	14	3.5	0	0	9	7	23	39	3.4							
Knowledge of law	1	9	2	16	35	63	3.2	0	0	2	5	7	14	3.4	0	0	7	9	23	39	3.4							
Decisions based on law and facts	5	6	6	9	37	63	3.1	0	0	2	4	8	14	3.4	0	0	8	9	22	39	3.4							
Clearly written, legally supported decisions	2	6	6	10	39	63	3.2	0	0	1	5	8	14	3.5	0	1	7	8	23	39	3.4							
Section II: Integrity	**1**	**1**	**0**	**6**	**22**	**29**	**3.5**	**0**	**0**	**0**	**1**	**12**	**13**	**3.9**	**0**	**0**	**1**	**5**	**20**	**26**	**3.7**	**0**	**0**	**0**	**0**	**9**	**9**	**4.0**
Basic fairness and impartiality	1	5	3	10	33	52	3.3	0	0	1	1	12	14	3.8	0	0	2	5	23	30	3.7	0	0	0	0	9	9	4.0
Equal treatment regardless of race	1	0	0	5	19	25	3.6	0	0	0	1	12	13	3.9	0	0	1	5	19	25	3.7	0	0	0	0	9	9	4.0
Equal treatment regardless of gender	2	0	0	5	24	31	3.6	0	0	0	1	12	13	3.9	0	0	1	5	21	27	3.7	0	0	0	0	9	9	4.0
Equal treatment regardless of religion	1	0	0	5	19	25	3.6	0	0	0	1	12	13	3.9	0	0	1	6	17	24	3.7	0	0	0	0	9	9	4.0
Equal treatment regardless of national origin	1	0	0	5	19	25	3.6	0	0	0	1	12	13	3.9	0	0	1	5	19	25	3.7	0	0	0	0	9	9	4.0
Equal treatment regardless of disability	1	0	0	5	19	25	3.6	0	0	0	1	12	13	3.9	0	0	1	5	19	25	3.7	0	0	0	0	9	9	4.0
Equal treatment regardless of age	2	0	0	5	19	26	3.5	0	0	0	1	12	13	3.9	0	0	1	5	19	25	3.7	0	0	0	0	9	9	4.0
Equal treatment regardless of sexual orientation	1	0	0	5	19	25	3.6	0	0	0	1	12	13	3.9	0	0	1	5	19	25	3.7	0	0	0	0	9	9	4.0
Equal treatment regardless of economic status	2	1	0	5	23	31	3.5	0	0	0	1	12	13	3.9	0	0	1	5	20	26	3.7	0	0	0	0	9	9	4.0
Section III: Communication Skills	**0**	**0**	**6**	**14**	**26**	**46**	**3.4**	**0**	**0**	**0**	**3**	**10**	**14**	**3.8**								**0**	**0**	**0**	**1**	**4**	**5**	**3.8**
Attentiveness	0	0	6	21	34	61	3.5	0	0	0	3	11	14	3.8														
Demeanor in communications with counsel	0	0	8	17	31	56	3.4																					
Appropriate restrictions on counsel during argument	0	0	0	1	3	4	3.8	0	0	0	3	10	13	3.8														
Relevant questions	0	1	10	15	32	58	3.3	0	0	0	4	10	14	3.7														
Preparation for oral argument	0	0	7	16	29	52	3.4																					
Clear and logical communications																						0	0	0	1	4	5	3.8
Section IV: Judicial temperament	**0**	**0**	**6**	**16**	**34**	**56**	**3.5**	**0**	**0**	**1**	**3**	**11**	**14**	**3.8**								**0**	**0**	**0**	**0**	**8**	**8**	**4.0**
Understanding and compassion																						0	0	0	0	5	5	4.0
Dignified	0	1	5	17	34	57	3.5	0	0	0	3	11	14	3.8								0	0	0	0	9	9	4.0
Courteous	0	0	6	16	34	56	3.5	0	0	0	3	11	14	3.8								0	0	0	0	9	9	4.0
Patient	0	0	6	15	34	55	3.5	0	0	0	3	11	14	3.8								0	0	0	0	9	9	4.0
Conduct that promotes public confidence in the court	0	0	7	15	33	55	3.5	0	0	2	1	11	14	3.6								0	0	0	1	8	9	3.9
Section V: Administrative Performance	**0**	**4**	**17**	**11**	**27**	**59**	**3.0**	**1**	**1**	**3**	**2**	**8**	**14**	**3.1**	**0**	**1**	**4**	**11**	**16**	**32**	**3.3**	**0**	**0**	**0**	**2**	**7**	**8**	**3.8**
Punctual in conducting proceedings																						0	0	0	3	5	8	3.6
Maintains proper control over courtroom																						0	0	0	1	7	8	3.9
Prepared for proceedings								0	0	3	2	9	14	3.4								0	0	0	2	6	8	3.8
Respectful treatment of staff																						0	0	0	1	8	9	3.9
Cooperation with peers																						0	0	0	1	8	9	3.9
Cooperation with staff																						0	0	0	1	8	9	3.9
Efficient management of calendar																						0	0	0	2	6	8	3.8
Promptness in making rulings and rendering decisions	0	4	17	11	27	59	3.0	1	2	3	1	7	14	2.8	0	1	4	11	16	32	3.3							
Works effectively with other judges								1	0	2	4	7	14	3.1														
Works effectively with other court personnel								0	0	3	1	9	13	3.5														
Effective handling of ongoing workload								1	2	2	2	7	14	2.9														

UN=Unacceptable, PO=Poor,
SA=Satisfactory, VG=Very Good,
SU=Superior

Category summaries are averages and may not add up due to rounding.

Surveys were distributed to court users from 04/2013 - 03/2016

ARIZONA COMMISSION ON JUDICIAL PERFORMANCE REVIEW

Appellate Courts

Name of Judge: Total Surveys: 186 Assignment: Appellate Cycle: Retention Election

APP-04 Hon. Kent Cattani	ATTORNEY UN	PO	SA	VG	SU	63 59 Mean	PEER JUDGE/JUSTICE UN	PO	SA	VG	SU	14 Mean	SUP COURT JUDGE UN	PO	SA	VG	SU	41 Mean	STAFF UN	PO	SA	VG	SU	5 4 Mean
Section I: Legal Ability	**4%**	**11%**	**8%**	**19%**	**58%**	**3.2**	**0%**	**0%**	**13%**	**30%**	**57%**	**3.4**	**0%**	**1%**	**20%**	**21%**	**58%**	**3.4**						
Legal reasoning ability	5%	9%	8%	22%	56%	3.2	0%	0%	14%	21%	64%	3.5	0%	0%	23%	18%	59%	3.4						
Knowledge of law	2%	14%	3%	25%	56%	3.2	0%	0%	14%	36%	50%	3.4	0%	0%	18%	23%	59%	3.4						
Decisions based on law and facts	8%	10%	10%	14%	59%	3.1	0%	0%	14%	29%	57%	3.4	0%	0%	21%	23%	56%	3.4						
Clearly written, legally supported decisions	3%	10%	10%	16%	62%	3.2	0%	0%	7%	36%	57%	3.5	0%	3%	18%	21%	59%	3.4						
Section II: Integrity	**5%**	**2%**	**1%**	**19%**	**73%**	**3.5**	**0%**	**0%**	**1%**	**8%**	**92%**	**3.9**	**0%**	**0%**	**4%**	**20%**	**76%**	**3.7**	**0%**	**0%**	**0%**	**0%**	**100%**	**4.0**
Basic fairness and impartiality	2%	10%	6%	19%	63%	3.3	0%	0%	7%	7%	86%	3.8	0%	0%	7%	17%	77%	3.7	0%	0%	0%	0%	100%	4.0
Equal treatment regardless of race	4%	0%	0%	20%	76%	3.6	0%	0%	0%	8%	92%	3.9	0%	0%	4%	20%	76%	3.7	0%	0%	0%	0%	100%	4.0
Equal treatment regardless of gender	6%	0%	0%	16%	77%	3.6	0%	0%	0%	8%	92%	3.9	0%	0%	4%	19%	78%	3.7	0%	0%	0%	0%	100%	4.0
Equal treatment regardless of religion	4%	0%	0%	20%	76%	3.6	0%	0%	0%	8%	92%	3.9	0%	0%	4%	25%	71%	3.7	0%	0%	0%	0%	100%	4.0
Equal treatment regardless of national origin	4%	0%	0%	20%	76%	3.6	0%	0%	0%	8%	92%	3.9	0%	0%	4%	20%	76%	3.7	0%	0%	0%	0%	100%	4.0
Equal treatment regardless of disability	4%	0%	0%	20%	76%	3.6	0%	0%	0%	8%	92%	3.9	0%	0%	4%	20%	76%	3.7	0%	0%	0%	0%	100%	4.0
Equal treatment regardless of age	8%	0%	0%	19%	73%	3.5	0%	0%	0%	8%	92%	3.9	0%	0%	4%	20%	76%	3.7	0%	0%	0%	0%	100%	4.0
Equal treatment regardless of sexual orientation	4%	0%	0%	20%	76%	3.6	0%	0%	0%	8%	92%	3.9	0%	0%	4%	20%	76%	3.7	0%	0%	0%	0%	100%	4.0
Equal treatment regardless of economic status	6%	3%	0%	16%	74%	3.5	0%	0%	0%	8%	92%	3.9	0%	0%	4%	19%	77%	3.7	0%	0%	0%	0%	100%	4.0
Section III: Communication Skills	**0%**	**0%**	**13%**	**30%**	**56%**	**3.4**	**0%**	**0%**	**0%**	**24%**	**76%**	**3.8**							**0%**	**0%**	**0%**	**20%**	**80%**	**3.8**
Attentiveness	0%	0%	10%	34%	56%	3.5	0%	0%	0%	21%	79%	3.8												
Demeanor in communications with counsel	0%	0%	14%	30%	55%	3.4																		
Appropriate restrictions on counsel during argument	0%	0%	0%	25%	75%	3.8	0%	0%	0%	23%	77%	3.8												
Relevant questions	0%	2%	17%	26%	55%	3.3	0%	0%	0%	29%	71%	3.7												
Preparation for oral argument	0%	0%	13%	31%	56%	3.4																		
Clear and logical communications																			0%	0%	0%	20%	80%	3.8
Section IV: Judicial temperament	**0%**	**0%**	**11%**	**28%**	**61%**	**3.5**	**0%**	**0%**	**4%**	**18%**	**79%**	**3.8**							**0%**	**0%**	**0%**	**2%**	**98%**	**4.0**
Understanding and compassion																			0%	0%	0%	0%	100%	4.0
Dignified	0%	2%	9%	30%	60%	3.5	0%	0%	0%	21%	79%	3.8							0%	0%	0%	0%	100%	4.0
Courteous	0%	0%	11%	29%	61%	3.5	0%	0%	0%	21%	79%	3.8							0%	0%	0%	0%	100%	4.0
Patient	0%	0%	11%	27%	62%	3.5	0%	0%	0%	21%	79%	3.8							0%	0%	0%	0%	100%	4.0
Conduct that promotes public confidence in the court	0%	0%	13%	27%	60%	3.5	0%	0%	14%	7%	79%	3.6							0%	0%	0%	11%	89%	3.9
Section V: Administrative Performance	**0%**	**7%**	**29%**	**19%**	**46%**	**3.0**	**4%**	**6%**	**19%**	**14%**	**57%**	**3.1**	**0%**	**3%**	**13%**	**34%**	**50%**	**3.3**	**0%**	**0%**	**0%**	**19%**	**81%**	**3.8**
Punctual in conducting proceedings																			0%	0%	0%	38%	63%	3.6
Maintains proper control over courtroom																			0%	0%	0%	13%	88%	3.9
Prepared for proceedings							0%	0%	21%	14%	64%	3.4							0%	0%	0%	25%	75%	3.8
Respectful treatment of staff																			0%	0%	0%	11%	89%	3.9
Cooperation with peers																			0%	0%	0%	11%	89%	3.9
Cooperation with staff																			0%	0%	0%	11%	89%	3.9
Efficient management of calendar																			0%	0%	0%	25%	75%	3.8
Promptness in making rulings and rendering decisions	0%	7%	29%	19%	46%	3.0	7%	14%	21%	7%	50%	2.8	0%	3%	13%	34%	50%	3.3						
Works effectively with other judges							7%	0%	14%	29%	50%	3.1												
Works effectively with other court personnel							0%	0%	23%	8%	69%	3.5												
Effective handling of ongoing workload							7%	14%	14%	14%	50%	2.9												

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Surveys were distributed to court users from 04/2013 - 03/2016

Friday, June 24, 2016

JPR Vote Results

ARIZONA COMMISSION ON JUDICIAL PERFORMANCE REVIEW
VOTE MEETING * JUNE 24, 2016

MEETS STANDARDS	DOES NOT MEET	NOT VOTING	JUDGE	COURT
32	0	0	Hon. Ann A. Scott Timmer	Supreme Court
32	0	0	Hon. Michael Brown	Court of Appeals-Division I
32	0	0	Hon. Kent Cattani	Court of Appeals-Division I
32	0	0	Hon. Kenton Jones	Court of Appeals-Division I
32	0	0	Hon. Jon Thompson	Court of Appeals-Division I
32	0	0	Hon. Lawrence Winthrop	Court of Appeals-Division I
32	0	0	Hon. Michael Miller	Court of Appeals-Division II
32	0	0	Hon. Susan Brnovich	Maricopa County Superior Court
32	0	0	Hon. David Gass	Maricopa County Superior Court
14	17	1	Hon. Jo Lynn Gentry	Maricopa County Superior Court
31	0	1	Hon. Douglas Gerlach	Maricopa County Superior Court
32	0	0	Hon. John Hannah	Maricopa County Superior Court
32	0	0	Hon. Lori Bustamante	Maricopa County Superior Court
32	0	0	Hon. Karen Mullins	Maricopa County Superior Court
32	0	0	Hon. Robert Oberbillig	Maricopa County Superior Court
32	0	0	Hon. Patricia Starr	Maricopa County Superior Court
32	0	0	Hon. David Udall	Maricopa County Superior Court
32	0	0	Hon. Andrew Klein	Maricopa County Superior Court
32	0	0	Hon. Christopher Whitten	Maricopa County Superior Court
32	0	0	Hon. Jay Adleman	Maricopa County Superior Court
32	0	0	Hon. Christopher Coury	Maricopa County Superior Court
32	0	0	Hon. Pamela Gates	Maricopa County Superior Court
32	0	0	Hon. Michael Gordon	Maricopa County Superior Court
32	0	0	Hon. Michael Kemp	Maricopa County Superior Court
32	0	0	Hon. Daniel Kiley	Maricopa County Superior Court
32	0	0	Hon. Margaret Mahoney	Maricopa County Superior Court
32	0	0	Hon. M. Scott McCoy	Maricopa County Superior Court
32	0	0	Hon. Jose Padilla	Maricopa County Superior Court
32	0	0	Hon. Teresa Sanders	Maricopa County Superior Court
32	0	0	Hon. Sherry Stephens	Maricopa County Superior Court
32	0	0	Hon. Suzanne Cohen	Maricopa County Superior Court
31	1	0	Hon. Jeanne Garcia	Maricopa County Superior Court
32	0	0	Hon. Paul McMurdie	Maricopa County Superior Court
32	0	0	Hon. Kathleen Mead	Maricopa County Superior Court
32	0	0	Hon. Joseph Mikitish	Maricopa County Superior Court
32	0	0	Hon. Timothy Thomason	Maricopa County Superior Court
32	0	0	Hon. Peter Thompson	Maricopa County Superior Court
32	0	0	Hon. James Beene	Maricopa County Superior Court
32	0	0	Hon. Rodrick Coffey	Maricopa County Superior Court
32	0	0	Hon. Bruce Cohen	Maricopa County Superior Court
32	0	0	Hon. Connie Contes	Maricopa County Superior Court