

**APPLICATION FOR NOMINATION TO
JUDICIAL OFFICE**

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

**SECTION I: PUBLIC INFORMATION
(QUESTIONS 1 THROUGH 71)**

PERSONAL INFORMATION

1. Full Name: Robert J. McWhirter

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

3. Office Address: 101 North 1st Avenue, Suite 950, Phoenix Arizona 85003

4. When have you been a resident of Arizona? Life

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

6. Age: 54

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

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

Democrat, since 1980.

(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: 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.

- Arizona State University, August 1980 - December 1983, Bachelor of Arts, *magna cum laude*.
- Arizona State University College of Law, August 1985 - May 1988, Juris doctorate.

10. List major and minor fields of study and extracurricular activities.
 - Bachelor of Arts, *magna cum laude*, December, 1983, Arizona State University:
 - Honors Program, College of Liberal Arts, Arizona State University.
 - College Level Examination Program (CLEP) 29 academic hours, November, 1982.
 - Intensive Spanish study, Instituto de Estudios de América Latina (I.D.E.A.L.), Cuernavaca, México, January through February 1983.
11. List scholarships, awards, honors, citations and any other factors (e.g., employment) you consider relevant to your performance during college and law school.
 - Dean's Honors List (all semesters).
 - PHI BETA KAPPA, Scholarship Honorary, Beta Chapter, Arizona State University.
 - OMICRON DELTA KAPPA, Leadership Honorary, Arizona State University.
 - Legislative Intern, Democratic Caucus, Arizona State Senate, Spring 1983.
 - Member, Arizona State University's first delegation to the 14th Annual Student Symposium sponsored by the Center for the Study of the Presidency, "The Presidency: Parties, Press, Personalities," Washington D.C., April 7-10, 1983.

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 Courts by admission to the State Bar of Arizona – October 1989.
- District of Arizona, 1988
- Ninth Circuit, 1988
- United States Supreme Court, 1990.

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
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- **Self-employed**, The Law Offices of Robert J. McWhirter, 2013-Present, Phoenix Arizona.
- **Supervising Criminal Attorney**, ASU Alumni Law Group, March 2014 to July 2016.
- **Adjunct Professor of Law, James E. Rogers College of Law, University of Arizona**, August 2012, Course: *History of the Bill of Rights in Play Today*.
- **Training Director, Pima County Public Defender**, July 2011 to July 2012.
- **Chief-of-Party**, Implementing the USAID contract for Improving the Justice System in El Salvador for Checchi and Company Consulting Inc., June 2010-July 2011. I work with the Salvadoran Supreme Court to reform court procedures, the Attorney General’s Office to train prosecutors, the National Civilian Police to develop a community policing, and the Public Defenders to improve the quality of representation. Other aspects of the program include developing alternative dispute resolution, improving the

juvenile justice system, and providing non-governmental organizations grants to promote civil society.

- **Senior Attorney, Office of the Legal Defender**, Maricopa County, representing defendants in death penalty trial defense and other serious felonies, March 2007 to June 2010.
 - **Adjunct Professor, Phoenix School of Law**, Trial Advocacy, 2007 to 2010.
 - **Assistant Federal Public Defender**, District of Arizona, representing clients in a broad range of Federal criminal cases including homicide, assault, fraud, bank robbery, and criminal immigration in the District Court and the Ninth Circuit Court of Appeals, August 1989 to February 2007.
 - **Visiting Professor of Law**, Universidad de Chile, teaching course in Spanish comparing American Criminal Procedure with Chilean Criminal Procedure entitled “El Proceso Penal de Los Estados Unidos y Chile: Visión Comparada,” March 1998 to May 1998.
 - **Visiting Professor of Law**, Pontificia Universidad Católica de Chile, teaching course in Spanish on Constitutional Law, Free Speech, Privacy, and the Internet entitled “Derecho Constitucional a la Intimidación y a la Información: Visión Comparada y Chilena,” March 1998 to May 1998.
 - **Staff Attorney and Grant Writer**, Guadalupe Law Center, October 1994 to May 1995.
 - **Judicial Law Clerk**, Vice Chief Justice Stanley Feldman, Supreme Court of Arizona, August 1988 to August 1989.
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.

None.

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.

My practice centers on Criminal Law in both Federal and Arizona courts. I am also an expert on the emerging area of “crimigration”, the interplay

between criminal law and immigration law. I have rendered expert opinions on the immigration consequences of criminal conviction and citizenship. I also handle a small number of adoption cases.

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

- Death Penalty defense.
- General civil practice in justice courts.
- Adoptions and parental severance.

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

I am a certified specialist in criminal law.

19. Describe your typical clients.

Many are indigent charged with federal crimes. I have retained cases in both Federal and Arizona courts.

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

No

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

- I have drafted/negotiated numerous documents related to complex criminal cases in Federal court.
- As a legislative intern in 1983, I drafted part of the bill that eventually became the intensive probation program in Arizona.
- I have served on the Criminal Standards Committee of the American Bar Association drafting the Criminal Justice Standards model legislation and policy.

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

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

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

Sole Counsel: _____

Chief Counsel: _____

Associate Counsel: _____

23. Have you handled any matters that have been arbitrated or mediated? None
If so, state the approximate number of these matters in which you were involved as:

Sole Counsel: _____

Chief Counsel: _____

Associate Counsel: _____

24. List not more than three contested matters you negotiated to settlement. State as to each case: (1) the date or period of the proceedings; (2) the names, addresses (street and e-mail) and telephone numbers of all counsel involved and the party each represented; (3) a summary of the substance of each case; and (4) a statement of any particular significance of the case. You may reveal nonpublic, personal, identifying information relating to client or litigant names or similar information in the confidential portion of this application.

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: Over 3000

State Courts of Record: Over 80

Municipal/Justice Courts: Over 50

The approximate percentage of those cases which have been:

Civil: 25

Criminal: 75

The approximate number of those cases in which you were:

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Sole Counsel: 2800

Chief Counsel: 100

Associate Counsel: 100

The approximate percentage of those cases in which:

You conducted extensive discovery¹: 30%

You wrote and filed a motion for summary judgment: 0%

You wrote and filed a motion to dismiss: 25%

You argued a wholly or partially dispositive pre-trial, trial or post-trial motion (e.g., motion for summary judgment, motion for a directed verdict, motion for judgment notwithstanding the verdict): 10%

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

You negotiated a settlement: 90%

The court rendered judgment after trial: 10%

A jury rendered verdict: 5%

Disposition occurred prior to any verdict: 1%

The approximate number of cases you have taken to trial: Over 45
Court 2
Jury 43

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

Over the course of almost 30 years of practice in the Federal Public Defender's Office, the Maricopa Legal Defender's Office, the Pima County

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

Defenders Office, and private practice, it is difficult to get all the records.

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

Arizona, mostly in the 9th Circuit Court of Appeals. I also have filed special actions in the Arizona Appeals courts.

The approximate number of your appeals which have been:

Civil: 3

Criminal: 60+

The approximate number of matters in which you appeared:

As counsel of record on the brief: AZ 3
U.S. 60

Personally in oral argument: AZ 0
U.S. 25+

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

➤ I served as a law clerk to the Honorable Stanley G. Feldman, then Vice Chief Justice of the Arizona Supreme Court from August 1988-August 1989.

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.

➤ *United States v. Pablo Navarrette*, 2:12-cr-00924-GMS-1. I represented this man from May 2, 2012 until the end of his appeal in the Ninth Circuit on October 19, 2014. His trial was in Federal District Court for the District of Arizona before the Honorable G. Murry Snow. Mr. Navarrette was being prosecuted by the United States Attorney's Office.

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He was charged with making a false statement when buying a firearm.

- *United States v. Terance Taylor Prigge*, 2:13-cr-01363-GMS-1. I represented this man from October 1, 2013 until the present both in trial and through appeal. His trial was in Federal District Court for the District of Arizona before the Honorable G. Murry Snow. Mr. Prigge is being prosecuted by the United States Attorney's Office by Assistant U.S. Attorney Karen McDonald. Mr. Prigge was charged and convicted of being a drug trafficker.
- *United States v. Ernesto Santos-Flores*, CR-15-632-PHX-DLR. I represented this man from April 2015 until the end of his case. His case presented a major detention appeal from the Federal District Court for the District of Arizona before the Honorable Susan Bolton to the Ninth Circuit. The Ninth Circuit in an issue of first impression published its opinion in *United States v. Santos-Flores*, 794 F.3d 1088 (9th Cir. 2015). Mr. Santos-Flores was being prosecuted by the United States Attorney's Office. He was charged and eventually convicted of reentry after deportation.

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.).

Not Applicable

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.

Not Applicable

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

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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? Yes If so, give details, including dates.

➤ I own my own publishing company, RR&G Enterprises, to distribute my writings.

33. Are you now an officer, director or majority stockholder, or otherwise engaged in the management, of any business enterprise? Yes 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.

See above.

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? Yes, if required by the Court's ethical rules. If not, give reasons.

➤ This small publishing company makes no profit and is solely to distribute my books to an educational audience. But, if this is a problem, I would be happy to resign.

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.

➤ If there were clerical mistakes in a tax year I immediately paid upon finding out.

36. Are there currently any judgments or tax liens outstanding against you? None If so, explain.

37. Have you ever violated a court order, including but not limited to an order for

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payment of child or spousal support? Never If so, explain.

38. Have you ever been a party to a lawsuit, including bankruptcy but excluding divorce? No If so, identify the nature of the case, your role, the court, and the ultimate disposition.
39. Do you have any financial interests, investments or retainers that might conflict with the performance of your judicial duties? None 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.

A speeding ticket in 2013. I paid all fines and finished the traffic course.

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? None If so, when? How was it resolved?

47. Have you received a notice of formal charges, cautionary letter, private admonition or other conditional sanction from the Commission on Judicial Conduct or any other official judicial disciplinary body in any jurisdiction? No If so, in each case, state in detail the circumstances and the outcome.

48. During the last 10 years, have you unlawfully used controlled substances, narcotic drugs or dangerous drugs as defined by Federal and State laws? No If your answer is "Yes," explain in detail. (Unlawful use includes the use of one or more drugs and/or the unlawful possession or distribution of drugs. It does not include the use of drugs taken under supervision of a licensed health care professional or other uses authorized by Federal law provisions.)

49. In the past year, have you ever been reprimanded, demoted, disciplined, placed on probation, suspended, cautioned or terminated by an employer as a result of your alleged consumption of alcohol, prescription drugs or illegal use of drugs? No If so, state the circumstances under which such action was taken, the name(s) of any persons who took such action, and the background and resolution of such action.

50. Within the last five years, have you ever been formally reprimanded, demoted, disciplined, cautioned, placed on probation, suspended or terminated by an employer? No If so, state the circumstances under which such action was taken, the date(s) such action was taken, the name(s) of any persons who took such action, and the back ground and resolution of such action.

51. Have any of your current or former co-workers, subordinates, supervisors, customers or clients ever filed a complaint or accusation of misconduct against you with any regulatory or investigatory agency, or with your employer? No
If so, state the date(s) of such accusation(s), the specific accusation(s) made, and the background and resolution of such action(s).
52. Have you ever refused to submit to a test to determine whether you had consumed and/or were under the influence of alcohol or drugs? No If so, state the date you were requested to submit to such a test, type of test requested, the name of the entity requesting that you submit to the test, the outcome of your refusal and the reason why you refused to submit to such a test.
53. Within the last five years, have you failed to meet any deadline imposed by a court order or received notice that you have not complied with the substantive requirements of any business or contractual arrangement? No If so, explain in full.
54. Have you ever been a party to litigation alleging that you failed to comply with the substantive requirements of any business or contractual arrangement, including but not limited to bankruptcy proceedings? No If so, explain in full.

PROFESSIONAL AND PUBLIC SERVICE

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

Books:

- ROBERT J. MCWHIRTER, QUILLS, BILLS, AND STILLS: AN ANNOTATED, ILLUSTRATED, AND ILLUMINATED HISTORY OF THE BILL OF RIGHTS (American Bar Association 2015).
- ROBERT J. MCWHIRTER, THE CITIZENSHIP FLOW CHART (American Bar Association 2007).

- ROBERT J. MCWHIRTER, THE CRIMINAL LAWYER'S GUIDE TO IMMIGRATION LAW: QUESTIONS AND ANSWERS 2ND ED. (American Bar Association 2006).
- ROBERT J. MCWHIRTER, THE CRIMINAL LAWYER'S GUIDE TO IMMIGRATION LAW: QUESTIONS AND ANSWERS, (American Bar Association 2001).
- ROBERT J. MCWHIRTER, THE CRIMINAL LAWYER'S GUIDE TO IMMIGRATION LAW: QUESTIONS AND ANSWERS: 2002 SUPPLEMENT - USA PATRIOT ACT, (American Bar Association 2003).
- CRIMINAL LAW OF ARIZONA (Robert J. McWhirter, Editor, 2001) State Bar of Arizona.
- J. JEFFERIES MCWHIRTER, ET AL. (INCLUDING ROBERT J. MCWHIRTER) AT RISK YOUTH: A COMPREHENSIVE APPROACH (5th ed. Projected publication 2013 Brooks-Cole).

Articles and Chapters:

- Robert J. McWhirter, Articles for the ARIZONA ATTORNEY, *Molasses and the Sticky Origins of the Fourth Amendment*, June 2007, *The Sixth Amendment: Lawyers, Trials and a Chamber Pot*, December 2007, *Going Courting: Where We Got Courts and the Rule of Law*, October 2008 and November 2008, *Baby Don't Be Cruel: Just What's So Cruel and Unusual about the Eighth Amendment?*, December 2009 and January 2010.
- Robert J. McWhirter, *Legal Issues for the Practitioner*, in AT RISK YOUTH: A COMPREHENSIVE RESPONSE (4th ed.) (J. Jeffries McWhirter et al., 2007).
- Robert J. McWhirter, *Chapter 15: Defending the Crime of Illegal Entry and Reentry*, in CULTURAL ISSUES IN CRIMINAL DEFENSE (Linda Friedman Ramirez, ed. 2007).
- Robert J. McWhirter, *An Illegal Immigrant's Journey: Antonio's Story*, ARIZONA ATTORNEY, January 2007.

- Robert J. McWhirter and Jon Sands, *Federal Sentencing Adventures in Jurisdictional Wonderland: Blakely, Booker, and Special Federal Jurisdiction Issues*, 18 FEDERAL SENTENCING REPORTER 102 (December 2005).
- Robert J. McWhirter, “*El Plea*”: *Acuerdos Con Imputados en los Estados Unidos y Colombia*, 6 LA DEFENSA; REVISTA DE LA DEFENSORÍA PÚBLICA DE COLOMBIA, 115 (2004, Bogata Columbia).
- Robert J. McWhirter, *Legal Issues for the Practitioner*, in AT RISK YOUTH: A COMPREHENSIVE RESPONSE (3rd ed.) (J. Jeffries McWhirter et. al., 2004).
- Robert J. McWhirter, *El Origen Legal del Sistema de la Defensoria Publica en los Estados Unidos: Un Modelo*,” 2 LA DEFENSA: REVISTA DE LA DEFENSORÍA PÚBLICA DE COLOMBIA, 92 (2003, Bogota Columbia).
- Robert J. McWhirter, *Border Searches, Aliens, and the Fourth Amendment*, CRIMINAL JUSTICE, Winter 2003, at 24 (Chapter 4 reprint from ROBERT J. MCWHIRTER, THE CRIMINAL LAWYER’S GUIDE TO IMMIGRATION LAW: QUESTIONS AND ANSWERS, (2001, American Bar Association)).
- Robert J. McWhirter, *Immigration Consequences of Criminal Convictions*, CRIMINAL JUSTICE, Fall 2002 at 12 (Chapter 2 reprint from ROBERT J. MCWHIRTER, THE CRIMINAL LAWYER’S GUIDE TO IMMIGRATION LAW: QUESTIONS AND ANSWERS, (2001, American Bar Association)).
- Robert J. McWhirter, *Immigration Law for Criminal Lawyers: Overview*, CRIMINAL JUSTICE, Winter 2002, at 18 (Chapter 1 reprint from ROBERT J. MCWHIRTER, THE CRIMINAL LAWYER’S GUIDE TO IMMIGRATION LAW: QUESTIONS AND ANSWERS, (2001, American Bar Association)).
- Robert J. McWhirter, *A Breath of Fresh Proportionality: Sentencing in Aggravated Felon Re-Entry Cases Under the 2001 Guideline*, 14 FEDERAL SENTENCING REPORTER 295 (2002).

- Robert J. McWhirter, Scott Hermann, Jon M. Sands, *Clients in Crisis: The Initial Meeting with Detained Defendants*, THE DEFENDER April 2002.
- Robert J. McWhirter, *The Fourth Amendment on the Edge: Search and Seizure Law on the Border*, 28 SEARCH AND SEIZURE LAW REPORT 1 (2001).
- Robert J. McWhirter, *Chapter 7: Testifying in Court for Fun and Profit*, in FORENSIC MEDICAL INVESTIGATION: A COMPREHENSIVE REVIEW, (Mary H. Dudley, M.D. et. al. 2001).
- Robert J. McWhirter, *La Institución de Reforma Constitucional: El Ejemplo de la Constitución de Los Estados Unidos*, in publication LA REVISTA DE DERECHO PÚBLICO, Pontificia Universidad Católica de Chile.
- Robert J. McWhirter, *Legal Issues for the Practitioner*, in AT RISK YOUTH: A COMPREHENSIVE RESPONSE (2nd ed.) (J. Jeffries McWhirter et. al., 1998).
- Robert J. McWhirter, *Book Reviews: Without a Doubt and In Contempt*, THE CHAMPION, May 1998, at 60 (book reviews).
- Robert J. McWhirter, *Hell Just Got Hotter: The Rings of Immigration Hell and Immigration Consequences to Aliens Convicted of Crimes Revisited*, 11:2 GEORGETOWN IMMIGRATION LAW JOURNAL (1997).
- Robert J. McWhirter, *Hell Just Got Hotter: The Rings of Immigration Hell Revisited*, 5 CRIMINAL PRACTICE LAW REPORT 1 (1997).
- Robert J. McWhirter, *The Rings of Immigration Hell: The Immigration Consequences to Aliens Convicted of Crimes*, 10:2 GEORGETOWN IMMIGRATION LAW JOURNAL 169 (1996).
- Robert J. McWhirter & Jon M. Sands, *Does the Punishment Fit the Crime? A Defense Perspective on Sentencing in Aggravated Felon Re-Entry Cases*, 8:5 FEDERAL SENTENCING REPORTER APRIL 1996.

- Robert J. McWhirter, *The Rings of Immigration Hell: The Immigration Consequences to Aliens Convicted of Crimes*, 3 CRIMINAL PRACTICE LAW REPORT 1 (1995).
- Robert J. McWhirter & Jon M. Sands, *Defending a Criminal Immigration Case*, CRIMINAL PRACTICE LAW REPORT December 1994.
- Robert J. McWhirter & Christopher Johns, *Immigration Consequences: By the Time I Get To Phoenix ...*, 4 FOR THE DEFENSE 9 (1994).
- Robert J. McWhirter & Jon M. Sands, *A Primer for Defending a Criminal Immigration Case*, 8:1 GEORGETOWN IMMIGRATION LAW JOURNAL 23 (1994).
- Robert J. McWhirter, *Legal Issues for the Practitioner, in AT RISK YOUTH: A COMPREHENSIVE RESPONSE* (J. Jeffries McWhirter et. al., 1993).
- Robert J. McWhirter & J. Jeffries McWhirter, *Legal Issues of Adolescent Suicide*, 7:4 JOURNAL OF EDUCATIONAL EQUITY AND LEADERSHIP 332 (1987).
- J. Jeffries McWhirter & Robert J. McWhirter, *Legal Considerations for the Practitioner, in PREVENTING ADOLESCENT SUICIDE* 437 (David Capuzzi & Larry Golden eds., 1988).
- J. Jeffries McWhirter, Mary C. McWhirter & Robert J. McWhirter, *The Learning Disabled Child: A Retrospective Review*, 18:6 JOURNAL OF LEARNING DISABILITIES 315 (1985).
- Robert J. McWhirter, *Toca Mis Hijos*, LOS DERECHOS DEL PUEBLO, BOLETÍN INFORMATIVO DE LA COMISIÓN DE DERECHOS HUMANOS DEL DECANATO CATÓLICO DE SAN JUAN DE LURIGANCHO-LIMA, Año VIII No. 7, Octubre 84.

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,

many If so, describe.

- Arizona Judicial Conference 2012, 2013, 2014, 2015, 2016, Criminal Law Update.
- United States Department of State, Grant Recipient, Course for Uruguay Prosecutors, Seminario Teorico – Practico Sobre El Proceso Penal Acusatorio, March 13 - 21, 2014.
- United States Department of State, Grant Recipient, Lecture Tour in Northern Mexico on Judicial Reform, August 19, 2013 – September 1, 2013.
- Arizona State Bar 2012, Saint Thomas More Society, *The First Amendment and Catholic Ethics*, June 21, 2012.
- Arizona Public Defender Conference, *Shooting Your Mouth Off About the Second Amendment*, June 21, 2012.
- Justice Project, *Actual Innocence Cases in Arizona*, April 27, 2012.
- Minority Bar Convention, *The History of the Equal Protection Clause*, April 13, 2012.
- Pima Public Defender Offices, *How to Cross Examine Experts*, March 2, 2012.
- Arizona Attorney's for Criminal Justice, Winter Seminar, *History of the Ninth Amendment: Still a Mystery After All These Years*, January 27, 2012.
- Appeals Workshop for Judges, Defenders, and Prosecutors, *How Good Lawyers Don't Write Like Lawyers*, October 21, 2011.
- Pima Public Defender Office, *Using PowerPoint in the Courtroom*, September 23, 2012.
- During 2010-2011 many presentations in Spanish to Salvadorian Courts, Prosecutors, Defenders, and Police.

- Presenter and trainer, American Bar Association Rule of Law Initiative: Justicia Penal Ecuador, *Técnicas de Juicio Oral*, Quito, Ecuador, February 22-26, 2010.
- Presenter and trainer, American Bar Association Rule of Law Initiative: Justicia Penal Ecuador, *Técnicas de Juicio Oral*, Quito, Ecuador, May 18-25, 2009.
- Presenter, ASU Libraries Constitutional Law Day, *Baby Don't Be Cruel: What's So Cruel and Unusual About the Eighth Amendment?*, September 17, 2008.
- Presenter, Criminal Justice Act Training, *From Testicles to Dragnet: How the Fifth Amendment Protects All of Us*, Naples Florida, June 20, 2008.
- Presenter, Arizona Public Defender Association Conference, *Citizenship Issues and Criminal Law*, June 17, 2008.
- Presenter, Arizona Attorneys for Criminal Justice Seminar, *How the Sixth Amendment Guarantees You a Lawyer, a Fair Trial and a Chamber Pot!*, January 25, 2008.
- Trainer, National Institute of Trial Advocacy, Monterey Mexico, September 2-7, 2007 (weeklong trial advocacy course in Spanish for Mexican lawyers).
- Faculty, State Bar Convention Criminal Justice Section Seminar, *Together We Make History* with three presentations on the history of the 4th, 5th, and 6th Amendments, June 29, 2007.
- Presenter and Panel Moderator, *Immigration: A Civil Liberties Perspective*, ACLU Immigration Forum, June 27, 2007.
- Faculty, Arizona Public Defender Association 5th Annual Statewide Conference with three presentations, *From Testicles to Dragnet: How the 5th Amendment Protects All of Us* and *Immigration Consequences for Juveniles*, and *Proposition 100 and Alien Bail Litigation* June 21, 2007.
- Presenter, *Immigration Law for the Non-Immigration Lawyer* and *The Immigration Consequences of Criminal Convictions to Aliens*, CLE West Seminar, May 18, 2007.

- Speaker and Specialist Grant recipient, Digital Video Conference with Argentina, *Plea Bargaining in the United States*, May 9, 2007.
- Faculty, 17th Annual Law and All the Jazz CLE seminar, *The Rings of Immigration Hell: The Collateral Consequences of Criminal Convictions to Aliens*, April 27, 2007.
- Presenter, *History of the Fifth Amendment*, City of Phoenix Law Department Retreat, April 26, 2007.
- Presenter, ILLEGAL IMMIGRATION, CRIME, AND PUBLIC POLICY SYMPOSIUM, Arizona State University, Topic: *Special Issues in the Prosecution and Defense of Illegal Immigration*, April 5, 2007.
- Seminar Chair: *Collateral Consequences: Concerns for the Representation and Prosecution of Non-citizens in Criminal Proceedings*, ABA Criminal Justice Section mid-year meeting Miami Florida 2007.
- Faculty, Annual Update on Constitutional Law and Criminal Procedure, State Bar of Arizona and Arizona Prosecutor's Advisory Council September 22, 2006, *Molasses and the Sticky Origins of the Fourth Amendment*.
- Faculty, 2006 Arizona Judicial Conference, Chair *Immigration Law* June 22, 2006.
- Faculty, 2006 Arizona Judicial Conference, *The Fourth and Fifth Amendment: An Historical Perspective*. June 23, 2006.
- Seminar Chair: *The Criminal Lawyer and Immigration Law*, State Bar of Arizona, November 16, 2006.
- Speaker, Utah State Bar, Criminal Justice Section Seminar, 21 June 2006, *Immigration Consequences of Criminal Conviction*.
- Seminar Chair: *4th And 5th Amendments Yesterday and Today*. State Bar of Arizona. 23 February 2006.

- Advisor to Public Defender Pilot Office, Colombia Administration of Justice Program, with presentations in Spanish of various seminars on direct and cross examination, Bogotá Colombia, November 2005.
- Speaker, Minority Bar Convention, State Bar of Arizona, *Getting Here Wasn't Easy, Staying Here Will Be Harder*, April 2, 2004.
- Speaker, Federal Defender Training, District of Arizona, *Representing Material Witnesses*, March 22, 2004.
- Panelist Speaker, Arizona District Court Conference, *Immigration: A Primer for Federal Practitioners*, February 7, 2004.
- Faculty, State Bar of Arizona Professionalism Course, January 14, 2004, June 12, 2004.
- Faculty, 2003 Criminal Justice Act Training Programs, Defender Services Division Training Branch, Scottsdale, Arizona, September 18-20, 2003.
- Faculty, *Winning Strategies 2003*, Training Program for Criminal Justice Act Panel Attorneys, Defender Services Division, Denver Colorado, July 17-19, 2003.
- Faculty, National Seminar for Federal Defenders, Portland Oregon, June 9-11, 2003.
- Faculty, *Winning Strategies 2003*, Training Program for Criminal Justice Act Panel Attorneys, Defender Services Division, Savannah, Georgia, May 29-31, 2003.
- Faculty, Workshop for Judges of the Ninth Circuit, Santa Barbara, California, January 27-29, 2003.
- Speaker, Arizona Attorney General, *Immigration Consequences of Criminal Conviction*, December 2, 2003.
- Speaker, Maricopa Legal Defender Seminar, *Immigration Consequences of Criminal Conviction*, September 25, 2003.

- Faculty, Colombia Administration of Justice Program, *Taller con Coordinadores Académicos de la Defensoría Pública*, Armenia Colombia, April 6-8, 2002.
- United States Speaker and Specialist Grant Recipient advising Defensoría Penal Pública (Criminal Public Defender), Santiago, Chile, September 27-28, 2001.
- United States Speaker and Specialist Grant Recipient providing oral advocacy training, *Seminario: El Juicio Oral*, León, Nicaragua, August 19-26, 2001.
- United States Speaker, Specialist Grant Recipient and Team Leader providing training in evidence law and oral proceedings to Venezuelan judges, *El Papel del Juez en el Proceso Oral*, October 1-5, 2000.
- Advisor to the Venezuelan Constitutional Assembly responsible for writing the Venezuelan Constitution, with testimony to the Comisión de Poderes Públicos (Commission on Public Powers) and Comisión de Poder Ejecutivo (Commission on Executive Power), September 1999.
- United States Information Agency Grant Recipient providing trial skills training to Public Defenders in Venezuela, September to October 1999 .
- Trial Skills Instructor and Program Coordinator to Venezuelan Public Defenders, *Preparación y Presentación de la Defensa Técnicas de Interrogatorio y Recursos*. Various courses in 1999-2001 sponsored by the World Bank.
- Faculty, State Bar of Arizona Annual Convention, *Immigration Consequences of Crimes*, June 1996, June 1997 and June 1999.
- Faculty, National Seminar for Federal Defenders, *Strangers in a Strange Land - Defending Reentry After Deportation*, Minneapolis, Minnesota, May 26-28, 1999.
- Presenter, XXIX Jornadas de Derecho Público, Facultad de Derecho, Pontificia Universidad Católica de Chile, *La Institucionalización de Reforma: El Ejemplo de La Constitución de Los Estados Unidos*, November 5-7, 1998.

- Presenter, Federal Sentencing Guideline Seminar, *Alien Smuggling - Defenses & Guidelines*, February 28, 1998.
- Presenter, Immigration Consequences of Crimes Seminar for Maricopa County Public Defenders, June 6, 1997.
- Faculty, Arizona Appellate Practice Institute, 1995-1997.
- Faculty, Strategies for Success in Federal Criminal Defense Practice program on *Immigration Consequences of Criminal Conviction and Defending a Criminal Immigration Case*, Houston, Texas and Jackson Hole, Wyoming, June 1994.
- Faculty, Only the Strong Survive II program on *Defending a Criminal Immigration Case*, Atlanta, Georgia, Dayton, Ohio, Phoenix, Arizona and Washington D.C., 1994.
- Co-chair and Presenter, *Strangers in a Strange Land: Defending Criminal Immigration Cases* Seminar, May 25, 1993.
- Jessup Team Advocacy Coach, Arizona State University 1993 through 1997.

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

- Board of Directors, Catholic Charities Community Services of Central and Northern Arizona, 1989-2010.
- President, Saint Thomas More Society, 1993-1994, 2004-2005 (Board Member 1990 to Present).

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

- American Bar Association, Criminal Justice Standards Committee 2008-2010.

- American Bar Association, Criminal Justice Section Council, 2005 to 2008.
- American Bar Association, Criminal Justice Section, Book Comm., 2003 to 2008.
- Chair, Criminal Justice Section, State Bar of Arizona, June 1997 to 2000.

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

In 1995, I took a leave of absence from the Federal Public Defender's Office to co-found the public interest law firm Guadalupe Law Center in Guadalupe Arizona. From a proposal I wrote in 1995, the prestigious Yale Initiative for Public Interest Law awarded the Guadalupe Law Center a \$10,000 grant. My time there afforded me the opportunity to work on numerous civil cases, including adoption matters.

I have actively served the legal community throughout my entire career. Before El Salvador, I served on the American Bar Association Criminal Justice Section Council and on the Standards Committee writing the ABA CRIMINAL JUSTICE STANDARDS. The United States Supreme Court and other courts cite the ABA STANDARDS as a guide to correct practice in the criminal justice system. I am also a past president of Arizona Attorneys for Criminal Justice and a past chair of the Arizona Bar's Criminal Justice Section.

I have served on the Board of Directors of the Justice Project. For nearly 20 years, I served on the board of directors of Catholic Charities Community Services of Arizona. I have twice served as president of the St. Thomas More Society of Phoenix Arizona, and in 2010 received the St. Thomas More Award, given in recognition of service to the community.

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

- Frank X. Gordon Award for Excellence in the Practice of Law, Mohave County Bar Association, 2013.
- Saint Thomas More Award, Saint Thomas More Society, 2010.

- Arizona State University College of Law, Writing Instructor, Honors, 1987 to 1988.
- Arizona State University, *magna cum laude*, December, 1983, Honors Program, College of Liberal Arts, Arizona State University, Dean's Honors List (all semesters)
- PHI BETA KAPPA, Scholarship Honorary, Beta Chapter, Arizona State University.

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 am a legal historian especially on the history of the United States Constitution and Bill of Rights.

HEALTH

63. Are you physically and mentally able to perform the essential duties of a judge in the court for which you are applying? None

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.

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

I am a nationally and internationally known speaker and author in both English and Spanish on trial advocacy, immigration law, constitutional law, and the history of the United States Bill of Rights.

I am also a frequent guest on Channel 8 - Arizona Horizon and other media as a constitutional expert. You can view these appearances on their webpage.

In 2010-11, I served for a year in El Salvador administering a \$10.2 million USAID contract to reform the judicial system where I worked mostly to assist and train the National Civilian Police and the prosecutors in the Salvadoran Attorney General's Office.

As you can see from my publications list, in 2007, the American Bar Association published my second book, ROBERT J. MCWHIRTER, THE CITIZENSHIP FLOWCHART (2007). This followed the publication of the second edition of ROBERT J. MCWHIRTER, THE CRIMINAL LAWYER'S GUIDE TO IMMIGRATION LAW: QUESTIONS AND ANSWERS (2nd ed. 2006). In the ground-breaking case *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), the United States Supreme Court extensively quoted THE CRIMINAL LAWYER'S GUIDE TO IMMIGRATION LAW in Justice Alito's concurring opinion.

In addition to numerous articles and book chapters in both English and Spanish on various areas of the law, last year, the American Bar Association published my history of the Bill of Rights, QUILLS, BILLS, AND STILL: AN ANNOTATED, ILLUSTRATED, AND ILLUMINATED HISTORY OF THE BILL OF RIGHTS (2015). The ARIZONA ATTORNEY magazine has published several advanced chapters in article form:

- Robert J. McWhirter, *Molasses and the Sticky Origins of the Fourth Amendment*, ARIZONA ATTORNEY, June 2007;
- Robert J. McWhirter, *The Sixth Amendment: Lawyers, Trials and a Chamber Pot*, ARIZONA ATTORNEY, December 2007;
- Robert J. McWhirter, *Going Courting: Where We Got Courts and the Rule of Law*, ARIZONA ATTORNEY, October 2008 and November 2008, and

- Robert J. McWhirter, *Baby Don't Be Cruel: Just What's So Cruel and Unusual about the Eighth Amendment?*, ARIZONA ATTORNEY, December 2009 and January 2010.

These articles are available at <http://www.myazbar.org/AZAttorney/>.

I have presented in Continuing Legal Education programs throughout the United States, including annually at the Arizona Judicial Conference and at The Workshop for Judges of the Ninth Circuit on January 27-29, 2003 in Santa Barbara, California and to federal and state defense attorneys and prosecutors. Before accepting the position in El Salvador, I taught trial advocacy as an adjunct professor at the Phoenix School of Law. In the Fall semester of 2012 I taught a seminar course at the University of Arizona Law School on the History of the Bill of Rights.

I have also extensively taught in Latin America. In 1998, while on leave from the Federal Public Defender's Office, I served as a Visiting Professor of Law (Profesor Visitante) at two of Latin America's most prestigious universities, the University of Chile and the Catholic University of Chile. I taught courses on *Comparative Criminal Procedure* and *Constitutional Law, Free Speech, Privacy, and the Internet* in Spanish. In 1999-2001, under a program with the Administrative Office of the United States Courts, I led several teams of U.S. Federal Public Defenders to train Venezuelan lawyers in trial advocacy skills.

In September of 1999, I received a grant from the United States Department of State to serve as an advisor to the Venezuelan Constitutional Assembly and to give testimony on constitutional structure to the Commission on Public Powers (Comisión de Poderes Públicos) and the Commission on Executive Power (Comisión de Poder Ejecutivo). Under other State Department grants, I trained Venezuelan judges in evidence law and adversarial proceedings, worked with the emerging Chilean Public Defender's office, taught law students in Nicaragua, prosecutors in Uruguay, and conducted a lecture tour in Northern Mexico.

During my 17-years as an Assistant Federal Public Defender, I handled over a thousand criminal cases in Federal District Court involving a broad range of issues, including homicide, assault, fraud, bank robbery, and criminal immigration. I have served as lead attorney in over 45 jury trials.

Additionally, I handled numerous cases involving complex jurisdictional

Filing Date: August 8, 2016

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issues while representing Native Americans from various Indian reservations.

I have extensive experience in the Ninth Circuit Court of Appeals, having argued 4 to 5 cases a year, several of which resulted in published opinions including, *United States v. Henderson*, 993 F.2d 187 (9th Cir. 1993) (defining counting of prior convictions under the Federal Sentencing Guidelines), *United States v. Paul*, 37 F.3d 496 (9th Cir. 1994) (redefining elements of manslaughter), and *Ray v. Carmona*, 446 F.3d 1000 (9th Cir. 2006) (requiring that juveniles receive the same good-time credit as incarcerated adults). Recently, I was the attorney presenting *United States v. Santos-Flores*, 794 F.3d 1088 (9th Cir. 2015), which defined the scope of the Bail Reform Act as it relates to persons charged with reentry after deportation.

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? None 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.
- Being a lawyer is a privilege, not a right. With that privilege comes the duty of service. I have tried to give service both to my clients and the profession my whole career. I wish to continue that service on the Supreme Court of Arizona.
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.
1. Appellant's Reply Brief in *United States v. Ernesto Santos-Flores*, 15-10289 (9th Circuit).
 2. Expert Opinion Letter regarding citizenship of Ellen Roe (name changed).
 3. Cert. Petition to the United States Supreme Court in *United States v. Leonardo Portillo-Vega*.

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.

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.

Not Applicable

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.

Not Applicable

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

Attachment 1

Appellant's Reply Brief in *United States v. Ernesto Santos-Flores*, 15-10289 (9th Circuit).

Docket No. 15-10289

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,)	
)	
Appellee,)	DC #CR-15-632-PHX-DLR
)	
-vs-)	
)	
ERNESTO SANTOS-FLORES,)	
)	
Appellant.)	
_____)	

ON APPEAL FROM THE DETENTION ORDER OF
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

APPELLANT'S REPLY BRIEF

ROBERT J. MCWHIRTER
ASU Alumni Law Group
Two North Central, Ste. 1600
Phoenix, AZ 85004
Attorney for Appellant

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ISSUE FOR REVIEW

Does the Bail Reform Act apply in a Reentry After Deportation prosecution?

FACTS/PROCEDURE
HISTORY/JURISDICTION

The government's long fact presentation fails to show how Mr. Santos-Flores is categorically different than any Reentry After Deportation defendant. All have checkered immigration history and prior immigration convictions. Many, though, lack Mr. Santos-Flores' ties to the community.

The government does not contest Mr. Santos-Flores is the husband and father of U.S. citizens who want him home. But for the charge, Pretrial Services would have recommended release. At the risk of losing a favorable result through the government's "fast-track" plea program, Mr. Santos-Flores wants to take this last chance to fix his immigration status.

THE DEFENDANT: Your Honor, all I ask is for one chance to help my family at this point in time, the struggle that they're having.

Record of Transcript, May 26, 2015 (RT) at 17.

Mr. Santos-Flores is not an unmanageable flight risk.

ARGUMENT

Under *Lopez-Valenzuela*, the District Court’s ruling here is an unconstitutional categorical denial of liberty.

Lopez-Valenzuela v. Arpaio, 770 F.3d 772 (9th Cir. 2014) condemns categorical denials of liberty noting “in our society liberty is the norm.” *Lopez-Valenzuela* at 785, quoting *United States v. Salerno*, 481 U.S. 739, 755 (1987). *Lopez-Valenzuela* found unconstitutional Arizona’s Proposition 100’s categorical denial of bail for undocumented aliens. Citing precedent, this Court found “regardless of whether an arrestee is a citizen, a lawful resident or an undocumented immigrant, the costs to the arrestee of pretrial detention are profound.” *Lopez-Valenzuela* at 790. Detention can imperil at defendant’s job, impair his family relationships, and hamper his defense. *Id.*

Despite *Lopez-Valenzuela*, the government wants this Court to uphold categorical detention for every §1326 defendant. As the government argues in its Response of Appellee (GB) at 18, 8 U.S.C. § 1231(a)(1)(C)(2) explicitly mandates detention for all reentry defendants:

(2) Detention

During the removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under section 1182 (a)(2) or 1182 (a)(3)(B) of this title or deportable under section 1227 (a)(2) or 1227 (a)(4)(B) of this title.

Thus, every 8 U.S.C. §1326 defendant must be mandatorily detained because by definition they have “been found inadmissible ... or deportable.” As in *Lopez-Valenzuela* this is an unconstitutional categorical denial of pretrial liberty.

The government’s reading renders the Bail Reform Act meaningless. It argued if the District Court released Mr. Santos-Flores, he would go to immigration custody under §1231(a)(1)(C)(2) and be deported under §1231(a)(1)(A). Thus, the government argued, and the District Court accepted, this as the justification for Mr. Santos-Flores’ pretrial detention. There was never a point to having a detention hearing. This is unconstitutional.

Although the government now argues the District Court’s main concern was not that ICE would deport Mr. Santos-Flores if it ordered release, the record shows otherwise:

THE COURT: If I release him, I don't know how to assure his appearance, because he will be taken into the custody of Immigration and Customs Enforcement, and all they have to do is once again remove him, because the removal order is already in place.

RT at 4.

THE COURT: So just assume though for a moment that I said, don't deport him until I'm finished, or whoever the district judge is that gets the case when it's indicted, until this case is concluded. And assuming ICE says yes. They still have him in their custody, and they're going to keep him in their custody, and he is not free to come see me.

RT at 5.

THE COURT: It's, why would I release him from this custody just to go into somebody else's custody, and then to get him to appear I would have to writ him out of wherever in the world ICE puts him.

RT at 8.

THE COURT: It isn't an issue of convenience. I would only release him on his promise to appear. And he can't promise to appear because he won't be in control of his ability to appear.

RT at 10. Under the District Court's reasons and the government's reasoning, the Bail Reform Act does not exist in §1326 cases.

The government tries to support the District Court with a string-cite of cases applying "the straightforward reasoning that a defendant who is likely to be detained and then removed to another county is not likely to appear for trial." Response of Appellee (GB) at 17 n. 5. Because these cases rely on 8 U.S.C. §1231's categorical denial of liberty, they are wrong for the same reason the District Court here was wrong.

Moreover, the government cannot argue a defendant is a flight risk because the government (ICE) will remove him. To allow this negates the Bail Reform Act, which provides the government the chance to show a defendant is a flight risk, not whether the government's own actions makes him one.

For the Bail Reform Act to prevent the categorical denial of liberty Congress intended, this Court should overturn the District Court's detention of Mr. Santos-Flores.

The District Court detained Mr. Santos-Flores in the mistaken belief ICE would automatically deport him.

In addition to detaining Mr. Santos-Flores because the government would detain him anyway under 8 U.S.C. §1231(a)(1)(C)(2), the District Court also justified detaining him because it believed the government would deport him before trial under 8 U.S.C. § 1231(a)(1)(A).

This Court's decision in *United States v. Castro-Inzunza*, No. 12-30205 (July 23, 2013)¹ dispels the government's argument that 8 U.S.C. § 1231(a)(1)(A) requires it to remove Mr. Santos-Flores before this current charge is done, noting,

“The government has not shown that defendant's trial ... cannot be completed prior to the expiration of the removal period of 8 U.S.C. § 1231(a)(1)(A).”

Thus, the District Court here was fundamentally wrong when it declared,

“THE COURT: If I release him, I don't know how to assure his appearance, because he will be taken into the custody of Immigration and Customs Enforcement, and all they have to do is once again remove him, because the removal order is already in place.” RT at 4.

Castro-Inzunza shows the District Court was also wrong in stating,

THE COURT: “I don't think that I can do – I can't order him released from Immigration custody if there's a statute that specifically requires his detention while the process is proceeding.”

Rather, the law is the government must show it cannot stop a defendant's removal:

¹ Per this Court's 6/24/2015 order, the parties are invited “to address this court's unpublished disposition” in *United States v. Castro-Inzunza*, No. 12-30205 (July, 23, 2012).”

“[T]he government has not shown that it lacks the ability to stay or defer defendant’s removal through a stay or departure control order if it believes that his removal before trial would be contrary to public interest.”

Castro-Inzunza at 3. The District Court wrongly assumed the government could not stop Mr. Santos-Flores’ deportation and wrongly used it as the reason to detain him, which this Court should overturn.

The record shows the District Court did not consider Mr. Santos-Flores’ immigration status as one factor, but as *the* factor for detention.

In addition to the categorical denial of Mr. Santos-Flores’ pretrial liberty outline above, the District Court categorically denied Mr. Santos-Flores release by only considering his immigration status and record.

The government’s repeated argument, and the District Court’s finding, that Mr. Santos-Flores’ conduct demonstrates,

- “a lack of candor, a lack of respect for United States laws, and a lack of respect for authorities in the United States,” GB at 27,
- that he “so repeatedly and so blatantly violated immigration court orders, district court orders, and the criminal laws of the United States,” GB 30, or
- that he is “such a slippery defendant,” GB 31 n. 12,

is overblown -- they show nothing to categorically distinguish him from any other §1326 defendant. If this Court finds these arguments dispositive, nearly every reentry after deportation defendant gets detained; it would be hard to divine any §1326 defendant qualifying for released. The Bail Reform Act not only disallows, but condemns, such categorical denials of liberty.

The government's argument that "based on the strength of the evidence, Defendant has every reason to flee," GB at 28-29, underscores the categorical nature of the District Court's denial of Mr. Santos-Flores pretrial liberty. All §1326 cases have strong evidence against the defendant, which the government generally proves with documents and fingerprints. This does not mean the Bail Reform Act provides for a different presumption than release.

The government's argument Mr. Santos-Flores faces "serious penalties that incentivize flight," GB 29, is disingenuous given that the Federal Sentencing Guidelines control his sentence not the 10 year statutory maximum. Mr. Santos-Flores is probably in Criminal History Category II at Offense Level 12. This yields a range of 12-18 months, or with acceptance of responsibility 8-14 months. He has committed to fighting this case so he can be with his family and does not have the type of criminal record that would statutorily preclude him from overturning his deportation or deportation relief. The fact he turned down the standard District of Arizona "fast-track" plea, which would have given him a 2-8 month sentencing range, shows his desire to not flee from the court's jurisdiction but to submit to it.

The District Court failed to consider Mr. Santos-Flores would be a manageable flight risk.

Even if the District Court correctly found Mr. Santos-Flores a flight risk, it missed the point because “the pertinent inquiry is whether the arrestee is an *unmanageable* flight risk.” *Lopez-Valenzuela* at 799 (original emphasis):

“Demonstrably, many undocumented immigrants are not unmanageable flight risks.”

Lopez-Valenzuela at 797. Indeed, “there is no evidence that undocumented status correlates closely with unmanageable flight risk.” *Lopez-Valenzuela* at 798. As if this Court was describing Mr. Santos-Flores, it noted,

“many undocumented immigrants were brought here as young children and have no contacts or roots in another country. May have ‘children born in the United States’ and ‘long ties to the community.’”

Lopez-Valenzuela, at 800. Mr. Santos-Flores U.S. citizen wife and children await him.

The government argues a *non-sequitur* that “[t]ransparently, what Defendant wants is the benefit of *living* in the United States, not to be subject to its laws ...” GB 30. The uncontested facts show Mr. Santos-Flores surely wants the benefit of living in the United States and would happily live under its laws to be with his family. He does not want to be a scofflaw but a deportation may result in “loss of both property and life; or all that makes life worth living.” *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

Mr. Santos-Flores has every reason to stay and not to flee.

CONCLUSION

For the Bail Reform Act to prevent the categorical denial of liberty Congress intended, this Court should overturn the District Court's detention of Mr. Santos-Flores. Moreover, the government did not show ICE had to remove him denying the District Court jurisdiction. Finally, even if Mr. Santos-Flores presents some flight risk, he is not an "unmanageable" flight risk.

The District Court should have ordered his release.

Respectfully submitted this 17th day of June, 2015.

s/Robert J. McWhirter

ROBERT J. MCWHIRTER
ASU Alumni Law Group
Two North Central, Ste. 1600
Phoenix, AZ 85004
Attorney for Appellant

STATEMENT OF RELATED CASES

There are no other cases pending before the United States Court of Appeals for the Ninth Circuit related to the instant case.

Respectfully submitted this 17th day of June 17, 2015.

s/Robert J. McWhirter

ROBERT J. MCWHIRTER

ASU Alumni Law Group

Two North Central, Ste. 1600

Phoenix, AZ 85004

Attorney for Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and Ninth Circuit 32-1 for Case No. CA 15-10289, I certify that Appellant Ernesto Santos-Flores's Opening Brief is proportionally spaced, has a typeface of 14 points and contains 1,681 words.

Dated this 17th day of June, 2015.

s/Robert J. McWhirter _____
ROBERT J. MCWHIRTER
Law Offices of Robert J. McWhirter
PO Box 26666
Tempe Arizona, 85285
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2015, I electronically filed Appellant Ernesto Santos-Flores's Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that I served the above Appellant's Opening Brief via US Mail on the following:

William G. Voit
Assistant U.S. Attorney
Two Renaissance Square
40 N. Central Ave., Ste. 1200
Phoenix, AZ 85004

Dated this 17th day of June, 2015.

s/Robert J. McWhirter
ROBERT J. MCWHIRTER
Law Offices of Robert J. McWhirter
PO Box 26666
Tempe Arizona, 85285
Attorney for Appellant

Attachment 2

Expert Opinion Letter regarding citizenship of Ellen Roe (name changed).

**LAW OFFICES OF
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TEMPE, ARIZONA 85282

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ROBERT.MCWHIRTER@AZBAR.ORG

MEMORANDUM

To John Doe

From Robert J. McWhirter

Date September 19, 2014

Subject Loss of US Citizenship: Ms. Ellen Roe

1.0 Opinion Requested:

1.1 You asked my opinion as to whether Ms. Ellen Roe lost her US citizenship under the facts set out below under the INA in effect at the time.

1.2 I conclude that if Ms. Roe intended to relinquish her US citizenship and showed that intent by obtaining and traveling on a Canadian passport and voting in Canadian elections, she lost her US citizenship under the effective statutes. Specifically, she would have lost her US citizenship under INA § 350 before its repeal on October 10, 1978.

2.0 Expert Qualifications:

2.1 See my attached resume.

2.2 For nearly 25 years, I have been an active member of the State Bar of Arizona. After law school, I clerked for Vice Chief Justice of the Arizona Supreme Court, Stanly G. Feldman (1988-89). After that, I spent over 17 years (1989-2008) practicing in Federal Court as an Assistant Federal Public Defender. From 2008 to 2010, I was a Senior Attorney with the Maricopa County Office of the Legal Defender defending death penalty cases. I am a Certified Specialist in Criminal Law with the State Bar of Arizona and first-chair qualified by the Arizona Supreme Court to defend capital cases.

2.3 I am a nationally and internationally known speaker and author in both English and Spanish on immigration law and citizenship, trial advocacy, constitutional law, and the history of the United States Bill of Rights.

2.4 I am currently a supervising attorney with the ASU Law Alumni Group heading the criminal section of the firm.

2.5 I have extensively written on United States citizenship law. In 2007, the American Bar Association published, ROBERT J. MCWHIRTER, *THE CITIZENSHIP FLOWCHART* (2007); a book on acquired and derivative United States citizenship. This manual provides a complete flow chart of US citizenship and comprehensive commentary text.

2.6 The publications of *THE CITIZENSHIP FLOWCHART* book followed the publication of the second edition of ROBERT J. MCWHIRTER, *THE CRIMINAL LAWYER'S GUIDE TO IMMIGRATION LAW: QUESTIONS AND ANSWERS* (2nd ed. 2006). In the ground-breaking *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), the United States Supreme Court extensively quoted from my book, *THE CRIMINAL LAWYER'S GUIDE TO IMMIGRATION LAW*, in Justice Alito's concurring opinion.

2.7 I have written numerous articles and book chapters involving criminal immigration law and attendant issues related to citizenship defenses, including publications in the *GEORGETOWN IMMIGRATION LAW REVIEW*, *CRIMINAL PRACTICE LAW REPORT*, and the *FEDERAL SENTENCING REPORTER*.

2.8 I have extensively taught regarding citizenship issues, the immigration consequences of criminal conviction, and on immigration law and policy including CLE programs throughout the United States.

2.9 I have qualified in court to testify as an expert on two occasions relevant to this issue, once regarding citizenship claims and once regarding the immigration consequences of criminal conviction.

2.10 In my practice, the vast majority of my cases involved immigrants charged with crimes. In each case, the defendant's citizenship is the first issue. I have reviewed thousands of documents and tapes related to deportation hearings. A key issue is always the basis of the deportation and whether the government has proven the defendant's alienage. I have successfully defended clients facing reentry after deportation charges on the element of alienage/citizenship.

3.0 Facts Relevant to Ms. Roe's Possible Loss of United States Citizenship:

3.1 Ms. Roe was born in Canada, on May 23, 1956.

3.2 Ms. Roe's mother (Mrs. Hollenberg) is a dual US-Canadian citizen born in US and lived there for more than 10 years, at least five of which were after she was 14 years old.

3.3 Ms. Roe's Canadian citizen father (Mr. Hollenberg) died in 2003 and never resided in the US.

3.4 When Ms. Roe was born, her birth was registered at a US consulate.

3.5 Ms. Roe's birth certificate lists her as a dual US-Canadian citizen.

3.6 Ms. Roe obtained a Canadian passport at around age 15 (1971) and travelled on that passport to Israel in 1975 or 1976. Only Canadian citizens are entitled to a Canadian passport.¹

3.7 Ms. Roe also has a US passport.

3.8 Ms. Roe has voted in Canadian Federal elections since age 18. Only Canadian citizens can vote in Canadian elections.²

3.9 Ms. Roe has never lived in the US, paid US income tax, voted in an US election, or took an oath of allegiance to the United States.

4.0 Relevant Statutes:

4.1 **Ms. Roe was a US citizen at birth under §301(g)** - Although Ms. Roe was born in Canada, she was a US citizenship at birth under Immigration and Nationality Act (INA) §301(g):³

301 The following shall be nationals and citizens of the United States at birth:

(g) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the

¹ See *Mikhail v. Canada (Attorney General)*, 2013 FC 724 at paragraph 19.

² *Opitz v. Wrzesnewskyj*, [2012] 3 S.C.R. 76 at paragraph 10.

³ 8 U.S.C. 1401(g). Section 301(g) was formerly §301(a)(7). Section 3 of Pub.L. 95-432 struck out "(a)" preceding "The following" and redesignated pars. (1) to (7) as (a) to (g), respectively, effective October 10, 1978.

birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years⁴: *Provided*, That any periods of honorable service in the Armed Forces of the United States, or periods of employment with the United States Government or with an international organization as that term is defined in § 288 of Title 22 by such citizen parent, or any periods during which such citizen parent is physically present abroad as the dependent unmarried son or daughter and a member of the household of a person (A) honorably serving with the Armed Forces of the United States, or (B) employed by the United States Government or an international organization as defined in section 288 of Title 22, may be included in order to satisfy the physical-presence requirement of this paragraph. This proviso shall be applicable to persons born on or after December 24, 1952, to the same extent as if it had become effective in its present form on that date.

4.2 **(b) Ms. Roe did not lose her US citizenship under § 301(b)** - Before its repeal, INA § 301(b)⁵ provided that a US citizen could lose citizenship if she did not return to live in the US for two years:

301(b) Any person who is a national and citizen of the United States under paragraph (7) of subsection (a) shall lose his nationality and citizenship unless—(1) he shall come to the United States and be continuously physically present therein for a period of not less than two⁶ years between the ages of fourteen years and twenty-eight years; or (2) the alien parent is naturalized while the child is under the age of eighteen years and the child begins to reside permanently in the United States while under the age of eighteen years. In the administration of this subsection absences from the United States of less than sixty days in the aggregate during the period for which continuous physical presence in the United States is required shall not break the continuity of such physical presence.

4.3 Because Ms. Roe was born abroad after May 24, 1934, § 301(b) applied to her.⁷

4.4 Public Law 85-316⁸ § 16 provided the following rule for determining continuity of residence:

In the administration of section 301(b) of the Immigration and Nationality Act, absences from the United States of less than twelve months in the aggregate, during the period for which continuous physical

⁴ Section 12 of Pub.L. 99-653 substituted “five years, at least two” for “ten years, at least five”. Section 23(d) of Pub.L. 99-653, as added by Pub.L. 100-525, § 8(r), Oct. 24, 1988, 102 Stat. 2619, provided that: “The amendment made by § 12 shall apply to persons born on or after November 14, 1986.”

⁵ 8 U.S.C. 1401(b).

⁶ This is the version of § 301(b) enacted by the first § of Pub.L. 92-584, effective October 27, 1972. Prior to this date, the requirement was five years of physical presence in the US.

⁷ *See* § 301(c) Subsection (b) shall apply to a person born abroad subsequent to May 24, 1934: PROVIDED, HOWEVER, That nothing contained in this subsection shall be construed to alter or affect the citizenship of any person born abroad subsequent to May 24, 1934, who, prior to the effective date of this Act, has taken up a residence in the United States before attaining the age of sixteen years, and thereafter, whether before or after the effective date of this Act, complies or shall comply with the residence requirements for retention of citizenship specified in subsections (g) and (h) of section 201 of the Nationality Act of 1940, as amended.

⁸ September 11, 1957, 71 Stat. 644.

presence in the United States is required, shall not be considered to break the continuity of such physical presence.

4.5 Public Law 92-584 §2 repealed § 16 effective October 27, 1972 and added a new § 301(d) as a savings clause for those complying with the previous law:

301(d) Nothing contained in subsection (b), as amended, shall be construed to alter or affect the citizenship of any person who has come to the United States prior to the effective date of this subsection and who, whether before or after the effective date of this subsection, immediately following such coming complies or shall comply with the physical presence requirements for retention of citizenship specified in subsection (b) prior to its amendment and the repeal of section 16 of the Act of September 11, 1957.

4.6 These amendments applied to aliens born abroad after May 24, 1934. However, as Ms. Roe never lived in the US, neither § 16 nor its repeal applied to her.

4.7 The first section of Pub.L. 95-432⁹ repealed subsections 301(b), (c), and (d) eliminating the residence requirement for retention of US citizenship. This change was effective October 10, 1978, and is prospective only. It does not reinstate citizenship to those who had lost it under § 301(b).¹⁰

4.8 Ms. Roe was age 22 on October 10, 1978 and would have still been able to meet the two-year US presence test before she turned 28. Thus, she had not yet lost her US citizenship under § 301(b).¹¹

⁹ October 10, 1978, 92 Stat. 1046.

¹⁰ See H. Rept. 95-1493 (95th Cong.), to accompany H.R. 13349, p. 2. The prospective repeal of § 301(b) (and § 350, as discussed below) is confirmed by comparing the legislation effecting that repeal to 8 USC 1401(h), which was added on October 25, 1994 by Pub. L. 103-416, Title I, § 101(a), 108 Stat. 4306. That section is not relevant to Ms. Oreck's situation, but the 1994 legislation expressly made paragraph (h) retroactive as if it had been in effect on the date of birth of the person in question (with certain exceptions). There was no such retroactive language attached to the 1978 repeal of 301(b).

¹¹ See U.S. Department of State Foreign Affairs Manual Volume 7, Consular Affairs, 7 FAM 1100, Appendix L, Retention Provisions, CT:CON-454; 04-15-2013, which states:

1978 Repeal of INA 301 (b) Prospectively: On October 10, 1978 the retention provisions of the Immigration and Nationality Act were repealed by Public Law 95-432.

(1) As a result, persons born on or after October 10, 1952, who acquired U.S. citizenship through birth abroad to one U.S. citizen parent are not required to be physically present in the United States to retain U.S. citizenship.

(2) Because the repeal was prospective in application, it did not benefit persons born on or after May 24, 1934, and before October 10, 1952.

(3) The intent of Congress in repealing § 301(b) is made clear in The Report of the House Judiciary Committee (House Report 95-1493) which stated that Congress desired to repeal the

4.9 (c) Depending what she intended, Ms. Roe may have lost her US citizenship under § 350 - Public Law 95-432 also repealed INA § 350,¹² which stated as follows (added emphasis):

350 Dual nationals; divestiture of nationality

A person who acquired at birth the nationality of the United States and of a foreign state and *who has voluntarily sought or claimed benefits of the nationality of any foreign state* shall lose his United States nationality by hereafter having a continuous residence for three years in the foreign state of which he is a national by birth at any time after attaining the age of twenty-two years unless he shall-

(1) prior to the expiration of such three year period, take an oath of allegiance to the United States before a United States diplomatic¹³ or consular officer in a manner prescribed by the Secretary of State; and

(2) have his residence outside of the United States solely for one of the reasons set forth in paragraph (1), (2), (4), (5), (6), (7), or (8) of section 1485 of this title, or paragraph (1) or (2) of section 1486 of this title: Provided, however, That nothing contained in this section shall deprive any person of his United States nationality if his foreign residence shall begin after he shall have attained the age of sixty years and shall have had his residence in the United States for twenty-five years after having attained the age of eighteen years.

4.10 Ms. Roe never took an oath of allegiance under § 350(1).

4.11 In *Afroyim v. Rusk*,¹⁴ the United States Supreme Court considered INA § 401(e) (later INA § 349(a)(5)),¹⁵ which mandated the automatic loss of US citizenship for voting in a foreign election. The Court held the mandatory/automatic citizenship loss unconstitutional. But, a citizen may still *voluntarily* relinquish citizenship:

We hold that the Fourteenth Amendment was designed to, and does, protect every citizen of this Nation against a congressional forcible destruction of his citizenship, whatever his creed, color, or race. Our holding does no more than to give to this citizen that which is his own, a constitutional right to remain a citizen in a free country unless he *voluntarily relinquishes that citizenship*.¹⁶

4.12 The US Department of Justice also interpreted *Afroyim* as allowing voluntary relinquishment:

section prospectively in order not to provide a basis to restore citizenship to those who lost their citizenship prior to enactment of the bill.

¹² 8 U.S.C. 1482.

¹³ The actual legislation uses the word “displomatic”, obviously a typographical error.

¹⁴ 387 U.S. 253 (May 29, 1967).

¹⁵ 8 U.S.C. 1481(a)(5).

¹⁶ 387 U.S. 253 at 268 (added emphasis). See also *Vance v. Terrazas* 444 U.S. 252 (January 15, 1980) (only the *mandatory* nature of 401(e) at issue in *Afroyim*; giving up citizenship *voluntarily* permitted).

In applying section 350, administrative authorities now hold that a dual national is not subject to expatriation under this section unless there is a persuasive showing of an intent to relinquish American citizenship or that the act performed was in derogation of allegiance to the United States. Consequently, in numerous administrative cases since *Afroyim* it has been held that expatriation under section 350 did not occur because there was no showing that citizenship had been *voluntarily* relinquished.¹⁷

4.13 An Attorney General opinion of January 18, 1969 (AG Opinion) confirmed that *Afroyim* allows for voluntary relinquishment:

Afroyim did not expressly address itself to the question of defining what declarations or other conduct can properly be regarded as a “voluntary relinquishment” of citizenship. As a consequence, it did not provide guidelines of sufficient detail to permit me to pass definitely upon the validity of other expatriating provisions of the act. It did, however, stress the constitutional mandate that no citizen born or naturalized in the United States can be deprived of his citizenship unless he has “*voluntarily relinquished*” it.

This opinion went on to clarify that written renunciation is not required and that “other acts” can show renunciation:

For administrative purposes, and until the courts have clarified the scope of *Afroyim*, I have concluded that it is the duty of executive officials to apply the act on the following basis. “*Voluntary relinquishment*” of citizenship is *not* confined to a written renunciation, as under section 349(a) (6) and (7) of the act, 8 U.S.C. 1481(a) (6) and (7). *It can also be manifested by other actions declared expatriative under the act, if such actions are in derogation of allegiance to this country.*

Whether a person has renounced US citizenship is a factual determination:

In each case the administrative authorities must make a judgment, based on all the evidence, whether the individual comes within the terms of an expatriation provision and has in fact *voluntarily* relinquished his citizenship.¹⁸

5.0 Conclusion:

5.1 A US citizen has the right to give up citizenship voluntarily. Before § 350’s repeal in 1978, the law did not require a formal written renunciation – renunciation could “be manifested by other actions declared expatriative under the act, if such actions are in derogation of allegiance to this country.” Obtaining and traveling on a non-US passport and voting in non-US

¹⁷ Justice report appearing in H. Rept. 95-1493 (95th Cong.) relating to repeal of § 350.

¹⁸ This AG Opinion stated that it might not apply to § 350 because the US Supreme Court was considering its constitutionality. *Rogers v. Bellei*, 401 U.S. 815 (April 5, 1971) subsequently held § 350 constitutional and thus the AG’s opinion applies to § 350.

elections are expatriative acts.¹⁹ If done with the intent of relinquishment it means the loss of US citizenship.

5.2 Before October 10, 1978, Ms. Roe acquired a Canadian passport and voted in Canadian elections, both of which only a Canadian can do. *If* she did those acts intending to give up her US citizenship, then § 350 applied and she lost her US citizenship. Because she did so before October 10, 1978, the repeal of § 350 did not affect this question. Whether she did those acts intending to renounce her US citizenship is a factual question upon which I cannot opine.



Robert J. McWhirter

¹⁹ In United States Department of Justice, Immigration & Naturalization Service, Interpretation Letter, Appendix C, Department of State Airgram of November 13, 1969, Relating to the *Afroyim* Decision, the following appears:

The voluntary use of a foreign passport would ordinarily be considered to have been a substantial benefit of the nationality of a foreign state (See 8 FAM 225.11 Interpretations). Also, voting in a foreign election under certain circumstances could be considered a substantial benefit. If it is established by persuasive evidence that such act was accompanied by affirmative intent to relinquish United States citizenship, the person could thereafter lose citizenship by having a continuous residence for three years in a foreign state of which he was a national by birth after the attainment of age twenty-two.

Similarly, in United States Department of Justice, Immigration & Naturalization Service, Interpretation Letter, Interpretation 350.1, Expatriation in the Absence of Elective Action by Persons Acquiring Dual Nationality at Birth Prior to Repeal of § 350, dealing with the effect of *Afroyim*, the following appears:

(ii) Obtaining or using a foreign passport. Such actions (as described in (a)(3)(i), supra) continued to be regarded as claims to a “substantial” benefit of a foreign nationality for former § 350 purposes. [FN42] Thus, where sworn testimony established that a dual national of the United States and Great Britain, who had been residing in Malta since 1921 (age 7), had voluntarily used British passports in 1951 and 1959, had voted voluntarily in Maltese political elections, and finally had voluntarily sought to renounce his American nationality in 1967 at the American Embassy in Malta [FN43] because the Maltese Constitution prohibited dual nationality and he wished to retain Maltese nationality as his family and business were established in Malta, the State Department held that such circumstances constituted persuasive evidence of his affirmative intention to relinquish United States citizenship [FN44] within the requirement of *Afroyim*, and that therefore his use of the British passport in 1959 and subsequent residence in Malta expatriated him under former section 350. [FN45] (Revised)

...

(iii) Voting in a foreign political election. Although the decision in *Afroyim v. Rusk* declared voting in a political election of a foreign state to be unconstitutional as an independent statutory ground of expatriation. [FN49] It was the administrative position that such act, when performed voluntarily by a dual national of the foreign state in question, was a claim to a “substantial” benefit of the foreign nationality for purposes of former section 350, provided the exercise of the franchise was a privilege for which only nationals of the foreign state were eligible. [FN50] However, such voting could cause citizenship loss under former section 350 only in accordance with the general rule which evolved from *Afroyim*, as set forth in (b)(2), supra. [FN51] (Revised)

Attachment 3

Cert. Petition to the United States Supreme Court in *United States v. Leonardo Portillo-Vega*.

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

LEONARDO PORTILLO-VEGA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

ROBERT J. McWHIRTER
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Phoenix, Arizona 85004
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DATE MAILED: September _____, 2014

QUESTION PRESENTED

I

Is *Almendarez-Torres v. United States*, 523 U.S. 224, 239-47 (1998) still the law after *Alleyne v. United States*, 133 S. Ct. 2151, 2160 n. 1 (2013) or is a factor that increases a defendant's statutory maximum sentence an element a jury must decide?

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

LEONARDO PORTILLO-VEGA,

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v.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

The petitioner, LEONARDO PORTILLO-VEGA,
requests that a Writ of Certiorari issue to review the July
9, 2014 judgment and opinion of the Ninth Circuit Court
of Appeals.

OPINION BELOW

United States v. Leonardo Portillo-Vega, No. 13-10411 (9th Cir. June 13, 2014) (Slip opinion attached as Appendix A).

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1255 and because the Ninth Circuit filed its opinion on July 9, 2014 the Petition is timely under Supreme Court Rule 3.13.

CONSTITUTIONAL PROVISIONS AND STATUTES

This case implicates the Sixth Amendment of the United States Constitution:

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and

cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

I. Facts

On June 25, 2012, the government filed a complaint against Mr. Leonardo Portillo-Vega, Clerk's Record on Appeal (CR) 1, alleging he reentered after deportation violating 8 U.S.C. § 1326. The government later indicted him on July 10, 2012. On April 17, 2013, Mr. Portillo-Vega pleaded "straight-up" to the indictment without a plea agreement but did not admit to anything regarding a prior conviction. CR 34 and 35.

Following the Presentence Report (PSR), the sentencing judge on July 26, 2013 used Mr. Portillo-Vega's prior conviction to drastically increase his sentence under 8 U.S.C. § 1326(b)(2) and Federal Sentencing Guideline § 2L1.2(a) by adding 8 levels to his base offense level. PSR ¶11. After receiving a two-point reduction for accepting responsibility, his total offense level was 14 with a criminal history category V, yielding a sentencing

range of 33 to 41 months. Without the 8 level increase, his offense level would have been 6 yielding a range of 9 to 15 months.

The judge sentenced Mr. Portillo-Vega to 41 months custody with three years supervised release on July 26, 2013. CR 43. Mr. Portillo-Vega never had the chance for a jury to decide the factors that drastically increased his sentence.

The Ninth Circuit denied Mr. Portillo-Vega's appeal where he argued the Sixth Amendment prohibited the district court from increasing his sentence for his prior felony conviction, since a jury did not find this beyond a reasonable doubt. The Ninth Circuit held that the "Supreme Court rejected precisely this argument in *Almendarez-Torres v. United States*, 523 U.S. 224, 239-47 (1998)." Thus, the court held Mr. Portillo-Vega's Sixth Amendment argument fails because "*Almendarez-Torres* continues to bind us."

REASONS FOR GRANTING THE WRIT

This case presents an important question of federal law this Court should settle. Supreme Court Rule 10(c).

Mr. Leonardo Portillo-Vega was convicted and punished under 8 U.S.C. §1326(b)(2), reentry after deportation, without a jury determining the facts allowing for the increase in his maximum sentence. Although *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) allows this, this Court's recent decision in *Alleyne v. United States*, 133 S.Ct. 2151, 2160 n. 1 (2013) shows otherwise. Indeed, *Apprendi v. New Jersey*, 530 U. S. 466 (2000) had already put *Almendarez-Torres* in question. Although *Alleyne* dealt with increases in mandatory minimums and this case involves an increase in the statutory maximum, the reasoning is the same that any fact that increasing the penalty for a crime is an 'element' that a jury must decide. *Alleyne*, in fact, specifically overturned *Harris v. United States*, 536 U. S. 545 (2002),

holding that judicial fact-finding that increases the mandatory minimum sentence for a crime is permissible under the Sixth Amendment.

Here, Mr. Portillo-Vega received a 41-month sentence under 8 U.S.C. §1326(b)(2), significantly greater than 8 U.S.C. §1326(a)'s two-year statutory maximum. Title 8 U.S.C. §1326(b) (2) defines a separate criminal offense with a distinct element from 8 U.S.C. §1326(a), namely a given defendant's prior conviction. A jury using the proof beyond a reasonable doubt standard must find this element before a person can receive punishment for it. Mr. Portillo-Vega never got this Sixth Amendment right.

Respectfully submitted this _____ day of
September, 2014.

ROBERT J. McWHIRTER
ASU Alumni Law Group
Attorney for Petitioner

CERTIFICATE OF MAILING - PROOF OF SERVICE

ROBERT J. McWHIRTER, declares under penalty of perjury that the following is true and correct:

That in accordance with Rule 29.2, Supreme Court Rules, he has properly deposited in a United States Post Office or mailbox the original and ten (10) copies of Petitioner's **Petition For Writ Of Certiorari** to be forwarded to the Clerk of the Supreme Court of the United States of America within the period prescribed in Rule 13.1, Supreme Court Rules.

That in accordance with Rule 29.5, Supreme Court Rules, two copies of this **Petition For Writ Of Certiorari** have this day _____ of September, 2014 been delivered to _____ Chief Assistant United States Attorney, Appellate Section, Two Renaissance Square, 40 North Central Avenue, Suite 1200, Phoenix, Arizona 85004-4408, telephone number (602) 514-7500; two copies mailed to the Honorable

Donald B. Verrilli, Jr., Solicitor General, U.S. Department of Justice, 950 Pennsylvania Avenue, N.W., Room 5614, Washington D.C. 20530; and a copy mailed to Leonardo Portillo-Vega, Petitioner.

EXECUTED this _____ day of September, 2016.

ROBERT J. McWHIRTER
ASU Alumni Law Group
Attorney for Petitione