

State of Arizona  
COMMISSION ON JUDICIAL CONDUCT

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Disposition of Complaint 15-124

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Judge:

Complainant:

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**ORDER**

The complainant alleged a superior court judge improperly dismissed his Rule 32 petition seeking post-conviction relief.

The responsibility of the Commission on Judicial Conduct is to impartially determine if the judge engaged in conduct that violated the provisions of Article 6.1 of the Arizona Constitution or the Code of Judicial Conduct and, if so, to take appropriate disciplinary action. The purpose and authority of the commission is limited to this mission.

The commission does not have jurisdiction to review the legal sufficiency of the judge's rulings. In addition, the commission found no evidence of ethical misconduct and concluded that the judge did not violate the Code in this case. Accordingly, the complaint is dismissed in its entirety, pursuant to Rules 16(a) and 23.

Dated: May 28, 2015

FOR THE COMMISSION

/s/ George A. Riemer

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George A. Riemer  
Executive Director

Copies of this order were mailed to the complainant and the judge on May 28, 2015.

*This order may not be used as a basis for disqualification of a judge.*

2015-124

COMPLAINT AGAINST A JUDGE

Rule 2.2

Name \_\_\_\_\_ Judge's Name \_\_\_\_\_

Instructions: Use this form or plain paper of the same size to file a complaint. Describe in your own words what you believe the judge did that constitutes judicial misconduct. Be specific and list all of the names, dates, times, and places that will help the commission understand your concerns. Additional pages may be attached along with copies (not originals) of relevant court documents. Please complete one side of the paper only, and keep a copy of the complaint for your records.

On \_\_\_\_\_ submitted notice of post-conviction relief and Motion for reinstatement of Rule 32 Inspector Assistance of Counsel pursuant to Ariz. R. Crim. P. Rule 16.1(G). On \_\_\_\_\_ the defendant filed Motion to show cause why Counsel has not been appointed and Evidentiary hearing set. On \_\_\_\_\_ the Hon. \_\_\_\_\_ ordered assigning this Rule 32 proceeding to the Hon. \_\_\_\_\_ for all further proceedings. The defendant expected to be appointed counsel after \_\_\_\_\_ pursuant to Article 6.3 of the Arizona Constitution pursuant to his notice of Rule 32 (PCR) and Motion pursuant to 16.1(G). On \_\_\_\_\_ the defendant received order vacating the Assignment of Judge \_\_\_\_\_ in this matter. Assigning this Rule 32 proceeding to Judge \_\_\_\_\_ for all further proceedings by the Hon. \_\_\_\_\_ On \_\_\_\_\_ dismissed defendant's Notice of Post-conviction. The defendant believes re assigning \_\_\_\_\_ is a conflict of interest. On \_\_\_\_\_ defendant filed certificate of service, Motion to correct Mistakes in judgement/Sentence, Rule 24.4, Ariz. R. Crim. \_\_\_\_\_ Alleged that his sentence is illegal and he is unlawfully confined in violation of the U.S. Const. Amendments 8, 14; Arizona Const, Art. 2 §§ 4, 15; Motion to correct \_\_\_\_\_ also gave Notice to the court below of the

fact Arizona state prisons do not have law libraries, thus making it nearly impossible to cite legal authority in support of his claims. He noted that he is proceeding with an incomplete record, argued the prosecutorial switch from A.R.S 13-604.02(B) to 13-604.02(A), was a fraud committed upon the court without legal basis nor factual justification.

On [redacted] filed a supplemental Memorandum in support of Motion to Correct sentence. Alleged his sentence is imposed in violation of, and not in accordance with the law in force when the offense was committed. A.R.S 1-245, 1-246, 1-247; On [redacted] the court issued its minute entry decision / order denying the Motion to Correct Mistakes. The court noted the version of A.R.S 13-604.02 in effect in [redacted] was enacted with an effective date of [redacted].

The court further concluded the defendant has failed to set forth any legal basis for relief.

On [redacted] submitted his Motion for Rehearing and Reconsideration to the court; possibly filed on [redacted]. As indicated in a subsequent Motion for Status and Notice to Court, it appears an impropriety or, at least irregularity occurred in regard to the clerk of the courts handling / filing of the Motion for Rehearing which error was rectified. see Motion for Status (Filed 12-2-2013.)

In the motion for reconsideration [redacted] conceded his initial motion to correct is defective. Motion for Rehearing and Reconsideration, The major defect in the motion

to correct is the assertion that the relevant amended statute was 13-604.02, whereas it actually is 41-1604.10 (5) Motion for Rehearing, pp. 3-12.

On [redacted], [redacted] filed his Supplemental Citation of Legal Authorities In Support of Relief. [redacted] draws the court's attention to the second clause of Rule 24.4, Ariz. R. Crim. P., which states in pertinent part, and errors in the record arising from oversight or omission may be corrected by the court at any time.

In this supplemental pleading [redacted] submitted that deputy county attorney [redacted] utilized the statutory language from the [redacted] version of A.R.S. 13-604.02(A), instead of and opposed to the [redacted] version applicable to this case and in effect in [redacted], when the offense occurred. The court indicated the date of offense in this case was [redacted], and the version of A.R.S. 13-604.02 in effect in [redacted] was enacted with an effective date of [redacted].

On [redacted], deputy county attorney [redacted] filed the correct sentence enhancement allegation under A.R.S. 13-604.02(B). Record of Appeal 20, [redacted] and without legal authority [redacted] filed an unlawful sentence enhancement allegation under 13-604.02(A). R.A. 109 The two priors used to enhance [redacted] sentence are non-dangerous, undesignated class 6 felonies.

was convicted of using a dangerous instrument, to-wit: a truck, intentionally placing in reasonable apprehension of imminent physical injury, in violation of A.R.S. 13-1204 (A)(2), (B), 13-1203 (A)(2) (RA)

Because was on probation for non-dangerous, non-serious, non-violent, undesignated class 6 felonies; to-wit: possession of and, at the time of the alleged offenses.

Challenges the application of that sentence enhancement provision to him. A more precise description of the allegation is whether the trial court erred in failing to determine the existence or absence of ... the intentional or knowing infliction of serious physical injury upon the victims in this case.

assented to Hon the trial court has an independent duty to adjudicate and pronounce judgment and sentence in accordance with applicable statutory provision, Rule 26.1 Ariz. R. Crim. P.

There are elements or triggers in the version of 13-1204.02 (B), which must be satisfied in order to activate / apply its sentence enhancement provision: (1) a person convicted of any felony offense involving the use or exhibition of a deadly weapon or dangerous instrument, (2) the intentional or knowing infliction of serious physical injury upon another, and (3) if [1 and 2] are committed while the person is on probation. All three triggers must be present. It is the absence of the

second trigger, i.e. the intentional or knowing infliction of serious physical injury upon another, which makes Subsection (A) inapplicable in this case. The circumstances of this case warrant only application of Subsection (B). Compare (A) and (B) of 13-604.02

The honorable Judge \_\_\_\_\_, should have corrected the mistakes on the written minute entry of the sentence, correcting the judgment, the errors and omissions in the minute entry. As the oral records findings support sentence for a first offense of Aggravated Assault, dangerous, a class 3 felony. The discrepancy between the oral, and written sentence effected \_\_\_\_\_ sentence, and parole eligibility pursuant to 31-412, the oral record provides that \_\_\_\_\_ must serve two-thirds before he is eligible for release; the oral pronouncement is made pursuant to A.R.S 13-604.02; without citation as to which subsection, (A) or (B); However, the minute entry cites subsection (A). No oral finding was made pursuant to 13-702(C)(1) or, as defined by 13-604(D)

The Court: The clerk will indicate in the minute entry that evidence is taken under A.R.S 13-604.02 [see Reporter's transcript of sentence pg 6, line 13-19]

No finding pursuant to A.R.S 13-604, was ever orally made; yet the written minute entry has sentence as repetitive pursuant to A.R.S

**THE COMMISSION'S POLICY IS  
TO POST ONLY THE FIRST FIVE  
PAGES OF ANY DISMISSED  
COMPLAINT ON ITS WEBSITE.**

**FOR ACCESS TO THE  
REMAINDER OF THE  
COMPLAINT IN THIS MATTER,  
PLEASE MAKE YOUR REQUEST  
IN WRITING TO THE  
COMMISSION ON JUDICIAL  
CONDUCT AND REFERENCE  
THE COMMISSION CASE  
NUMBER IN YOUR REQUEST.**