BEFORE THE PRESIDING DISCIPLINARY JUDGE OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA, **CREIGHTON W. CORNELL, Bar No. 011433,** Respondent.	**PDJ-2011-9051** **REPORT AND ORDER IMPOSING SANCTIONS** [No. 09-2194]

On March 12, 13 and 14, 2012, the Hearing Panel ("Panel") composed of Robert M. Gallo, a public member from Maricopa County, Richard L. Brooks, an attorney member from Maricopa County, and the Presiding Disciplinary Judge ("PDJ") held a three day hearing pursuant to Supreme Court Rule 58(j), Ariz.R.Sup.Ct. James D. Lee appeared on behalf of the State Bar of Arizona ("State Bar") and Respondent appeared pro per. The witness exclusionary rule was invoked.[1] The Panel carefully considered the exhibits, testimony, the parties' Joint Pre-Hearing Statement, individual pre-hearing statements, individual post hearing memorandum, Respondent's Amended Post Hearing Memorandum filed on April 26, 2012, and evaluated the credibility of the witnesses including Respondent. On May 21, 2012, Respondent further filed a motion to expand or amend the record and for reconsideration of admission of Exhibit D, which was denied by the PDJ following argument. *See* Order filed May 24, 2012. The PDJ and Panel now issue the

[1] Consideration was given to the in court or telephonic sworn testimony of Charles Grube, AAG; Monica Klapp, Esq.; Levi Gunderson, Esq.; Roger Nelson, Esq.; Mr. Henry Varela II; and Dale Wren, Esq.

following "Report and Order Imposing Sanctions," pursuant to Rule 58(k), Ariz.R.Sup.Ct.

I. SANCTION IMPOSED:

ATTORNEY SUSPENDED FOR TWO YEARS PLUS COSTS OF THESE DISCIPLINARY PROCEEDINGS.

II. PROCEDURAL HISTORY

The Probable Cause Order was filed on September 12, 2011, and the Complaint in this matter was filed on August 31, 2011, alleging violations of Supreme Court Rule 42, ERs 3.1(a), 4.4(a), 8.2(a), 8.4(d) and current Rule 54(c), Ariz.R.Sup.Ct. On September 28, 2011, Respondent filed his Answer. An initial case management conference was held on October 7, 2011. Respondent filed a Motion to Dismiss on November 7, 2011, and the State Bar filed a Motion to Amend Complaint that same day; AND both were denied. Respondent filed a Motion for Summary Judgment on November 29, 2011 and December 29, 2011, which was also denied. The parties filed a Joint Pre-Hearing Statement on December 16, 2011. A final prehearing conference was held on March 7, 2012. The matter was then set for an evidentiary hearing.

Upon conclusion of the hearing on the merits, the PDJ ordered the parties' to submit written closing arguments and proposed findings of fact and conclusions of law and both parties complied.

The State Bar asserted that a six month suspension and plus two years of probation (practice monitor and 12 hours of CLE), is the appropriate sanction. Respondent asserted, however, that the record supports his argument that at all material times he made voluminous, concerted and successful efforts to reveal

prosecutorial and judicial misconduct and accurately related concerns that were well grounded in case law, rules and Canons. Respondent further asserted that there is unquestionably an overlap of religious faith in a small community such as the one here, and his argument of an existing judicial conflict of interest was not contrived, and that his efforts were in good faith.

III. FINDINGS OF FACT

1. At all relevant times Respondent was a lawyer licensed to practice law in the state of Arizona, having been first admitted to practice in Arizona on October 24, 1987. [Answer, ¶1]
2. Attorney Dale Wren ("Wren") began representing Henry Varela, II ("Varela II"), in a Yuma County criminal case in or about July 2003 in CR-2003-01530. [Answer, ¶2]
3. Varela II and his son, Henry Varela, III ("Varela III"), were accused of committing fraud related to the manufacture and construction of various structures. [Answer, ¶3]
4. Attorney Dale L. Wren ("Wren") filed motions on Varela II's behalf pursuant to Criminal Rule 12.9. [Answer, ¶4]
5. Wren never filed a notice of change of judge for cause against Judge Nelson or Judge Reeves, but did file a bias challenge regarding Judge Kenworthy. [Answer, ¶7]
6. On November 7, 2007, both Varela II and Varella III were re-indicted for the final time. Those two cases were assigned to Judge Reeves. Answer, ¶8.

7. On or about May 5, 2008, the Yuma County Attorney's Office moved to disqualify Wren as Varela II's counsel, primarily because of an alleged conflict of interest. [Answer, ¶9]

8. On June 13, 2008, Yuma County Superior Court Judge Mark Reeves granted the State's motion to disqualify Wren from representing Varela II. [Answer, ¶10]

9. On June 26, 2008, attorney Kelly Smith ("Smith") was appointed to represent Varela II. [Answer, ¶11]

10. On or about July 23, 2008, Respondent appeared as *Knapp* counsel for the limited purpose of representing Varela II in his effort to reverse Wren's disqualification and have Wren reinstated as his counsel. [Answer, ¶12]

11. Also on July 23, 2008, Respondent filed several motions on Varela II's behalf regarding Wren's disqualification as his counsel, including a motion for reconsideration of Judge Reeves' disqualification of Wren. [Answer, ¶¶12, 13]

12. On September 26, 2008, Judge Reeves denied reconsideration of his disqualification of Wren as counsel for Varela II. [Answer, ¶14]

13. On October 14, 2008, Respondent filed a Notice of Appearance Regarding Motion to Dismiss County 1-21 [of the November 7, 2007, Indictment] and a Defendant's Motion to Dismiss Counts 1-21 [of the November 7, 2007, Indictment] Due to Prosecutorial Misconduct. [Exh. 1 and. 2;[2] Answer, ¶15] Respondent alleged that the prosecutor "obtained its indictment based upon

[2] "Exh." refers to the stipulated exhibits, "SBA Exh." refers to the State Bar's exhibits, and "R Exh." refers to Respondent's exhibits.

erroneous, false and perjured testimony," [Exh. 2, SBA000014, lines 12-13[3]], and a failure to provide evidence that was clearly exculpatory to Varela II, and failed to correct inaccurate or false testimony to the grand jury.

14. On October 24, 2008, the Yuma County Attorney's Office filed a State's Response to Defendant's Motion to Dismiss Counts 1-21 Due to Prosecutorial Misconduct. [Exh. 3]

15. On October 29, 2008, Respondent filed a Motion for Clarification of Findings of Fact and Law in which he sought clarification from the court regarding the disqualification of Wren as counsel for Varela II. [Exh. 4]

16. On or about November 7, 2008, Respondent filed a Reply Regarding Dismissal of Counts 1-21 Due to Prosecutorial Misconduct. [Exh. 5]

17. On November 14, 2008, Respondent filed a Notice of Appearance Regarding Motion to Modify Conditions of Release, a Motion to Modify Conditions of [Varela II's] Release, a Notice of Appearance Regarding Motion to Dismiss Counts 22-27, and a Motion to Dismiss Counts 22-27 Due to Prosecutorial Misconduct, Alternatively Motion for Reconsideration of Grand Jury Challenge. [Exh. 6 and 7; Answer, ¶15]

18. Also on November 14, 2008, Respondent filed a Notice of Appearance Regarding Motion to Modify Conditions of Release and a Motion to Modify Conditions of Release. [Answer, ¶16; Exh. 8 and 9]

19. On November 17, 2008, Respondent filed an Offer of Highlighted Grand Jury Transcript that supplemented his Motion to Dismiss Counts 22-27 Due to

[3] References to quotations and summaries of statements are identified by the Bates number and line numbers.

Prosecutorial Misconduct, Alternatively Motion for Reconsideration of Grand Jury Challenge, which he filed on November 14, 2008. [Exh. 11]

20. Also on November 14, 2008, Respondent filed a Reply re: Response to Motion for Clarification of Prosecutorial Misconduct (Counts 1-21). [Exh. 10]

21. On November 24, 2008, the Yuma County Attorney's Office filed a State's Response to Defendant's Motion to Modify Conditions of Release. [Exh. 13]

22. On or about December 3, 2008, the Yuma County Attorney's Office filed a State's Response to: Defendant's Motion to Dismiss Counts 22-27 Due to Prosecutorial Misconduct, Alternatively Motion for Reconsideration of Grand Jury Challenge. [Exh. 14]

23. On December 8, 2008, Judge Reeves entered an order denying Respondent's Motion to Modify Conditions of Release and an order denying both Respondent's Motion to Dismiss Counts 1-22 for Prosecutorial Misconduct, and Respondent's Motion to Dismiss Counts 22-27 Due to Prosecutorial Misconduct, Alternatively Motion for Reconsideration of Grand Jury Challenge. [Exh. 15 and 16]

24. Smith was permitted to withdraw as counsel for Varella II. On or about December 17, 2008, attorney Kristi Riggins ("Riggins"), a Public Defender, was appointed to represent Varella II. [Answer, ¶18]

25. On or about December 18, 2008, Respondent filed a Notice of Appearance Regarding Bias Challenge, a Bias Challenge against Judge Reeves ("Reeves I"), and an affidavit regarding Reeves I. [Answer, ¶19; Exh. 17, 18 and 19]

The bias challenge stated in part:

(a) "Judge Reeves is biased and prejudiced against Mr. Varela II, or has the appearance of bias and prejudice, and can no longer have contact with this litigation." SBA000152, lines 16-18.

(b) "A general review of the court file, especially since May, 2008, reveals bias concerns." [SBA000154, lines 12-13]

(c) "2. JUDGE REEVES' BIAS AND PREJUDICE - OR THE APPEARANCE THEREOF - IS CONFIRMED BY THE DISPARATE TREATMENT THAT IS SPREAD THROUGHOUT THE LITIGATION.

Judge Reeves treats Mr. Varela different from other litigants. First, the court stated that it makes detailed findings of fact and law. . . . However, Judge Reeves declined to do so regarding the orders regarding Mr. Wren's disqualification. . . .

Second, Judge Reeves was briefed about his obligation to make findings of fact and law to facilitate appellate review. . . . He ignores that mandate. . . . Judge Reeves was reminded again of his obligation, but still ignores the mandate. . . .

Third, Mr. Varela II filed motions regarding Mr. Wren's disqualification and prosecutorial misconduct containing a detailed factual and legal analysis. The prosecution has not addressed the claims on the merits and Judge Reeves has chosen to ignore the claims. . . .

Judge Reeves' departure from his habit or desire to analyze and address all claims confirms disparate treatment that reveals bias and prejudice. His disregard for the law, and his failure to uphold the duty to analyze and address asserted claims, confirms bias and prejudice. The

refusal to address uncontradicted claims on the merits also reflects bias and prejudice.

Judge Reeves treats the prosecution different and better than it treats Mr. Varela II. First, the prosecution violated a direct order and admitted it violated the order to facilitate the reassignment of the case (i.e. forum shopping). . . . Judge Reeves imposed no sanction despite the prosecution's several manipulations. . . . The prosecution was allowed to return for another grand jury presentation and suffer no consequence. Only Mr. Varela II suffered by remaining in custody.

Second, Judge Reeves has stated that he will *sua sponte* take action when he receives 'notice' about ethical/constitutional concerns. . . . For example, the prosecution lacked standing to assert a conflict of interest, or move for Dale Wren's disqualification, so the Court *sua sponte* analyzed and disqualified Mr. Wren. . . .

Judge Reeves then received extensive notice that the prosecution/sheriff have engaged in shocking misconduct by intentionally, knowingly, or recklessly presenting erroneous or perjured testimony on dozens, if not hundreds of points, and committed constitutional violations throughout the case.

Judge Reeves has done nothing. He has not set a hearing for the prosecution to answer to the court, nor ordered the prosecution to address the allegations. He has not imposed, nor apparently even considered, any sanction. . . .

Judge Reeves has every reason to *sua sponte* address obvious concerns. His refusal to do so proves the door only swings one way in this case – for the Yuma County Attorney. The door does not budge for Mr. Varela II.

Judge Reeves has directly interfered with Mr. Varela II's right to counsel. First, Judge Reeves took the extraordinary step of disqualifying a retained lawyer for a potential conflict of interest.[2] Judge Reeves declined to have the prosecution explain how the alleged potential conflict of interest could ever become an actual conflict of interest or how it could be serious (i.e. how Jim Sandoval can ever offer adverse testimony to Mr. Varela II). Judge Reeves also found it impossible to waive a 'potential' conflict, and refuses to acknowledge clear legal authorities and precedents regarding Mr. Varela II's ability to waive the conflict, and the option of a lesser sanction. . . . Judge Reeves declines to address a pending Motion for Clarification. . . .

[Footnote 2] The prosecution asserted a 'potential' conflict. Judge Reeves found an "actual" conflict of interest, and then inexplicably changed his ruling and found a 'potential' conflict of interest. . . .

Second, Judge Reeves also relies upon advice from other judges when making decisions in this case (i.e. Wren's disqualification, modify conditions of release, and presumably all other legal matters). Some of the judges in Yuma County have been removed from the case and cannot be consulted. Judge Reeves refuses to identify the judges with whom he consults. . . .

Mr. Varela II has been placed at a huge and unfair disadvantage. The litigation is not being controlled by the evidence or applicable law. Judge Reeves' effort to avoid uncontradicted evidence and claims cannot be fairly explained. His conduct reveals a favorable disposition for the prosecution, or unfavorable disposition against Mr. Varela II, that is either wrong, inappropriate, undeserved, based upon knowledge that shouldn't be possessed, or is in excess of the court's authority. The bias and prejudice asserted above reveals a clear inability to render a fair judgment. There is a deep-seated favoritism for the prosecution, or an antagonism toward Mr. Varela II, and a fair determination of Mr. Varela's case is impossible.

3. Recent Evidence of Bias and Prejudice is Overwhelming.

There can be no doubt about Judge Reeves' lack of fairness and impartiality given recent events. First, the prosecution recently admitted, for the first time, it has made a number of 'mistakes'. . . . However, the prosecution refuses to clearly acknowledge what that means. . . . Judge Reeves declines to order the prosecution [to] acknowledge each and every error and mistake to which it admits.

Second, Mr. Varela II filed a motion to lower his bond given a change in circumstances not previously related to the court. Evidence reveals the prosecution has no case and Mr. Varela II has a tremendous defense(s). Actually, he is innocent. . . . The prosecution still refuses to address the evidentiary claims on the merits.

Third, Mr. Varela II contacted Judge Reeves' division on Sunday, November 23 inquiring how much time was set for the December 12 hearing. [Footnote omitted] A return call stated that several hours were set aside for the hearing. A Notice of Hearing was filed on November 28, clearly noting a key prosecution witness (accountant Linscott) would testify.

Judge Reeves vacated the December 12 hearing, denied a bond modification and both dismissal motions, without taking any evidence or hearing any argument. . . . The December 8 order(s) reveal bias and prejudice on several levels:

1) Judge Reeves denied the Motion to Modify Conditions of Release by finding no change in circumstances. . . . That is patently wrong. The prosecution has not cited even one place in the record wherein the strength of the defense evidence, or the paucity of the prosecution's evidence or misconduct, was asserted or proven. Judge Reeves is not making a mistake:

A) the prosecution presented false/erroneous testimony to the 2007 Grand Jury on dozens of levels, and hundreds of points, that infected the entirety of that presentation;

B) the court never received the prosecution's disclosure packet, and could not have known about all of the concerns;

C) the prosecution never admitted that it did anything wrong, on any level, until December 3. . . .

D) Judge Reeves had no knowledge about the quantity or quality of evidence relating to Mr. Varela II's innocence until the dismissal motions were filed after the last bail hearing in September.[4]

[Footnote 4] If Judge Reeves did have notice, he kept it to himself and took no action. Those errors and omissions would reflect separate and worse misconduct.

2) Judge Reeves may be admitting the paucity of the prosecution's evidence and prosecutorial misconduct. If so, he admits half of Mr. Varela II's claims and seemingly denies relief because the prosecution's misconduct was due to mere negligence, and not reckless, knowing or intentional decisions. . . . If so, this reflects bias and prejudice on several additional levels:

A) No objective person can reasonably forgive the quantity or quality of "errors" in this case. Nothing like it has occurred in the history of Yuma County and perhaps Arizona (i.e. six grand jury remands possibly being a state record.) Judge Reeves' refusal to acknowledge that this case is an aberration, on every possible level, ignores the obvious;

B) common sense and logic dictate that so many errors and mistakes cannot occur by accident. They can only occur as a course of conduct. Judge Reeves refuses to acknowledge this basic logic;

C) Judge Reeves denied the dismissal motions without addressing a motion to depose several Yuma County Attorney employees, and motion for a hearing so that Mr. Varela II can further prove the existence of prosecutorial misconduct;

D) Judge Reeves' December 8 order insulates and protects the prosecution;

E) Judge Reeves ordered that Mr. Varela shall not file two 'replies'. Filing motions is controlled by Rule 35.1 which does not grant a trial court the ability to forbid a reply. Moreover, no local Yuma rule grants the court that authority.

Judge Reeves has taken the extraordinary step of repeatedly impinging on the Sixth Amendment Right to Counsel – and right to prove asserted claims. Only bias and prejudice can explain the regular violations of constitutional protections, rules and the right to make a record."

Respondent concluded:

. . . .

"First, Mr. Varela moves for Judge Reeves to recuse himself.

Second, if Judge Reeves does not recuse himself, there is evidence of bias and prejudice. Each specific bias and prejudice claim requires the removal of Judge Reeves on its own merit.

Third, if an independent analysis of each bias claim does not require relief; then a cumulative analysis of all the bias claims requires relief.

Fourth, each bias allegation is Rule 404(b) evidence confirming bias as to all prior and subsequent bias claims (i.e. no accident, no mistake, a reckless, knowing, intentional state of mind).

In the event that bias and prejudice is rejected, there must then be a review for the 'appearance' of bias and prejudice. Each specific bias

claim must be independently reviewed to determine whether there is an 'appearance' of bias. If that does not result in Judge Reeves' removal, then a cumulative analysis of all claims must be conducted to determine whether there is an 'appearance' of bias and prejudice. Each bias claim is still Rule 404(b) evidence confirming the appearance of bias as to all prior and subsequent bias claims." [SBA000163, line 12 through SBA000169, line 24]

An affidavit that Respondent attached to the Bias Challenge stated in part:

"I'm unfamiliar with any reasonable explanation for Judge Reeves' conduct, rulings, declination to make rulings, failure to grant claims, failure to assert his authority over the prosecution, or willingness to allow the prosecution [to] do whatever it pleases." [SBA000150, lines 3-5]

26. On December 19, 2008, Yuma County Superior Court Judge Larry Kenworthy was assigned to rule on Reeves I. [Answer, ¶20]

27. On or about December 21, 2008, Respondent sent a letter to the Yuma County Superior Court judges, with the exception of Judge Reeves, asking them to discuss with him any conversation they may have had with Judge Reeves regarding the Varela II case, but especially (a) the State's motion to disqualify Dale Wren as Varela II's counsel in May 2008; (b) the motions to dismiss due to prosecutorial misconduct filed in October and/or November 2008 and (c) motions for change of Varela II's conditions of release filed between August and December 2008. On that same date, Respondent sent a letter to Judge Reeves personally in which Respondent notified Judge Reeves of the Bias Challenge Respondent had filed against him, and inquired whether he would be

willing to discuss his conversations with other judges since October 1, 2007. Respondent "copied" the Yuma County Attorney's Office on both letters. [Answer, ¶21; SBA Exh. 201 and 202]

28. On December 26, 2008, Respondent filed a challenge for cause regarding Judge Kenworthy because the Judge previously represented a "victim" in the underlying fraud case against Varela II. [Answer, ¶22]

29. Also on December 26, 2008, Respondent filed a Notice of Extensive Argument/Hearing re: Bias Challenge of Judge Reeves. [Exh. 20]

30. On December 29, 2008, the Yuma County Attorney's Office filed a State's Response to Defendant's Bias Challenge. That response stated, in part, that Judge Reeves had previously ruled against the State on other occasions, including (a) grand jury remands (the County Attorney's Office had opposed the motions to remand filed by Varela II's lawyer(s); and (b) requests to review Varela II's release conditions (Judge Reeves denied two of those requests and granted one, which resulted in the reduction of Varela II's bond from $400,000.00 cash to $250,000.00 surety (which reduced the amount of cash to post bond to $25,000.00). [Exh. 21]

31. On January 7, 2009, Judge Kenworthy recused himself. [Answer, ¶23]

32. On January 9, 2009, Yuma County Superior Court Presiding Judge Andrew Gould ("Gould") noted that Yuma County Superior Court Judge John Paul Pante had previously recused himself and assigned *Reeves I* to Judge Nelson. [Answer, ¶24]

33. On or about January 12, 2009, Respondent filed a Reply Regarding Bias Challenge to Judge Reeves.

That reply stated in part:

(a) "First, Mr. Varela II does not allege that Judge Reeves was biased and prejudiced at the inception of his appointment to the case. It has taken some time for Judge Reeves' bias and prejudice to develop and/or be revealed[.]" [SBA000181, lines 9-11]

(b) "ii) Judge Reeves' October 2007 order, finding but not punishing prosecutorial misconduct, gave clearance for the prosecution to do whatever it wants, whenever it wants, however it wants, and to proceed without restraint. The October, 2007 remand order lends a thin veneer that does not hide the unfairly disparate treatment that has occurred ever since." [SBA000181, lines 18-22]

(c) "[Judge Reeves] refuses to address or analyze a myriad of constitutional challenges. The remand litigation does not belie Judge Reeves as being fair and impartial. It confirms he is not." [SBA000182, lines 7-9]

(d) "Judge Reeves then found, in obvious contradiction of the record, that there had been no 'change in circumstances'. A Judge cannot fairly or impartially ignore evidence that was not previously provided until the October/November/December, 2008 pleadings were filed." [SBA000182, lines 20-23]

(e) "Third, the prosecution may have agreed to a $100,000 cash bond. If true, the prosecution agreed to a lower bond than $250,000 (cash/surety). Judge Reeves' decision to impose a higher bond than the prosecution requested confirms bias." [SBA000183, lines 4-6]

(f) "Mr. Varela II does not argue that the mere denial of motions results in evidence of bias. He also asserts the following:

1) Judge Reeves treats Mr. Varela II different from other litigants by stating an inclination to make detailed findings of fact and law, and then declining to do so since March and certainly no later than June, 2008;

2) Judge Reeves has been reminded of his obligation to make findings of fact and law to facilitate appellate review and repeatedly ignores that mandate;

3) Judge Reeves has chosen to ignore claims of fact and law, not addressed or contradicted by the prosecution, during the Wren disqualification and dismissal litigation. This reveals another departure from his habit/obligation to analyze and address all claims and thus confirms disparate treatment revealing bias and prejudice;

4) Judge Reeves treats the prosecution different and better than it treats Mr. Varela II. The prosecution is free to violate orders and suffer no adverse consequence. Judge Reeves' refusal to *sua sponte* take action when there are ethical/constitutional prosecutorial concerns reveals a clear predisposition against Mr. Varela II or for the prosecution;

5) Judge Reeves has interfered with Mr. Varela II's 6th Amendment right to counsel by taking several extraordinary steps: 1) noting a 'potential' conflict of interest, finding an actual conflict, and then retracting and finding a potential, all without explanation;

2) declining to make findings; 3) declining to order or force the prosecution to articulate how Tim Sandoval can offer adverse testimony to Mr. Varela II; 4) relying upon advice from other judges when several judges cannot be consulted; and, 5) refusing to identify the judges with whom he consults." [SBA000183, line 8 through ABA000184, line 7]

(g) "Mr. Varela II moves the prosecution or a court identify any case(s) in the collective history of Yuma County with 75% of the 'errors' contained in this case. If there is no such case, then Mr. Varela II requests identification of cases with 50% of the errors. If that cannot be deduced, then identification of cases with 25% of the alleged errors.

Undoubtedly, no court or prosecutor will offer any examples, because no such examples exist. This case is the one and only. It is an aberration and an abomination." [ABA000184, lines 14-20]

(h) "Judge Reeves is now affirmatively insulating and protecting the prosecution from the consequences of its misconduct. He is neutralizing the applicable rules of procedure, statutes and efforts of counsel in contradiction of the federal constitution." [ABA000185, lines 6-8]

34. On January 20, 2009, Respondent filed a Bias Challenge to Judge Nelson ("Nelson I"), an affidavit regarding the bias challenge of Judge Nelson, and a Motion for Depositions of Yuma County Bench. Answer, ¶¶25 and 26; Exh. 23, 24 and 25.

In the Bias Challenge to Judge Nelson, Respondent stated in part:

"Judge Nelson is of the same faith and/or attends the same church as prosecutors Nelson/Gunderson. There is bias and prejudice, or the appearance thereof, given the inability of one member of a congregation to fairly sit in judgment of other members of their congregation:

1) Judge Nelson may 'personally' know prosecutors Nelson or Gunderson by way of church activities or reputation and may have a favorable or highly favorable impression of one or both men that is unshakable. If so, Mr. Varela II will not be able to prove prosecutorial misconduct, or even go forward with prosecutorial misconduct claims, because Judge Nelson will not have an open mind and will not be able to accept that members of his congregation have engaged in the alleged misconduct;

2) Judge Nelson may know family members of prosecutors Nelson/Gunderson and hold those family members in high regard (i.e. parents, aunts, uncles, cousins, in-laws). Again, that would lead to an inability for Mr. Varela II to prove misconduct even before the process begins;

3) Judge Nelson's spouse may have a relationship with the prosecutors' spouses;

4) Judge Nelson's children may have relationship with the prosecutors' children or families;

5) There may be a very close link within the church. The men may meet to discuss and conduct church business, church membership, to

pray or socialize. At heart, the allegations in this case are that the police and prosecution have repeatedly sinned for years. There have been violations of fundamental commandments.

Judge Nelson cannot sit in judgment of other members of his congregation in this context. Even if he has a legitimate concern that misconduct has occurred, he will face some consequences if prosecutors Nelson/Gunderson are found to have committed misconduct."

. . . .

Respondent concluded:

"First, Mr. Varela II moves for Judge Nelson to recuse himself.

Second, if Judge Nelson does not recuse himself, there is evidence of bias and prejudice. Each specific bias and prejudice claim requires the removal of Judge Nelson on its own merit.

Third, if an independent analysis of each bias claim does not require relief, then a cumulative analysis of all the bias claims requires relief.

Fourth, each bias allegation is Rule 404(b) evidence confirming bias as to all prior and subsequent bias claims (i.e. no accident, no mistake, a reckless, knowing, intentional state of mind).

In the event that bias and prejudice is rejected, there must then be a review for the 'appearance' of bias and prejudice. Each specific bias claim must be independently reviewed to determine whether there is an 'appearance' of bias. If that does not result in Judge Nelson's removal,

then a cumulative analysis of all claims must be conducted to determine whether there is an 'appearance' of bias and prejudice. Each bias claim is still Rule 404(b) evidence confirming the appearance of bias as to all prior and subsequent bias claims.

Finally, if relief is not granted based upon this pleading, Mr. Varela II will move that Judge Nelson be deposed, and an evidentiary hearing be set, so that Judge Nelson and other witnesses can be examined. Mr. Varela II requires a fair opportunity to prove bias, or the appearance of bias and prejudice, pursuant to Rule 10.1 (C), Ariz. R. Crim. P. and federal due process guaranteed by the 5th/14th Amendments. *Jackson v. Denno*, 378 U.S. 368 (1964); *Bracey v. Gramley*, 520 U.S. 899 (1997). This motion will be supplemented and additional Rule 404(b) evidence will be alleged after a response or initial order is received." [SBA000197, line 13 through SBA000198, line 13; SBA000200, line 2 through SBA000201, line 1]

In the affidavit, Respondent stated in part:

"I have received information that Deputy Yuma County Attorneys Roger Nelson and Levi Gunderson are of the same denomination and/or may attend the same church as Judge Nelson[.] . . . There is a distinct possibility of an extensive and personal overlap, acquaintance and mutual acquaintances, that would make it difficult for one church member to decide the misconduct or 'sins' of another church member." [SBA000186, line 20 through SBA000187, line 2]

In the motion for depositions, Respondent stated in part:

"A bias challenge was filed regarding Judge Mark Reeves on December 18. The general allegations are that Judge Reeves: 1) treats Mr. Varela II different and worse compared to other defendants in Yuma County, and different and worse compared to the prosecution in this case; and 2) has exceeded his authority and failed to act in accordance with the law.

There are numerous examples of bias and prejudice, or the appearance thereof, that preclude Judge Reeves from further contact with the case, including: repeatedly failing to make findings of fact and law – or even acknowledge legal claims – despite numerous requests and an obligation to do so; ordering that Mr. Varela II forego a reply; insulating the prosecution from being exposed for its reckless, knowing and intentional misconduct that has plagued this litigation since 2003.

Judge Reeves did not decide to avoid whole legal claims, or make wildly erroneous findings of fact and law, in a vacuum. He consulted with at least one judge, and perhaps several judges, on the Yuma County bench. This raises the possibility that: A) Judge Reeves has received good advice about what he should do, or what the law requires, but is ignoring that good advice; or B) Judge Reeves is receiving and embracing very bad advice in contradiction to the cited evidence and applicable law." [SBA000205, lines 3-19]

35. Also on January 20, 2009, Judge Nelson held a status hearing in the Varela II case. Riggins was present at that hearing, but Respondent was not. Judge

Nelson dismissed Respondent's Bias Challenge to Judge Nelson. [Answer, ¶28; Exh. 26 and 27]

During that hearing, the following evidence was adduced and conclusions reached:

(a) Judge Nelson and Roger Nelson are not related. [SBA000215, lines 12-17]

(b) Judge Nelson does not attend the same congregation as Deputy County Attorneys Nelson and Gunderson. [SBA000218, lines 2-7]

(c) Judge Nelson was not familiar with the circumstances regarding the religious background of Deputy Yuma County Attorney Levi Gunderson. [SBA000218, lines 2-7]

(d) Deputy Yuma County Attorney Levi Gunderson had not been active in the Mormon church in almost a decade and, as of the date of the hearing, did not attend any congregation in the Yuma area. [SBA000218, lines 21-25]

(e) Judge Nelson was the trial judge on this case for a period of approximately six months, from January 2007 through the end of June, 2007, during which time, Judge Nelson handled "multiple hearings on substantive issues" regarding this case. During that time period, Deputy County Attorney Nelson appeared in front of him. [SBA000215, lines 18-25; SBA000218, lines 13-20]

(f) No new evidence or change in circumstances was presented in the Bias Challenge to Judge Nelson or the affidavit filed therewith that would justify a Rule 10.1 challenge being made against Judge Nelson,

approximately eighteen months after Judge Nelson had ceased to be the trial judge. [SBA000216, lines 2-4, and lines 17-20; SBA000216, line 24 through SBA000217, line 1]

(g) The Defendant's Motion was filed "in bad faith." [SBA000215, line 25 through SBA000216, line 4; SBA000216, lines 5-7]

(h) Mr. Cornell is "playing games with this Court." [SBA000216, lines 23-24]

(i) Judge Nelson set *Reeves I* for hearing on February 27, 2009. [Answer, ¶30; Exh. 27; SBA000219, lines 11-15]

36. On January 20, 2009, Judge Nelson noted in a minute entry (filed January 23, 2009) that no bias challenge had been filed against him during a six-month period of time in 2007, and that there was no new evidence that he was biased. He dismissed Nelson I and concluded that Nelson I was filed in bad faith. [Exh. 27]

37. On or about January 26, 2009, Respondent sent a letter to Yuma County Superior Court judges in which he stated he had not heard from them regarding his December 2008 request for a statement, inquired whether they would respond, and "request[ed] a statement regarding any consultations [they've] had with other judges since the bias challenge to Judge Reeves was filed in December 2008." [SBA Exh. 203]

38. On January 30, 2009, the Yuma County Attorney's Office filed a State's Response to Defendant's Bias Challenge to Judge Nelson. Deputy Yuma County Attorney Levi Gunderson stated in that response that although Respondent's bias challenge to Judge Nelson was moot because Judge Nelson

denied the challenge on January 20, 2009, he wanted the record to reflect that the State opposed the bias challenge to Judge Nelson. [Exh. 31]

39. Also on January 30, 2009, Respondent filed a Notice of Appearance to address "any and all bias challenges, and attendant discovery motions," a Second Bias Challenge to Judge Nelson ("Nelson II") for an alleged violation of Rule 10, Ariz. R. Crim. Proc., an affidavit regarding Nelson II, and an Anticipatory Bias Challenge to Judge Gould. [Answer, ¶31; Exh. 28, 29, 30 and 33]

Respondent's Anticipatory Bias Challenge to Judge Gould stated in part:

(a) "COMES NOW Mr. Henry Varela II, by and through undersigned counsel, to offer notice of a bias challenge that will be filed in the event Judge Gould ever assigns himself to decide any substantive part of this litigation." [SBA000241, lines 14-16]

(b) "Nevertheless, Judge Gould has apparently taken no action to assign a tribunal to decide the January 20[, 2009,] Nelson bias challenge. This reflects bias and prejudice, or the appearance thereof, given a refusal to follow the rules of procedure and standard protocol. There can be no fair or reasoned explanation for Judge Gould's violation of Rule 10 and his standard course of conduct except for bias and prejudice or the appearance thereof." [SBA000242, lines 14-18]

(c) "Second, Judge Gould knows, or should know, that Judge Nelson denied the bias challenge to himself on Tuesday, January 20. Jude Gould knows, or should know, that Judge Nelson violated the rules of procedure and further revealed his inability to be fair and impartial." [SBA000242, lines 19-22]

(d) "Judge Gould has apparently taken no action to vacate Judge Nelson's January 20 order. Judge Gould's silence is a ringing endorsement of Judge Nelson's misconduct and rule violations. Therefore, Judge Gould is facilitating Judge Nelson's constitutional errors and misconduct that detrimentally affect Mr. Varela II's ability to have a fair hearing or trial." [SBA000242, line 23 through SBA000243, line 3]

(e) "This notice will be refiled as a bias challenge in the event any part of this litigation is assigned to Judge Gould, or in the event of Judge Gould's substantive contact with the case. Any forthcoming bias challenge will also allegations [sic] of bias and prejudice." [SBA000243, lines 6-8]

Respondent's Second Bias Challenge to Judge Nelson stated in part:

(a) "First, Judge Nelson's violation of Rule 10, Ariz. R. Crim. P.[,] reflects bias and prejudice. The rules specifically preclude a challenged judge from any further contact with a case, or making any substantive ruling, until the bias challenge is decided by a neutral tribunal." [SBA000224, lines 3-6]

(b) "Second, even if Judge Nelson had authority to address the bias challenge against himself, he only ruled by avoiding and ignoring uncontradicted evidence and facts. The bias challenge does not allege that Judge Nelson can never preside over criminal prosecutions by Deputy County Attorneys Nelson/Gunderson. . . . The bias challenge does allege dozens of prosecutorial misconduct claims, alleged as of October, 2008, that came into existence after Judge Nelson's last contact with this case." [SBA000225, lines 7-13]

(c) "Judge Nelson has violated the rules of procedure and made unfounded rulings that are unsupported and/or are contradicted by the record. His conduct reflects inexplicable, disparate and worse treatment of Mr. Varela II compared to other litigants and the prosecution. He also acted in excess of his authority. Judge Nelson's conduct reveals bias and prejudice or the appearance thereof. . . .

Mr. Varela II will never receive a fair hearing if Judge Nelson has contact with the case. Judge Nelson's ongoing conduct will violate federal due process as guaranteed by the 5th and 14th Amendments. There is a concern that Judge Nelson made additional statements, or exhibited conduct, further reflecting his inability to be fair or impartial." [SBA000226, line 16 through SBA000227, line 1]

40. On February 3, 2009, Judge Nelson referred Nelson II to Judge Gould for assignment to another judge to hear the bias challenge. [Answer, ¶32; Exh. 34]

41. On February 3, 2009, Judge Gould referred Nelson II to Mohave County Superior Court Presiding Judge Randolph A. Bartlett. [Answer, ¶33]

42. On or about February 5, 2009, the Yuma County Attorney's Office filed a State's Response to Defendant's Anticipatory Bias Challenge to Judge Gould. In it, Deputy Yuma County Attorney Levi Gunderson stated that Respondent's Anticipatory Bias Challenge to Judge Gould was premature because Rule 10.1 limits such challenges to "the assigned judge." [Exh. 38; SBA000276, lines 21-23]

43. Also on or about February 5, 2009, Respondent filed a Reply Regarding Motion for Deposition of Yuma County Bench. [Exh. 37]

In that reply, Respondent stated in part:

(a) "Judge Reeves declines to address any prosecutorial misconduct claims on the merits." [SBA000271, lines 24-25]

(b) "The inability or refusal of the Yuma County bench to require the prosecution comply with applicable rules of procedure, statutes and constitutional guarantees belies bias and prejudice." [SBA000273, lines 12-14]

44. Also on February 5, 2009, Respondent filed a Supplement to Second Bias Challenge to Judge Nelson and Motion for Clarification (i.e., a supplement to *Nelson II*). [Answer, ¶34; Exh. 36]

Respondent's Supplement to Second Bias Challenge to Judge Nelson and Motion for Clarification stated in part:

(a) "Second, Judge Nelson made glaring errors while denying the bias challenge and setting an evidentiary hearing:

A) he found that prosecutors Nelson and Gunderson had previously appeared in the case, while Judge Nelson was assigned, and therefore a bias challenge was waived. (Exh. A, p. 5). That was incorrect. (Id. p. 8);

B) he found no 'new' evidence of bias. (Id. p. 6). That was incorrect. Numerous points of fact and law regarding extensive prosecutorial misconduct have been asserted since Judge Nelson's last contact with the case. (First bias challenge to Judge Nelson, pp. 3-10;

Second bias challenge to Judge Nelson, pp. 3-4). Judge Nelson's inability to sit in direct judgment of a fellow church member(s) seems obvious;

C) he asked Assistant Public Defender Riggins to 'pass on' his inclination to file a bar complaint. (Exh A, p. 6). The indirect threat of a bar complaint confirms bias and prejudice or the appearance thereof. The failure to reference a bar complaint in the January 20 order confirms an effort to intimidate;

D) he found that Mr. Varela II sent an 'inappropriate letter to all the judges in this case'. (Exh. A, p. 6). Mr. Varela II sought witness statements as part of an effort to investigate, confirm and prove bias and prejudice pursuant to Rule 10.1 and due process. (Motion to Depose, 1-16-(9). That cannot be 'inappropriate'. (Supplemental Motion to Depose forthcoming);

E) he found that Mr. Varela II sought to 'privately' meet with judges. (Exh. A, p. 6). Mr. Varela II noticed the Yuma County bench, and the prosecutors, and never suggested the prosecutors be precluded from participating in recorded statements. (Exhibits C and D, attached). Mr. Varela made an effort to avoid private conversations and to conduct discovery in a public and appropriate manner;

F) he found that Judge Reeves' consultations with the bench, in the context of this case, were 'confidential'. (Exh. A, p. 6). Judge Reeves offered no authority for that proposition. Mr. Varela II is unaware of any such authority.

Third, Judge Nelson held that 'Mr. Cornell's playing games with this court. It is inappropriate in my opinion.' (Exh. A, p. 6). Nothing in the record hints at 'game playing' by undersigned counsel.

Mr. Varela II moves Judge Nelson: A) state the extent of his record review prior to the January 20 hearing; and, B) clarify the basis for his conclusion of 'game playing'. A record review will only reveal 'game playing' by the prosecution.

. . . .

In conclusion, Mr. Varela II supplements the second bias challenge to Judge Nelson with this pleading. All of the evidence and theories relating to the second bias challenge, and this supplement, confirms bias and prejudice as to the first bias challenge to Judge Nelson. So too, the first challenge relates evidence of bias confirming the second and supplemental bias challenge." [SBA000249, line 22 through SBA000251, line 6; SBA000251, line 21 through SBA000252, line 2]

[Footnote 1] "This begs the question: are the rules of procedure applied in Yuma County or in Judge Nelson's courtroom." [SBA000251]

45. Also on or about February 5, 2011, Respondent filed a Reply Regarding First Bias Challenge to Judge Nelson. [Exh. 35]

That reply stated in part:

"First, the prosecution erroneously asserts the bias challenge to Judge Nelson is 'moot' because it was denied at the January 20 hearing. The

motion was 'denied' by the challenged tribunal-Judge Nelson. That ruling is a nullity and void.

Second, Judge Nelson's eagerness to deny the bias challenge belies obvious bias and prejudice or the appearance thereof." [SBA000246, lines 16-20]

On February 8, 2009, Respondent sent a letter to Judge Reeves in which he asked Judge Reeves to accept a subpoena for the February 27, 2009, hearing and sent letters to other Yuma County Superior Court judges in which he asked them to accept a subpoena for the February 27, 2009, hearing. [SBA Exh. 204 and 205]

46. On or about February 9, 2009, the Yuma County Attorney's Office filed a State's Response to Defendant's Second Bias Challenge to Judge Nelson (i.e., a response to Nelson II) in which Deputy Yuma County Attorney Levi Gunderson stated that Respondent had acted in bad faith in filing Nelson II and that Varela II was in custody. [Answer, ¶36; Exh. 39]

47. On February 10, 2009, Judge Bartlett set the hearing on Nelson II for February 18, 2009. [Answer, ¶37; Exh. 40]

48. On or about February 13, 2009, Respondent filed a Supplemental Motion for Deposition of Yuma County Bench. [Answer, ¶38; SBA Exh. 206] Respondent's supplemental motion stated in part:

"It is possible that some or all of the judges have discussed the request for statements and agreed to forego a response. The appearance of a bench-wide consultation and/or agreement underscores the need for

depositions and underscores bias and prejudice, or the appearance thereof, toward Mr. Varela II." [SBA002013, lines 12-15]

49. Also on February 13, 2009, Respondent filed a Bias Challenge to Judge Gould (Gould I). [Exh. 45]

That bias challenge stated in part:

(a) "COMES NOW Mr. Varela II, by and through undersigned counsel, to assert a bias challenge to the Honorable Andrew Gould based upon rule violations and bias that became manifest upon receipt of Judge Gould's February 3, 2009 order." [SBA000301, lines 14-16]

(b) "The Honorable John Nelson denied a bias challenge, as to himself, on January 20. Judge Gould knew, or should have known, about Judge Nelson's ruling as soon as it occurred. Nevertheless, Judge Gould chose not to assign an impartial tribunal to decide the Nelson bias challenge despite an obligation to do so pursuant to Rules 10.1 and 10.6, Ariz. R. Crim. P.

Judge Gould took no action from January 20 through January 30. A second bias challenge to Judge Nelson was filed and Judge Gould seemingly waited for Judge Nelson to refer the second challenge to him.

Judge Gould proceeded to make substantive rulings on February 3 despite notice of a forthcoming bias challenge. Judge Gould revealed his bias and prejudice, or the appearance thereof, by making substantive rulings without appointing himself, and effectively precluded a bias challenge during the 15 days required by rule. [Footnote omitted] Mr.

Varela II alleges that Judge Gould intentionally tried to circumvent a bias challenge from being asserted prior to substantive rulings.

Moreover, Judge Gould's several orders are unsupported or contradicted by the record and the law. These serious and obvious errors further reveal bias and prejudice or the appearance thereof.

First, Judge Gould has taken no action regarding the first bias challenge filed against Judge Nelson on January 20. Judge Gould is continuously violating his obligation to immediately appoint an impartial tribunal pursuant to Rules 10.1, 10.6 and due process.

Second, Judge Gould has taken no action regarding Judge Nelson's illegal January 20 Order. Judge Gould is allowing and/or approving Judge Nelson's continuous violation of the rules and due process.

Third, Judge Gould 'ordered' the January 20 deposition motion be assigned to the Honorable Mark Reeves until bias challenges to Judges Nelson and Reeves are decided. That operates as a denial of depositions and deprives Mr. Varela II of a fair opportunity to litigate or obtain depositions prior to a bias hearing.

Fourth, Judge Gould only forwarded to Judge Bartlett bias pleadings filed since December 18, 2008. However, the bias litigation concerns substantial prosecutorial misconduct, and disparate treatment, alleged since October/November 2008. The abbreviation of the bias record unfairly disadvantages Mr. Varela II." [SBA000302, line 2 through SBA000303, line 11]

(c) "Mr. Varela II moves for the following relief: 1) an impartial tribunal be assigned to decide the instant bias challenge to Judge Gould; 2) immediately strike Judge Nelson's January 20 order denying the first bias challenge; 3) assign an impartial tribunal to decide the first bias challenge to Judge Nelson; and 4) that Judge Gould be prohibited from any contact with the instant case, including assigning tribunals, because of his ongoing refusal to follow rules, precedents and federal due process to the disadvantage of Mr. Varela II.

Finally, if relief is not granted based upon this pleading, Mr. Varela II will move that Judge Gould be deposed, and an evidentiary hearing be set, so that Judge Gould and other witnesses can be examined." [SBA000305, lines 1-9]

50. Also on or about February 13, 2009, Respondent served, or had served, a criminal subpoena duces tecum on Judge Nelson that directed Judge Nelson to appear at the hearing on February 27, 2009 (the subpoena incorrectly stated the date of the hearing was February 27, 2008). [Exh. 41]

51. Also on or about February 13, 2009, Respondent filed a Second Supplemental to Second Bias Challenge to Judge Nelson. [Exh. 42]

That pleading stated in part:

"Judge Nelson's failure to recuse himself, and refusal to follow the rules of procedure, and allow an impartial tribunal to decide the first bias challenge, reflects bias and prejudice or the appearance thereof.

Judge Nelson's ongoing refusal to recuse himself since the second bias also confirms that he will not follow established rules and

procedures. He is biased and prejudiced, or has the appearance thereof. Indeed, Judge Nelson's continuing refusal confirms a knowing and intentional violation of Rule 10 and due process. Every day that passes, without an effort to remedy the wilful [sic] error(s), proves additional bias and prejudice." [SBA000290, lines 4-13]

On or about February 17, 2009, Respondent filed a Reply Regarding Second Bias Challenge to Judge Nelson (i.e., reply in Nelson II). [Answer, ¶39; Exh. 46]

That reply stated in part:

(a) "A. Judge Nelson Made a Reasoned and Intentional Decision to Violate the Rules of Criminal Procedure and Due Process." [SBA000308, lines 2-3]

(b) "Second, Judge Nelson did not make a 'mistake' when he denied a bias challenge to himself on January 20. Judge Nelson knew that a bias challenge was coming. Judge Nelson received and read the bias challenge prior to ruling. Judge Nelson knew that Rule 10 prohibits a challenged judge from making any substantive decision or denying a challenge against himself. Judge Nelson knew that Judge Gould had to assign an impartial tribunal.

Nevertheless, Judge Nelson violated all of the safeguards guaranteed by Rules 10.1 and 10.6 and due process. There was no 'mistake'. There was an effort to deflect inspection and hinder the bias litigation.

Third, Judge Nelson did not make 'a mistake' but made numerous findings of fact that are unsupported or contradicted by the record." [SBA000308, lines 7-17]

(c) "Second, the six member Yuma County bench may not be able to have contact with the instant case. Ongoing violations of the Rules of Criminal Procedure, to Mr. Varela II's disadvantage, is not coincidence. It reflects a wide-spread bias and prejudice or the appearance thereof." [SBA000309, lines 12-15]

(d) "Indeed, there seems to be a pattern of activity that reveals deep-seated favoritism for the prosecution or antagonism to Mr. Varela II." [SBA000310, lines 3-5]

(e) "Mr. Varela II did nothing to make Judge Nelson deny a bias challenge against himself in violation of the rules of procedure and due process, or make Judge Gould violate his obligation to appoint an impartial tribunal and/or grant tacit approval of Judge Nelson's improper conduct." [SBA000310, lines 12-15]

(f) "Judge Reeves, and seemingly every judge assigned to the case since December 18, 2008, have violated applicable rules of procedure, evidence and constitutional protections that apply to all defendants, all of the time, and certainly should apply to Mr. Varela II." [SBA000311, lines 1-3]

(g) "The prosecution has been allowed, and will continue to be allowed, to do whatever it wants, when it wants, the way it wants. That

must stop now, and will only stop if a different and impartial tribunal is assigned." [SBA000311, lines 22-24]

52. On or about February 18, 2009, Respondent filed a Motion to Recuse and/or Bias Challenge to Judge Bartlett ("Bartlett I"). [Answer, ¶40; Exh. 47] Respondent's Motion to Recuse and/or Bias Challenge to Judge Bartlett stated in part:

(a) "Judge Bartlett is biased and prejudiced, or has the appearance of bias and prejudice, and therefore cannot have contact with this litigation." [SBA000313, lines 16-18]

(b) [Footnote 1] "A bias challenge is pending against Judge Gould. One request for relief is that Judge Gould no longer appoint tribunals to have contact with the case. Therefore, another judge should appoint a tribunal to decide the bias challenge to Judge Bartlett." [SBA000313]

(c) "A bias challenge was assigned to the Honorable Randolph Bartlett on February 3, 2009. A review of Kingman newspaper articles reveals that Judge Bartlett presided over litigation, including a trial, in Walnut Creek *(Dunton) v. American Land (Rhodes Homes)*, S-80 IS-CV -2005-0026 in Mohave County Superior Court. The trial occurred in July-August 2007 and the Kingman Daily Miner reported the plaintiff (Dunton) won the lawsuit. . . .

Thereafter a 'series' of articles reported concerns regarding the release of an appraisal to a seller and Judge Bartlett's involvement in negotiating the purchase of a building. . . . Specifically, Judge Bartlett sent an e-mail on August 10, 2007[,] recusing himself from the probation

department's search for a 'new building' because he had presided over the *Dunton v. Rhodes* litigation and had to 'avoid the appearance of impropriety in light of (Dunton) receiving a favorable verdict'. . . .

The newspaper reported that Judge Bartlett participated in at least one meeting, and e-mails, regarding the purchase of Dunton's building while presiding over Dunton's litigation. Moreover, Judge Bartlett's involvement continued after August 10. . . . The newspaper reported that the debate 'continues to build' even months later. . . .

Judge Bartlett seemingly had contact with the seller of property, while presiding over the seller's litigation in another case, and the seller received a favorable verdict. Judge Bartlett believed there was an appearance of impropriety, after the verdict returned, and recused himself.

However, the articles raise more questions than they answer concerning: 1) Judge Bartlett's relationship with Mr. Dunton, or the Dunton family, prior to the June 2007 negotiations or the Walnut Creek litigation; 2) whether Judge Bartlett delayed in disclosing an actual or potential conflict to American Land (Rhodes) prior to the start of trial; and 3) whether Judge Bartlett made full, accurate and complete disclosure during the trial.

These concerns cannot be addressed in the 15 days allowed to file a bias challenge. Rule 10.1, Ariz. R. Crim. P. The following must be undertaken in order to confirm whether additional concerns exist: A) review the entirety of the Walnut Creek file and obtain and review pertinent transcripts to determine whether Judge Bartlett made full

disclosure concerning the conflict of interest; B) conduct additional investigation via contact with Mr. Dunton and/or Judge Bartlett and/or any other relevant witnesses who may have insight into the conflict of interest, and/or Judge Bartlett's failure to fully disclose a conflict of interest." [SBA000314, line 2 through SBA000315, line 11]

(d) "Put simply, if Judge Bartlett does not understand or rejects the applicable rules and cannons in his own cases, he will likely not follow or apply them in Mr. Varela II's case. Mr. Varela II is doomed to lose his bias challenge to Judge Nelson even before it starts." [SBA000317, lines 4-7]

(e) "Mr. Varela II moves for the following relief if Judge Bartlett does not recuse himself: 1) an impartial tribunal be assigned to decide the instant bias challenge to Judge Bartlett; 2) if relief is not granted based upon this pleading, Mr. Varela II moves that Judge Bartlett be deposed, and an evidentiary hearing be set." [SBA000317, lines 9-12]

53. On or about February 19, 2009, Respondent sent a letter to Yuma County Superior Court judges in which he stated he "need[ed] to speak with [them] regarding any knowledge [they] have about pending bias challenges to Judges Nelson and Gould, and any conversation [they] have had with or about Judges Nelson and Gould regarding Mr. Varela II's case since December 18, 2008." [SBA Exh. 207]

54. On February 27, 2009, Deputy Attorney General Charles Grube ("Grube") sent a letter to Respondent addressing his effort to compel the judges' deposition testimony. [SBA Exh. 209]

55. On March 2, 2009, the Yuma County Attorney's Office filed a State's Response to Defendant's Motion to Recuse and/or Bias Challenge to Judge Bartlett (i.e., response to Bartlett I). [Answer, ¶42; Exh. 48] Deputy Yuma County Attorney Levi Gunderson stated in that response that the State "agrees with Judge Nelson's holding that [Respondent] has acted 'in bad faith'" regarding the various bias challenges. [SBA000334, lines 1-4]

56. On March 5, 2009, Respondent filed a Second Bias Challenge to Judges Gould and Bartlett ("Gould II" and "Bartlett II"). [Answer, ¶43; Exh. 49]

That pleading stated in part:

(a) "COMES NOW Mr. Varela II, by and through undersigned counsel, to assert a second bias challenge to Judges Gould and Bartlett based upon rule violations and bias that have become manifest. This motion is pursuant to Rules 10.1 and 10.6, Arizona Rules of Criminal Procedure and federal due process as guaranteed by the Fifth and Fourteenth Amendments." [SBA000337, lines 14-18]

(b) "A bias challenge was filed as to Judge Gould on February 13, 2009. To date, Judge Gould, the presiding judge for Yuma County, has not assigned that bias challenge to an impartial tribunal.

A bias challenge was filed as to Judge Bartlett on February 18, 2009. Judge Gould has not assigned an impartial tribunal to decide the bias challenge against Judge Bartlett, and Judge Bartlett has apparently not assigned the bias challenge to an impartial tribunal. Both judges are the presiding judges of their counties and are obliged to promptly assign a judge to decide bias challenges. Rule 10.1(C) Ariz. R. Crim. P.

Nevertheless, neither judge has apparently taken any action to assign a tribunal to decide either bias challenge. This reflects bias and prejudice, or the appearance thereof, given a refusal to follow the rules of procedure and standard protocol. There can be no fair or reasoned explanation for the violations of Rule 10 except for bias and prejudice or the appearance thereof.

. . . .

Mr. Varela II moves for the following relief: 1) an impartial tribunal be assigned to decide the bias challenges to Judges Gould and Bartlett; 2) that Judge Gould be prohibited from further contact with the instant case, including assigning tribunals, because of his ongoing refusal to follow rules, precedents and federal due process to the disadvantage of Mr. Varela II.

Finally, if relief is not granted based upon this pleading, Mr. Varela II will move that Judges Gould and Bartlett be deposed, and an evidentiary hearing be set, so that Judges Gould and Bartlett and other witnesses can be examined. Mr. Varela II requires a fair opportunity to prove bias, or the appearance of bias and prejudice, pursuant to Rule 10.1 (C), Ariz. R. Crim. P. and federal due process guaranteed by the 5th/14th Amendments. *Jackson v. Denno*, 378 U.S. 368 (1964); *Bracey v. Gramley*, 520 U.S. 899 (1997). This motion will be supplemented and additional Rule 404(b) evidence will be alleged after a response or initial order is received." [SBA000338, lines 2-14; SBA000340, lines 4-16]

57. Also on or about March 5, 2009, Respondent filed a Reply to Prosecution's February 23 Responses. [Exh. 50] That reply stated in part:

"Judge Gould's misconduct and refusal to follow the rules reflects 'bad faith' that waived and forfeited his ability to assign tribunals. Another judge, who is willing and able to follow the rules, is required to assigned tribunals." [SBA000346, lines 5-7]

On March 13, 2009, Respondent filed a Reply Regarding First Recusal/Bias Challenge to Judge Bartlett (i.e., reply re: Bartlett I). [Answer, ¶44]

That reply stated in part:

(a) "A. The Allegations

Mr. Varela II alleges that Judge Bartlett may not have been forthcoming or timely in his disclosure in the *Dunton v. American Land* litigation. First, there may be a greater connection between Judge Bartlett and the Dunton family than was explained by virtue of political connections. Second, the newspaper reported that Judge Bartlett could have or should have known about the overlap with plaintiff Dunton, and the real estate transaction, in June. Third, Judge Bartlett's subsequent recusal from the land transaction confirms bias/favoritism, or the appearance thereof.

Judge Bartlett apparently did not follow the applicable cannons regarding his own conflict of interest in *Dunton v. American Land*. Mr. Varela II's ability to fairly litigate his bias challenge should not have to hinge on Judge Bartlett, who seemingly applied a lesser or different

standard to himself. Put another way, Mr. Varela II cannot fairly litigate his bias challenge unless Judge Bartlett is inconsistent with his own conduct in *Dunton v. American Land*.[3]" [SBA000353, lines 7-20]

(b) [Foot note 3] "A second bias challenge was filed because Judge Bartlett has taken no action to request another judge decide the first bias challenge. Judge Bartlett's abdication of his duties and obligations pursuant to Rules 10.1/10.6 and federal due process, and/or his willingness to stand by while the rules are violated, confirms Judge Bartlett's inability to follow the rules and fairly conduct this litigation." [SBA000353]

(c) "Judge Reeves inconsistently treated Mr. Varela II different and worse than other litigants, and inconsistently treated the prosecution different and better compared to Mr. Varela II.

Judge Nelson is not biased by virtue of his 'religion'. (Response, p. 4). Judge Nelson is biased by the quantity and quality of personal/filmily contacts, with the prosecution, given membership in the same church whatever the religious beliefs may be." [SBA000354, lines 10-15]

(d) "Otherwise, he moves to incorporate by reference all bias motions and replies contained in the court file as an accurate record of the bias litigation." [SBA000354, lines 20-21]

(e) "First, Judge Bartlett did not apparently act properly. He seemingly failed to disclose the 'appearance of impropriety' for

days, weeks or perhaps months prior to the start of the August, 2007 trial.

Second, Judge Bartlett's post hoc admission and withdrawal from the real estate transaction confirms his error from withholding disclosure until the eve of jury selection or recusing himself from the civil litigation." [SBA000355, lines 4-9]

(f) "Mr. Varela II alleges grounds reasonably demonstrating bias and prejudice given an inability to conduct a fair and impartial bias hearing. Mr. Varela II has presented more than a 'colorable claim', or a claim that if taken as true, would require Judge Bartlett's removal. *State v. Eastlack*, 180 Ariz. 243, 255 (1994).

. . . There are obvious concerns that Judge Bartlett has not fairly applied the judicial canons to himself and thus cannot be expected to do so in this litigation." [SBA000355, lines 17-24]

58. On or about March 16, 2009, the Yuma County Attorney's Office filed a State's Response to Defendant's Second Bias Challenge to Judges Gould and Bartlett (i.e., response Gould II and Bartlett II). [Answer, ¶46; Exh. 52] In that response, Deputy Yuma County Attorney Levi Gunderson asserted that Respondent had engaged in a pattern "frivolous and 'in bad faith' misuse of Rule 10.1." [SBA000419, lines 14-15]

59. On or about March 18, 2009, Respondent filed a Motion to Dismiss Due to Prosecutorial Vindictiveness, in which he set forth various reasons why he believed the Yuma County Attorney's Office was vindictive and acting inappropriately in the Varela II case. [Answer, ¶15; Exh. 53]

60. On or about March 20, 2009, Respondent filed a Reply Regarding Second Bias Challenge to Judges Gould and Bartlett (i.e., reply re Gould II and Bartlett II). [Answer, ¶47; Exh. 55]

That reply stated in part:

(a) "First Judge Nelson denied a bias challenge to himself on January 20. There was no basis in fact or law for that. Judge Bartlett thereafter failed to follow the mandate of Rule 10 and took no action to remedy Judge Nelson's illegal order." [SBA000444, lines 20-22]

(b) "Third, Judges Gould/Bartlett then repeated these violations of Rule 10 by again taking no action after they were challenged for cause. Neither judge has ever found, on the facts or the law, that Petitioner does not state a 'colorable claim'." [SBA000445, lines 1-3]

61. Also on or about March 20, 2009, Respondent filed a Notice and Statement of Facts re: Need to Remove Yuma County Attorney Office. [Exh. 54]

62. On March 27, 2009, Respondent filed a Third Bias Challenge to Judge Bartlett ("Bartlett III"). [Answer, ¶48; Exh. 56] That pleading stated in part:

COMES NOW Mr. Henry Varela II, by and through undersigned counsel, to assert that Judge Bartlett's March 18, 2008 Order, denying a bias challenge to himself, and setting a status conference on April 1, reveals bias and prejudice – or the appearance thereof – and confirms all prior allegations of bias and prejudice: 1) Judge Bartlett violated the tenants of Rule 10, Arizona Rules of Criminal Procedure by failing to appoint an impartial tribunal and by denying the bias challenge against himself; 2) Judge Bartlett erred as a matter of law by finding "no valid

legal or factual basis for either challenge" when legitimate bias concerns are alleged; 3) Judge Bartlett ruled on March 18 before a reply could be filed regarding the second bias challenge; and, 4) Judge Bartlett prematurely ruled knowing that a Motion for Deposition was forthcoming. That also reveals bias and prejudice, or the appearance thereof, given the effort to avoid a clear statement, or testify under oath, regarding what he did and did not do in the 2007 civil case, and whether he can fairly apply the law in the instant litigation.

Mr. Varela II incorporates by reference all legal arguments and authorities asserted in the first and second bias challenges to Judge Bartlett, and moves Judge Bartlett recuse himself or appoint an impartial tribunal to decide this challenge.

Mr. Varela II acknowledges, based upon the March 18 Order, that these bias claims will necessarily be denied and will be prepared to go forward with the April 1 status conference." [SBA000446, line 14 through SBA000447, line 8]

Also on March 27, 2009, Respondent file a Motion for Prosecution to Fairly Communicate With All Complainants/Supplemental Motion re: YCAO Misconduct. [Exh. 57]

63. On or about March 30, 2009, the Yuma County Attorney's Office filed a State's Response to Defendant's Motion to Dismiss Due to Prosecutorial Vindictiveness. [Exh. 58]

64. Also on or about March 30, 2009, Respondent faxed a letter to Levi Gunderson and Roger Nelson of the Yuma County Attorney's Office. [SBA Exh. 211] That letter stated, in part:

"I'm going to request that your please make yourself available for a recorded statement concerning the pending bias challenges to Judge Nelson. I need to obtain your statements regarding your contacts with Judge Nelson outside the courthouse, your contacts with Judge Nelson's family, and your family's contacts with Judge Nelson and/or his family." SBA002022.

65. Also on or about March 30, 2009, Respondent sent a letter to Grube. [SBA Exh. 210]

That letter stated in part:

"You have not supplied a cite to the statute that allows you to intervene on behalf of the Yuma County bench. You have not explained how it is that your office was contacted or decided to inject itself into the litigation.

Therefore, I am attaching a correspondence for you to forward to Judge Nelson. However, I'm not going to forward any additional correspondence or motions unless you file a Notice of Appearance or cite an authority that requires me to communicate with you rather than the Yuma judges." [SBA Exh. 210]

66. On March 31, 2009, Respondent filed a Motion for Depositions of Judge Nelson and YCAO Prosecutors. [Answer, ¶49; Exh. 59] That motion stated in part:

"It is possible that some or all of the Yuma bench has discussed prior requests for statements and agreed to forego a response. The appearance of a bench-wide consultation and/or agreement underscores bias and prejudice, or the appearance thereof, and underscores the need for Judge Nelson's deposition." [SBA000466, lines 14-17]

67. On or about April 1, 2009, Judge Bartlett denied Respondent's motion to remove the Yuma County Attorney's Office in the Nelson II case, stating there was "no basis to determine a conflict of interest exists with the Yuma County Attorney's Office." Judge Bartlett also denied Respondent's motions to depose Judge Nelson and the Yuma County prosecutors. [Exh. 66]

68. On or about April 2, 2009, Grube sent a letter to Respondent stating that Judge Nelson would "not participate in the 'recorded statement'" that he had requested, explained the Attorney General's duty to represent judges, and reminded Respondent of his duty, pursuant to ER 4.2, to communicate with Grube rather than the judges. [SBA Exh. 212]

69. On or about April 7, 2009, Respondent filed a First Supplemental Motion to Dismiss Due to Vindictive Prosecution and Motion for Disclosure, in which he set forth various reasons why he believed the Yuma County Attorney's Office was vindictive and acting inappropriately in the Varela II case. [Exh. 60]

70. On or about April 8, 2009, Respondent sent to Grube a criminal subpoena duces tecum requiring Judge Nelson to testify at a hearing on April 22, 2009. [SBA Exh. 215]

71. On or about April 10, 2009, Respondent filed an Anticipatory Motion Regarding Subpoena of Judge Nelson. [Exh. 61]

That anticipatory motion stated in part:

"The decision of Judge Nelson to attempt to avoid testifying further confirms that he is biased and prejudiced or has the appearance thereof. Judge Nelson does not want to be examined because he will not be able to offer valid or satisfactory explanations for his conduct on January 20." [SBA000493, lines 15-18]

72. Also on or about April 10, 2009, Respondent filed a Motion for Adverse Inference. [Exh. 62]

That motion stated in part:

(a) "COMES NOW Mr. Varela II, by and through undersigned counsel, to move the court to draw an adverse inference from the declination of Judge Nelson and prosecutor Nelson to make statements about their relationship." [SBA000495, lines 14-16]

(b) "Mr. Varela II alleges a personal connection between the judge and the prosecution. However, Judge Nelson and prosecutor Nelson stand silent and decline to explain the nature or quality of their personal relationship or the relationship of their families." [SBA000496, lines 12-15]

Also on or about April 10, 2009, Respondent filed a Motion and Order for Review of the Record. [Exh. 63]

That motion stated in part:

(a) "Mr. Varela II alleges that Judge Nelson's conduct on January 20, 2009 reveals that he will go out of his way to insulate the Yuma County Attorney from inspection and/or will go out of his way to prevent Mr.

Varela II from fairly presenting, arguing and litigating pending bias claims." [SBA000498, lines 17-20]

(b) "Reviewing the full record since October, 2007 affords an understanding of why Judge Nelson violated his oath to uphold the federal constitution and/or follow the rules of criminal procedure. Therefore, it is requested the court obtain and review the aforementioned parts of the court file." [SBA000499, lines 6-10]

On or about April 13, 2009, Respondent filed a Reply Regarding Response to Vindictive Prosecution, in which he set forth grounds in support of his claim that the Yuma County Attorney's Office had been vindictive in its prosecution of Varela II. [Exh. 64]

73. On or about April 17, 2009, the Yuma County Attorney's Office filed a State's Response to Defendant's First Supplemental Motion to Dismiss for Vindictive Prosecution and Motion for Disclosure. [Exh. 65]

74. On or about April 20, 2009, the Arizona Attorney General's Office filed a Motion to Quash Subpoena and a Motion for Expedited Consideration of Motion to Quash, which also included a response to Respondent's Anticipatory Motion Regarding Subpoena of Judge Nelson. [Exh. 67 and 68]

75. Also on or about April 20, 2009, the Yuma County Attorney's Office filed a State's Response to Defendant's Motion for Adverse Inference. [Exh. 70]

76. On or about April 21, 2009, Respondent had Judge Nelson served with a criminal subpoena duces tecum, requiring Judge Nelson to appear as a witness at a hearing on April 22, 2009. [Answer. ¶50; Exh. 71]

77. Also on or about April 21, 2009, Judge Bartlett denied Respondent's Motion for Status Conference, Defendant's Anticipatory Motion Regarding Subpoena of Judge Nelson, Defendant's Motion and Order for Review of the Record, and Defendant's Motion for Adverse Inference. Judge Bartlett also granted the Attorney General's Motion to Quash Subpoena. [Exh. 72]

78. On or about April 22, 2009, Judge Bartlett denied "Second Motion for Change of Judge for Cause of Judge Nelson" (i.e., *Nelson II*). Answer, ¶51; Exh. 73.

79. On May 1, 2009, Respondent filed a Reply re: First Supplemental Motion to Dismiss for Vindictive Prosecution. [Exh. 74]

80. Also on May 1, 2009, Respondent filed a Motion to Reconsider Denial of First Bias Challenge (i.e. a motion to reconsider Nelson I). [Answer, ¶52; Exh. 75] That motion stated in part:

(a) "[T]he following concerns should be addressed regarding the quantity and quality of the personal relationship [between Judge Nelson and prosecutor Nelson]:

1) How long both men have known each other;

2) When the men first met;

3) When both men realized they are members of the same church;

4) The periods of time that both men and/or their families have worshiped together in Yuma;

5) Whether both men are currently, or ever were, part of the same 'ward'. Ward needs to be defined by geographic size, membership and the purpose it serves;

6) Whether the men hold any positions in the church, such as a 'bishop', or any other designation;

7) A description of the duties and responsibilities of a 'bishop';

8) The number of bishops in their specific wards and generally in Yuma;

9) Whether either man is in a position of leadership above the other in their church;

10) If both men are bishops, the effect of that on their relationship;

11) Whether either man has changed wards in the past 12 to 24 months and why they changed wards;

12) A detailed description of their connection by way of church business (committees) and church social activities (picnics, outings);

13) A detailed description of the same connection concerning the families." [SBA 000541, lines 4-24]

(b) "Moreover, the church is highly organized, and may exert more effort to control or guide the daily lives of its members compared to other denominations. For example, there may be an organized and efficient structure and/or goal for church members to obtain elected positions (i.e.[,] Superior Court, Justice Court, County Attorney). Rule 201, supra.

If any of this is true, it underscores the difficulty that Mr. Varela II faces trying to confirm the depth of the personal relationship between Judge Nelson and prosecutor Nelson and their families. It also underscores that public condemnation of one church member, of another, may result in church sanctions. In short, Judge Nelson may be motivated

to avoid addressing prosecutorial misconduct or seek any means of possibly denying the existence of prosecutorial misconduct.

Mr. Varela II has alleged a personal relationship of which the details have never been disclosed. He now alleges an overriding relationship even if no personal relationship exists, given the prosecution's argument. There is no reasonable possibility that Judge Nelson will fairly contemplate the bias challenge, grounded in prosecutor Nelson's extraordinary misconduct. Judge Nelson should not have any further contact with the case given the unique procedural history. The bias challenge to Judge Reeves should be reassigned to another division." [SBA000542 line 13 through SBA000543, line 7]

81. On May 4, 2009, Judge Nelson denied Respondent's Motion to Reconsider Denial of First Bias Challenge [of Judge Reeves] (i.e., motion to reconsider Reeves I). [Answer, ¶53; Exh. 76]

82. On or about May 11, 2009, Respondent had Judge Reeves, Levi Gunderson and Roger Nelson served with criminal subpoenas, which required them to appear as witnesses at a hearing on May 15, 2009. [Exh. 79, 80 and 81]

83. On or about May 11, 2009, the Yuma County Attorney's Office filed a State's Request for a Protective Order [and] Request for Expedited Telephonic Hearing in which it sought a protective order to prevent Respondent from calling prosecutors in that office as witnesses at a hearing on May 15, 2009, regarding Respondent's bias challenge to Judge Reeves. [Exh. 78]

84. On May 13, 2009, the Arizona Attorney General's Office filed a Motion to Quash Subpoena [Requiring Judge Reeves to Appear as a Witness at a Hearing

on May 15, 2009] and a Motion for Expedited Consideration of Motion to Quash. [Exh. 82 and 83] The Motion to Quash Subpoena moved the court to quash a subpoena for Judge Reeves to testify at a hearing on May 15, 2009, because "any testimony by Judge Reeves would require disclosure of privileged or other protected matter and no exception or waiver applies." [SBA000559, lines 19-21]

85. On May 21, 2009, Respondent filed a Response Regarding Motion to Quash Subpoena of Judge Reeves and a Response Regarding Prosecution's Request for Protective Order. [Answer, ¶55; Exh. 84 and 85]

The Response Regarding Motion to Quash Subpoena of Judge Reeves stated in part:

"Third, there is no reasonable explanation for Judge Reeves' declination to follow his normal course of conduct or a long-standing mandate. Logic dictates his deviations reveal bias and prejudice as follows:

A) Judge Reeves made a decision to treat Mr. Varela II different and worse than other litigants; or,

B) Judge Reeves cannot make findings of fact that support his decisions; or,

C) Judge Reeves cannot offer a legal analysis or cite authorities to substantiate his decisions; and,

D) Judge Reeves must avoid cited and controlling authorities. These explanations underscore, individually and cumulatively, ill will toward Mr. Varela II and/or favoritism to the prosecution.

Fourth, if 'extraordinary' or 'rare' circumstances are required, then those circumstances exist in this case because:

A) Judge Reeves' persistent refusal to make findings of fact and law is a rare and extraordinary circumstance raising a concern about ill will toward Mr. Varela II and/or favoritism to the prosecution;

B) Judge Reeves addressed an alleged conflict of interest and disqualified Dale Wren because the prosecution raised the issue. (Orders, June 13 and September 26, 2008). Judge Reeves was then confronted with depressing claims of longstanding prosecutorial misconduct. (Court File, October/November, 2008 Motions to Dismiss). Judge Reeves did not require the prosecution to address specific misconduct claims, never made an independent or direct inquiry about misconduct, apparently took no action with the State Bar, and ignored a wealth of uncontradicted misconduct alleged to date.

Judge Reeves affords the parties very unequal treatment. A baseless claim of a conflict of interest resulted in Dale Wren's disqualification. Assuming for purposes of argument that disqualification was required, the prosecution is allowed to do whatever it wants, whenever it wants, with no regard for the rules of procedure or constitutional protections. There is clearly a need to present Judge Reeves' testimony.

Fifth, Mr. Varela II's allegations of ill will and favoritism can only be confirmed and proven by examining Judge Reeves. Judge Reeves' testimony will reveal, whether he directly admits it or not, the existence of ill will or favoritism. He will not have satisfactory responses for his

conduct to date and his statements, tone of voice and overall demeanor will reveal concerns about ill will and/or favoritism."

. . . .

Judge Reeves has personal knowledge of factual matters at issue in the bias litigation. Specifically, the prosecution's past and ongoing misconduct. If Judge Reeves acknowledges misconduct, it confirms he is biased. If Judge Reeves denies prosecutorial misconduct, it will confirm his bias or the appearance thereof.

Judge Reeve's testimony cannot create an appearance of impropriety. Judge Reeves has already revealed an appearance of impropriety by unfairly and unreasonably protecting the prosecution to the detriment of Mr. Varela II." [SBA000571, line 14 through SBA000573, line 6; SBA000573, line 17 through SBA000574, line 2]

86. On May 28, 2009, Respondent filed a Motion and Order for Subpoenas to remain in Full Force and Effect. [Answer, ¶56; Exh. 86]

87. On June 4, 2009, Judge Nelson granted the State's motion to quash the subpoena as to Judge Reeves, granted the County Attorney's Office's motion for a protective order and quashed the subpoenas for the prosecutors to testify at a bias hearing, and denied Reeves I. [Answer, ¶57; Exh. 87]

88. On June 30, 2009, Respondent filed a Motion to Reconsider Order of December 8, 2008, which denied Respondent's October and/or November 2008, motions to dismiss. In that motion, Respondent asserted that the indictment against Varela II should be dismissed without prejudice, or another sanction imposed, due to a pattern of alleged prosecutorial misconduct. Respondent asserted

that the court invoked a deadline for filing motions to dismiss when it ruled that Respondent's 2008 motions to dismiss were "untimely," and that by doing so violated Varela II's rights to due process and assistance of counsel. In addition, Respondent asserted that the court revealed prejudice and disparate treatment by determining not to sanction the Yuma County Attorney's Office for violating a remand order in September 2007 but sanctioned Varela II by denying the motions to dismiss as untimely. Regarding the Yuma County Attorney's Office, Respondent stated that it used Detective Perez "to create a layer of deniability for the YCAO's misconduct." [Exh. 88]

89. Also June 30, 2009, Respondent filed a Motion for Disclosure and Clarification Regarding YCAO Recusal/Assumption of the Case by the Attorney General. [SBA Exh. 220] In that motion, Respondent asked the court to order the Attorney General's Office to provide him with information about the process by which the Yuma County Attorney's Office transferred the Varela II case to the Attorney General's Office.

That motion stated in part:

(a) "[T]he YCAO lied to the Attorney General." [SBA002060, line 13]

(b) "The YCAO declined to establish interviews because it wanted to retard the interview process. It wanted to stop Mr. Varela II from further confirming the weakness of the prosecution's case and the strength of his defenses." [SBA002060, lines 16-18]

90. On or about July 24, 2009, Respondent filed a Notice of Appearance as Knapp counsel regarding all pending motions and attendant litigation. [Exh. 89]

91. Also on July 24, 2009 (but after Respondent filed a Notice of Appearance as Knapp counsel), Judge Reeves ordered (a) Riggins to be lead counsel for Varela II and to "sign off on all pleadings and correspondence"; (b) Respondent must disclose by affidavit under seal who retained him; and (c) Respondent must disclose by affidavit under seal how much he had received for the representation of Varella II. [Answer, ¶58; Exh. 91; SBA Exh. 221] Judge Reeves also granted Respondent's Motion to Reconsider Modification of Conditions of Release (Judge Reeves set a Surety Bond in the amount of $12,500.00). [Exh. 91; SBA Exh. 221] The minute entry order dated July 24, 2009, was amended on August 4, 2009. [Exh. 91]

92. On or about July 29, 2009, Judge Reeves ordered (a) Respondent "to file an affidavit stating who hired him to represent Henry Varela, II, in th[e] matter"; (b) Respondent file an affidavit under seal stating the source of funds or other compensation regarding Respondent's representation of Varela II; (c) Respondent file an affidavit under seal stating how he had been or would be compensated for representing Varela II; (e) Respondent file an affidavit under seal providing an accounting of compensation of any kind that he had or would receive for representing Varela II; and (f) Respondent file an affidavit under seal stating whether Wren hired, promised or pledged anything to him regarding his representation of Varela II and whether Wren has participated in the Varela II matter since Respondent's involvement. [Exh. 90]

93. During a hearing on August 5, 2009, Klapper asked Judge Reeves whether he intended to impose a deadline for Respondent to file his affidavit under seal, as ordered on July 24 and 29, 2009. [Exh. 92 SBA000598, lines 19-21]

Judge Reeves stated: "You know, I didn't set a deadline on that. I expected a response back. I haven't received it. I may set one at some point because I need to know what Mr. Cornell intends to do because he is not NAPP [sic] counsel until I determine him as NAPP [sic] counsel. [Exh. 92 SBA000598, line 22 through SBA000599, line 1]

94. On August 7, 2009, Respondent filed a Motion to Stay July 29 Order Until Resolution of the Simultaneously Filed Motion to Reconsider and Forthcoming Supplemental Pleadings and Exhibits. [Exh. 93]

95. Also on August 7, 2009, Respondent filed a Motion to Reconsider July 29 Order Regarding Knapp Counsel and Attendant Motions, in which Respondent sought, at a minimum, an evidentiary hearing at which he could have prosecutors from both the Yuma County Attorney's Office and Arizona Attorney General's Office testify about the Attorney General's Office's bad faith regarding Respondent's role as *Knapp* counsel based upon: (a) the transfer of the Varela II file from the Yuma County Attorney's Office to the Attorney General's Office; (b) communication between the Yuma County Attorney's Office and the Attorney General's Office; (c) "[s]eeking [i]nformation [w]ithout [a]uthority"; (d) lack of legitimate concerns about Respondent's appearance and effort as *Knapp* counsel; (e) groundless allegations that Dale Wren was the source of Respondent's fees; and (f) attempt to "[m]icro-[m]anage [o]pposing [c]ounsel." [Exh. 94]

96. On August 18, 2009, Judge Reeves denied Respondent's Motion to Stay July 29 Order Until Resolution of the Simultaneously Filed Motion to Reconsider and Forthcoming Supplemental Pleadings and Exhibits and Respondent's

Motion to Reconsider July 29 Order Regarding Knapp Counsel and Attendant Motions. [Exh. 95]

97. On August 19, 2009, the Attorney General's Office filed a State's Motion to Strike Motions Filed by Creighton Cornell because Respondent filed the following pleadings after the court ordered Riggins to file all pleadings as of July 24, 2009. [Exh. 96]

98. On August 26, 2009, Respondent, who had not yet been allowed to represent Varela II as *Knapp* counsel, filed a Petition for Special Action with the Arizona Court of Appeals in which he sought to overturn Wren's disqualification as counsel for Varela II. [Answer, ¶59]

99. On August 28, 2009, Respondent filed an Affidavit in Response to July 24 Order.

That affidavit stated in part:

"1) I cannot identify who has paid my fees based on the belief that no valid obligation exists to disclose such information. Therefore, I cannot identify who has paid fees in the past, or who is likely to pay fees in the future;

2) If I am ultimately forced to divulge the identify of any third person(s) paying my fees, I will not divulge the amount of fees received based upon a belief that no valid obligation exists to disclose such information.

3) I will not divulge whether Mr. Dale Wren has participated in this matter, since my involvement, based upon a belief that no valid obligation exists to disclose that information" [SBA Exh. 222]

Respondent's affidavit did not comply with Judge Reeves' July 24 and 29, 2009, orders.

100. Also on August 28, 2009, Riggins filed a Supplemental Challenge for Cause Pursuant to Rule 10.1 and Due Process regarding Judge Reeves. [Exh. 97] That pleading was filed on Respondent's pleading paper, but Riggins signed for herself and Respondent. [Exh. 97]

That pleading stated in part:

(a) "In short, Judge Reeves will inspect and disqualify *Knapp* counsel because *Knapp* counsel tried to disqualify Judge Reeves.

Judge Reeves (hereinafter "Court") previously avoided Mr. Varela II's constitutional claims. Now he punishes Mr. Varela II for asserting constitutional claims." [SBA000629, line 15-19]

(b) "The Court made a unilateral decision to inspect, control and disqualify *Knapp* counsel after being challenged for cause. The retaliation relates bias and prejudice, or the appearance thereof, given all of the circumstances. . . . There is undue favoritism for the prosecution, hostility and ill will toward Mr. Varela II, and for no good reason. The Court should be removed based upon the plethora of individual bias challenges contained herein." [SBA000631, lines 17-22]

(c) "The Attorney General was ordered to confirm whether it received the YCAO's entire file. . . . It is the simplest thing the Attorney General can be ordered to do, yet there has been no compliance. The Court's failure to enforce the order reveals disparate

treatment and a subjective intent to protect the prosecution and/or actively work against Mr. Varela II." [SBA000623, lines 5-9]

(d) "The Attorney General is still violating the June 23 order, and the Court's response is to insulate the prosecution from review. The prosecution – once gain – is allowed to do whatever it wants, when it wants, including violate a direct order. [Footnote omitted] The Court cannot and will not abide by the law, or the record, and treats the prosecution different and better." [SBA000633, Lines 4-8]

(e) "2. The Court Avoids Motions Concerning the Attorney General's Bad Faith." [SBA000634, Line 11]

(f) "The Court refused to address the disclosure/offer of proof motion and the Alexander motion on July 24 or 29. The Court seemingly avoids the motions believing a cryptic record will blunt appellate review.

. . . The Court's one word "denial" does not identify all of the motions that are being denied and contains no findings of fact/law. . . . In short, the Court cannot justify its desire to deny any of the motions and guarantees a cryptic record. That reveals bias and prejudice.

3. Bias Is Revealed By A Groundless Allegation That Dale Wren is a Source of *Knapp* Counsel's Fees.

The Court embraces a claim that *Knapp* counsel's fees are paid in part or in whole by Dale Wren. . . ." [SBA000635, Lines 4-14]

(g) "The Court's willingness to accept a baseless allegation, and preclude inspection of bad faith, reveals bias and prejudice." [SBA000636, Lines 10-11]

(h) "4. Bias is Revealed By The Refusal to Review the Attorney General's Declination to Inspect the YCAO Misconduct or Make Informed Decisions." [SBA000636, Lines 12-13]

(i) "B) The Court's Refusal to Inspect the Prosecution Reveals Bias.

Mr. Varela II moved the Court [to] order the Attorney General [to] address all concerns relating to the YCAO's *Brady* violations and misconduct. . . . The August 18 summary denial insures the following prosecutorial misconduct will not become part of the records, such as:

Again, the Court's effort to insulate and maintain a cryptic record reflects bias." [SBA000637, Line 1 through SBA000638, Line 3]

(j) "5. Bias is Revealed By the Failure to Cite Authorities, Noting Irrelevant Authorities, and Ignoring Controlling Authorities." [SBA000638, Lines 4-5]

(k) "First, the Court's repeated declination to cite even one authority in its orders reveals bias." [SBA000638, Lines 9-10]

(l) "Fourth, the Court refuses to acknowledge or analyze the holdings and reasoning underlying *Gonzales-Lopez*, 126 S.Ct. 2557 (2006) and *Wheat v. United States*." [SBA000639, Lines 7-8]

(m) "The Court's refusal to cite authorities, to follow authorities, and to misconstrue authorities, reveals bias and prejudice." [SBA000639, Lines 20-21]

(n) "6. Bias is Revealed by the Intention to Micro-Manage and Limit *Knapp* Counsel's Impact on the Litigation." [SBA000639, Lines 23]

(o) "Nevertheless, the Court embraces the need to micromanage the defense team. Minimizing *Knapp* counsel's representation, without authority or need to do so, is the essence of bias." [SBA000640, Lines 8-10]

(p) "SUMMARY

The Court has every reason to inspect the prosecutions' bad faith, yet grants the YCAO and Attorney General a "pass" regarding obvious misconduct. The Court goes out of its way to inspect and control Mr. Varela II's representation. The disparate treatment – especially combined with the lack of authority and analysis – reveals a refusal to apply the facts or follow the law. Bias and prejudice, or the appearance thereof, clearly exits." [SBA000640, Lines 11-17]

(q) "III. BIAS IS REVEALED BY THE COURT'S RELIANCE ON ERRONEOUS FACTS AND LAW." [SBA000640, Line 18]

(r) "Nevertheless, the Court finds that Mr. Wren's disqualification necessarily applies to *Knapp* counsel. . . . That reveals bias. The Court knows – or should know- that nothing about Mr. Wren's disqualification applies to *Knapp* counsel[.]" [SBA000641, Lines 6-13]

(s) "E) The Court never inquired whether Mr. Varela II has waived any potential conflict of interest, in writing, concerning *Knapp* counsel's fees. . . . *The Court wanted to avoid a record confirming a written waiver of potential conflicts of interest. Moreover, Mr. Varela II did generate a written waiver as of October 2008.* . . ." [SBA000642, Lines 3-7]

(t) "The Court insulates the prosecution from a historically unique (bad faith) effort to disqualify *Knapp* counsel, and again reveals bias. . . ." [SBA000642, Lines 19-20]

(u) "IV. BIAS IS REVEALED BY THE COURT'S DETERMINATIONS THAT *KNAPP* COUNSEL ACTED AS LEAD COUNSEL AND THAT ACTING AS LEAD COUNSEL WAS IMPROPER.

1. There is No Concern About *Knapp* Counsel's Effort." [SBA000642, Lines 21-23]

(v) "The Court condemns *Knapp* counsel's effort while appointed attorney (repeatedly) became conversant between June 2008 and June 2009." [SBA000643, Lines 18-19]

(w) "The Court essentially reasons that a *Knapp* attorney must forego any motion practice until appointed counsel is conversant. That

reasoning is belied by logic, common sense and the ethical mandate to be diligent." [SBA000643, Lines 22-24]

(x) "The illogic of condemning *Knapp* counsel's effort and using that effort to disqualify/constrain *Knapp* counsel is startling. . . . The Court's effort to minimize *Knapp* counsel's role, and make baseless allegations, reveals bias." [SBA000645, Lines 13-18]

(y) "V. BIAS IS REVEALED BY THE COURT'S EAGERNESS TO ERRONEOUSLY, IF NOT FALSELY, DISPARAGE *KNAPP* COUNSEL." [SBA000645, Line 19]

(z) "Only bias can explain the Court's eagerness to disparage *Knapp* counsel's effort and condemn *Knapp* counsel for utilizing his time and energy to comply with an order." [SBA000646, Lines 9-10]

(aa) "VI. BIAS IS REVEALED BY THE COURT'S EAGERNESS TO ERRONEOUSLY BLAME *KNAPP* COUNSEL FOR DELAY.

The Court seemingly blamed *Knapp* counsel for delaying the litigation on June 23. . . . The Court then blamed *Knapp* counsel for doing too much work on July 24." [SBA000646, Lines 12-15]

(bb) "The prosecution bears all responsibility for any delay, and bias is the only explanation for accusing *Knapp* counsel of groundless and inconsistent allegations." [SBA000647, Lines 6-8]

(cc) "VII. BIAS IS REVEALED BY EXPANDING THE SCOPE OF THE *KNAPP* LITIGATION." [SBA000647, Line 9]

(dd) "First, the Court exceeded its authority by expanding the Order – especially given the circumstances of this case – without notice to allow for objection, briefing or argument. Just the opposite, the Court made a concerted effort to avoid briefing, argument and evidentiary development." [SBA000647, Line 17-20]

(ee) "Mr. Varela II moved to strike the July 29 Order regarding Mr. Wren's participation and/or order the matter be briefed. . . . The Court refused to order briefing, or even acknowledge it expanded the litigation. . . . The Court's conduct can only be explained by bias." [SBA000648, Line 6-9]

(ff) "VIII. BIAS IS REVEALED BY THE FAILURE TO MAKE FINDINGS OF FACT AND LAW.

. . . However, the Court habitually fails to address whole motions and almost never makes findings of fact and law. The ongoing disregard of its obligation transitioned from reckless to knowing to intentional a long time ago.

The Court does not make findings of fact and law because it cannot. Nothing substantiates or justifies its inquiries or orders. . . . The misconduct by omission reflects a desire to vindicate the prosecution and/or facilitate convictions." SBA000648, Lines 10-20

(gg) "IX. BIAS IS CONFIRMED BY THE VIOLATION OF EQUAL PROTECTION.

. . . .

. . . Mr. Varela II is being treated different and worse because he cannot afford to retain his counsel of choice. The Court's disparate treatment violates equal protection and confirms bias." SBA000648, Lines 22 through SBA000649, Line 6

(hh) "X. BIAS IS REVEALED BY THE COURT'S FINDINGS OF FACT UTILIZED TO DENY JURISDICTIONAL CLAIMS.

. . . .

The denial of the jurisdictional motion – *based upon a record that does not exist* – reveals the Court has not read the record, or read it and never understood it, or read it and understood it has [sic] but forgotten it and now refuses to refresh his recollection. Either way – the Court is shockingly wrong by commingling VMI and VM, LLC and by finding panels were manufactured in Yuma in 2005-2006. This relates bias." [SBA000649, Lines 7 through SBA000650, Line 3]

(ii) "Obtaining the sworn statements of the former and current prosecutors will reveal bad faith and confirm the Court is insulating the prosecution and itself from appellate review.

Mr. Varela II also moved the Court address each and every topic of inquiry on the facts and law, including all motions contained herein. . . . The response – or lack thereof – confirms judicial bias. [Footnote omitted]" [SBA000650, Lines 7 – 12]

(jj) "Judge Reeves treats Mr. Varela II different and worse compared to other litigants and compared to the prosecution. The disparate treatment cannot be reconciled and reflects favoritism of the prosecution and/or ill will to Mr. Varela II. Judge Reeves is not controlled by logic, authority, the record or the constitution. Bias is the only explanation for the ongoing effort to: inspect, control and disqualify *Knapp* counsel; insulate the prosecution; and, maintain a cryptic record.

First Mr. Varela II renews all prior bias challenges to Judge Reeves alleged and argued December – June 2009." [SBA000650, Lines 4-11]

(kk) "Third, each individual allegation of bias and prejudice contained herein requires the removal of Judge Reeves on its own merit.

Fourth, a cumulative analysis of all individual bias claims contained herein requires Judge Reeves' removal.

Fifth, each prior bias challenge to Judge Reeves alleged December – June 2009, is Rule 404(b) evidence confirming the instant bias claims (i.e.[,] no accident, no mistake, but reckless, knowing, intentional state of mind). Mr. Varela II moves to incorporate by reference all prior bias allegations as Rule 404(b) evidence to prove the instant claims." [SBA000650, Lines 14-21]

(ll) "Finally, if relief is not granted based upon the pleadings, Mr. Varela II moves Judge Reeves and other witnesses be deposed,

and an evidentiary hearing be set, so he can fairly prepare for a hearing and make a record for appellate review." [SBA000652, Lines 3-5]

(mm)[Footnote 1] "Bias was confirmed when the August 18 Order was received on August 19. The Court's complete refusal to rule on motions and/or make findings of fact/law, especially given the record, was definitive on that date." [SBA000629, Lines 23-24]

101. Also on August 28, 2009, Judge Reeves transferred the Supplemental Challenge for Cause Pursuant to Rule 10.1 and Due Process regarding Judge Reeves to Judge Gould to designate a judge to rule on the motion for change of judge for cause. [Exh. 98]

102. After August 2009, Respondent continued to draft bias challenges, which he forwarded to Riggins. He was aware that she might file them without making any change. [Re-direct testimony by Respondent] Respondent never objected to Riggins signing his name on the bias challenges she filed and, in fact, told Riggins she could sign for him if she left his draft pleadings on his letterhead.

103. On September 2, 2009, Judge Gould assigned to Judge Nelson to hear the Supplemental Challenge for Cause Pursuant to Rule 10.1 and Due Process regarding Judge Reeves. [Exh. 99]

104. On September 3, 2009, Judge Nelson scheduled a hearing on September 18, 2009, to address the Supplemental Challenge for Cause Pursuant to Rule 10.1 and Due Process regarding Judge Reeves. [Exh. 100]

105. On September 10, 2009, Riggins filed a Supplemental Challenge for Cause to Judge Reeves, to which she attached Respondent's unsigned First Supplemental Challenge for Cause to Judge Reeves. [Answer, ¶61; Exh. 101]

106. On September 14, 2009, Riggins filed a Third Bias Challenge to Hon. John Nelson ("Nelson III"). [Answer, ¶62; Exh. 103] Respondent forwarded that bias challenge to Riggins, who placed it on her pleading paper. [Answer, ¶62]

That bias challenge stated in part:

"The defendant respectfully submits that Judge Nelson, in view of his visible anger at Mr. Cornell in the hearing on January 20, his ruling on and dismissing a bias challenge against himself (a clear violation of Rule 10.1) at that same hearing, his refusal to allow meaningful discovery or confrontation regarding the previous bias allegations against Judge Reeves in the last round of bias litigation culminating in the June 4 hearing, and the appearance that he pre-decided the Attorney General's motion to quash prior to the date it was set for consideration and that decision was given to Judge Reeves prior to the actual ruling on the Motion to Quash on June 4, all lead to at least an appearance of bias and prejudice towards Mr. Cornell and defendant. Accordingly, defendant respectfully requests Judge Nelson to recuse himself, or in the alternative, that this bias challenge be assigned to a judge heretofore unconnected with this case who can both be and appear to be fair and impartial." [SBA000695, lines 15-25]

107. Also on September 14, 2009, Respondent filed a Notice re: Motion Practice/Motion to Reconsider or Stay. [Exh. 102]

That pleading stated in part:

"*Knapp* counsel [Respondent] will file pleadings and send correspondence under his own signature.

. . . .

. . . [T]he order precluding *Knapp* counsel from filing motions and sending correspondence was generated as a result of Judge Reeves' 'bias and prejudice'. Judge Reeves' bias was thoroughly briefed on August 28.

The order constraining *Knapp* counsel can be distilled into one terse statement – *Knapp* counsel's very effective motion and correspondence practice must be stopped as much as possible." [SBA000688 , line 15 through SBA000689, line 5]

108. On or about September 17, 2009, Judge Nelson denied the third bias challenge of Judge Nelson. Judge Nelson's order stated in part:

a. "In this third bias challenge[,] counsel for the defendant essentially regurgitates the same allegations made in the second bias challenge[,] which were rejected by Judge Bartlett from Mohave County. The only additional allegation in this third bias challenge is the purely speculative claim that this court pre-judged the motion to quash the subpoena served upon Judge Reeves prior to the evidentiary hearing and in some way either notified Judge Reeves or telegraphed this decision[,] which resulted in Judge's [sic] Reeves not vacating his usual criminal calendar. This newest claim is absolutely not true and is completely ridiculous.

This court finds that the defendant's third bias challenge of the undersigned is totally without merit, baseless and was blatantly filed in bad faith." [SBA000698, line 24 through SBA000699, line 10]

109. On or about September 24, 2009, Respondent filed with Division One of the Arizona Court of Appeals a Notice of Attorney General's Startling Revelation and Several Misstatements. Respondent requested the court to order the Attorney General's Office to "appear or respond by pleading and admit its misstatements or substantiate the basis for its statements." [SBA Exh. 223, SBA0002157, lines 15-16]

110. On September 28, 2009, Riggins filed a *Supplemental Challenge for Cause to Judge Nelson*. [Answer, ¶63]

111. On September 30, 2009, Judge Nelson transferred *Nelson IV* to Judge Gould for reassignment, after which Judge Gould reassigned it to Judge Bartlett. [Answer, ¶64]

112. On or about October 1, 2009, the Court of Appeals overturned Wren's disqualification as counsel to Varella II. [Answer, ¶65]

113. On October 12, 2009, Riggins filed a Fourth Challenge for Cause to Judge Bartlett, to which she attached Respondent's unsigned Fourth Challenge for Cause to Judge Bartlett. [Exh. 106] Riggins' only arguments were included in Respondent's unsigned Fourth Challenge for Cause to Judge Bartlett. The "First Bias Challenge" in Respondent's motion pertains to a case unrelated to the Varela II case and was, therefore, irrelevant to the Varela II case in which respondent's pleading was filed.

Respondent's unsigned Fourth Challenge for Cause to Judge Bartlett stated in part:

(a) "Judge Bartlett is biased and prejudiced, or has the appearance of bias and prejudice, and therefore cannot have contact with this litigation." [SBA000708, lines 17-19]

(b) "Judge Bartlett's direct violation of Rules 10.1(c) and 10.6 reflected bias and prejudice, or the appearance thereof, given a knowing refusal to follow the rules of procedure." [SBA000711, lines 5-7]

(c) "Judge Bartlett denied both bias challenges to himself on March 18, 2008 that revealed bias and prejudice – or the appearance thereof – and confirmed all prior allegations of bias and prejudice by: 1) violating the tenets of Rules 10.1(c) and 10.6; 2) finding "no valid legal or factual basis for either challenge" when legitimate concerns were alleged; and 3) ruling before a reply could be filed and knowing that a Motion for Deposition was forthcoming." [SBA000711, lines 9-14]

(c) "Judge Bartlett will not follow Rules 10.1(c) and 10.6 and remove Judge Nelson for the same rule violations.

Judge Bartlett has revealed his refusal or inability to follow and apply the Rules of Criminal Procedure. The only apparent explanation for this is bias and prejudice, or the appearance thereof." [SBA000711, lines-24]

(d) "Judge Bartlett has rejected the applicable rules and cannons after full briefing. This can only be explained as a result of bias or the appearance thereof." [SBA000714, lines 7-8]

On November 2, 2009, Riggins filed a Fifth Challenge for Cause to Judge Bartlett, to which she attached Respondent's unsigned Fifth Challenge for Cause to Judge Bartlett. [Answer, ¶67; Exh. 107]

Respondent's Fifth Challenge for Cause to Judge Bartlett stated in part:

(a) "Judge Bartlett is biased and prejudiced, or has the appearance of bias and prejudice, and therefore cannot have contact with this litigation." [SBA000720, lines 17-19]

(b) "Judge Bartlett has revealed his refusal or inability to follow and apply the Rules of Criminal Procedure. The only apparent explanation for this is bias and prejudice, or the appearance thereof." [SBA000724, lines 1-3]

(c) "Judge Bartlett is again rejecting or ignoring the applicable rules and cannons after full briefing. This can only be explained as a result of bias or the appearance thereof." [SBA000726, lines 10-11]

(d) "This motion incorporates by reference all prior bias challenges to Judge Bartlett as Rule 404(b) evidence proving the bias alleged herein." [SBA000726, lines 20-21]

On November 2, 2009, Riggins and Respondent filed with the court of appeals a Petition for Special Action alleging that Judge Nelson, Judge Gould and Judge Bartlett had failed to comply with Ruled 10.1 and

10.6, Ariz. R. Crim. Proc. [Answer, ¶68; Exh. 109] The Court of Appeals and the Arizona Supreme Court subsequently declined jurisdiction. [Answer, ¶68]

114. Also on November 2, 2009, Judge Bartlett considered and ruled on Riggins and Respondent's Supplemental Challenge for Cause to Judge Nelson (i.e., Nelson IV) and Riggins' Fourth Challenge for Cause regarding Judge Bartlett. [Answer, ¶69; Exh. 110]

The minute entry setting forth Judge Bartlett's ruling stated in part:

"Having reviewed Attorney Riggins' pleadings identified above, the Court finds that said challenges lack factual and legal merit. The Court further finds that said challenges are spurious and made in bad faith to the extent that the[y] appear to violate the Arizona Rules of Professional Conduct.

It also appear that Attorneys Kristi A. Riggins (Bar #006954) and Creighton Cornell (Bar #011433) have intentionally engaged in an abusive pattern of challenging assigned judges solely based upon their disagreement with adverse judicial ruling. Thus, the Clerk is directed to forward a copy of these minutes to the State Bar of Arizona." SBA000913.

115. Also on November 2, 2009, Judge Gould entered an order in which he referred to Judge Nelson the Supplemental Challenge for Cause Pursuant to Rule 10.1 and Due Process regarding Judge Reeves. [Exh. 108]

116. On or about November 9, 2009, Respondent filed a *Supplement to Petition for Special Action* in which he alleged that Judge Bartlett once again violated Rule

10.1(c) and 10.6, Ariz. R. Crim. P., by entering an order on or about November 2, 2009, denying a bias challenge filed against him without transferring it to an impartial tribunal for ruling and without disclosure, argument or an evidentiary hearing. [Exh. 111]

117. On or about November 12, 2009, the Arizona Attorney General's Office filed a State's Response to Defendant's Supplemental Challenge to Judge Reeves and Motion for Sanctions, which stated in part that Respondent's "challenge to Judge Reeves [was] untimely, insufficient, and filed in bad faith." [Exh. 112]

118. Also on or about November 12, 2009, the Arizona Attorney General's Office filed a State's Response to Petition for Special Action Relief. [Exh. 113]

119. On or about November 16, 2009, Riggins filed a Sixth Bias Challenge to Judge Bartlett/Third Bias Challenge to Judge Gould/Motion for Evidentiary Development. [Exh. 114] That bias challenge was on Respondent's pleading paper, but Riggins signed for herself and on Respondent's behalf.

That bias challenge stated in part:

(a) "Judge Bartlett's signed November 2, order reflects rule and due process violations, and confirms Judge Bartlett's bias and prejudice." [SBA000952, lines 19-20]

(b) "Judge Bartlett ignores an irrefutable record that Judge Nelson repeatedly violated Rules 10.1(c) and 10.6, Ariz. R. Crim. P." [SBA000952, lines 21-22]

(c) "Judge Bartlett insulated himself and Judge Nelson from inspection by precluding Mr. Varela II from a fair opportunity to seek discovery,

evidentiary development, or conduct argument." [SBA000952, line 25 through SBA000953, line 2]

(d) "Judge Gould's November 2 order reveals bias and prejudice, or the appearance thereof, for all the same reasons that apply to Judge Bartlett." [SBA000954, line 24 through SBA000955, line 2]

(e) "That bias challenge asserted, among other things: (a) "Judge Gould's November 2 order reveals additional bias." [SBA000955, line 3]

120. On November 20, 2009, Riggins and Respondent filed a First Motion for Disclosure Re: Challenges to Judges Nelson/Bartlett, in which he asked judges and prosecutors to identify all other cases in which courts challenged for cause have violated Rules 10.1(c) and 10.6, Ariz. R. Crim. P. [Exh. 116] That motion was on Respondent's pleading paper, but Riggins signed for herself and on Respondent's behalf.

That motion stated:

"COMES NOW Mr. Varela II, by and through undersigned counsel, to move the court and the prosecution identify all other cases in Yuma County wherein tribunals challenged for cause have violated Rules lO.1(c) and 10.6, Ariz. R. Crim. P. Mr. Varela II anticipates there will be no other examples of Rule 10 violations much less repetitive Rule 10 violations. Confirmation of this will prove that Mr. Varela II is receiving different and worse treatment compared to other litigants and thus support his claims of bias and prejudice or the appearance thereof.

Mr. Varela II also moves the court and the prosecution to identify all other cases reflecting any habitual rule violations that have occurred in

the past five years. That list will be short or perhaps empty – and for good reason. Repetitive rule violations do not habitually occur – because the courts scrupulously follow the rules. Confirmation of this will support Mr. Varela II's contention that he is being treated differently and worse than other criminal defendants. Further, if there are habitual rule violations, and they involve Judges Nelson and Bartlett, it will be evidence of their inability or refusal to follow and apply the law, which supports Mr. Varela II's claim of bias and prejudice, or the appearance thereof. This motion is pursuant to Rule 15.1 and due process as guaranteed by *Brady v. Maryland*." [SBA000979, line 15 through SBA000980, line 6]

Also on November 20, 2009, Riggins and Respondent filed a Supplement re: Bias Challenge to Judge Reeves. [Exh. 115] That supplemental bias challenge was on Respondent's pleading paper, but Riggins signed for herself and on Respondent's behalf.

That Supplement stated in part:

(a) [Footnote 1] "Mr. Varela II maintains his objection to Judge Nelson's contact with this case and asserts Judge Gould's November 2 order and Judge Bartlett's signed November 2 order are null and void." [SBA000966]

(b) "Judge Reeves made inquiries and sought to disqualify or limit *Knapp* counsel's ability to conduct litigation from June – August 2009, (Court File). Judge Reeves revealed his bias on August 18 by subjecting *Knapp* counsel to Mr. Wren's disqualification analysis (i.e.

Mr. Wren's disqualification necessarily required *Knapp* counsel to be inspected and constricted).

Dale Wren's disqualification was reversed by the Court of Appeals on October 1, (Attachment A). As a result, Judge Reeves' justification for inspecting, limiting or disqualifying *Knapp* counsel has been eliminated, yet Judge Reeves has done nothing to undo the disqualification of *Knapp* counsel Creighton Cornell. If Judge Reeves believed that the pending bias challenge precluded him taking action to restore Mr. Cornell's ability to participate in the case, there is no explanation of Judge Reeves granting the motion to withdraw of a Phoenix attorney representing some of the alleged victims on or about October 21,2009. (Court File).

First, Judge Reeves cannot have any contact with the case as his bias challenges were transferred to other courts. Rule 10.6, Ariz. R. Crim. P. Judge Reeves' October 21 order violates both Rule 10 and due process and supports a claim of bias and prejudice or the appearance thereof.

Second, Judge Reeves believes he has the authority to enter orders regarding counsel but has made no effort to modify, amend or reverse the August 18 order regarding *Knapp* counsel Judge Reeves refuses to rescind the order despite a clear record the order is unconstitutional. His refusal to acknowledge *Knapp* counsel's ability to appear and fully litigate is additional evidence of bias and prejudice or

the appearance thereof. Judge Reeves again treats Mr. Varela II different and worse compared to other litigants.

Mr. Varela II requires relief pursuant to Rule 10.1 and due process guaranteed by the 5th/14th Amendments. This motion incorporates all of the prior legal arguments, authorities and analysis previously briefed. [SBA000966, line 16 through SBA000967, line 20]

On or about November 25, 2009, Riggins and Respondent filed a *Supplement re: Bias Challenges to Judges Reeves and Nelson*. [Exh. 117] That supplement was printed on Respondent's pleading paper, but Riggins signed for herself and on Respondent's behalf.

That supplement stated:

"A status conference was set for Tuesday, October 20 at 8:30 a.m. The Attorney General had notice.

Mr. Varela II and counsel appeared for the October 20 status conference but the Attorney General never appeared. Moreover, it did not waive its appearance and did not request a telephonic appearance. The Attorney General was simply a "no show".

Judge Reeves had no difficulty with the Attorney General's unexplained absence. There was no expression of concern, contempt, anger, bewilderment or any other negative sentiment. (Attached affidavit).

Judge Reeves' lack of concern stands in stark contrast to Judge Nelson's strong negative response when the Public Defender appeared with Mr. Varela II at the January 20, 2009 hearing. *Knapp* counsel called

to participate telephonically, approximately half way through the hearing, but no one was available to put him through to the courtroom. Judge Nelson was visibly angry at Knapp counsel's perceived failure to telephonically appear. (Court File, Mt. 1-30-09).

The conduct of Judges Nelson and Reeves further proves the disparate treatment and double standard that exists in this case. The prosecution is allowed to do what it wants, when it wants, without repercussion. Defense counsel is challenged and derided for imaginary slights.

Moreover, Judge Reeves' willingness to overlook the prosecution's disregard for the court calendar is consistent with the deferential treatment afforded the Yuma County Attorney September – November 2007 when the YCAO violated a court order. (Court File). There is disparate treatment, and for no good reason. Judges Reeves and Nelson should be stricken for bias, or the appearance thereof." [SBA000982, lines 2-24]

On November 27, 2009, the Arizona Attorney General's Office filed a State's Response to Defendant's 6th Bias Challenge to Judge Bartlett/3rd Bias Challenge to Judge Gould/Motion for Evidentiary Development –And- State's Request for Sanctions, which stated in part that Respondent's "challenges are untimely, insufficient, and filed in bad faith." [Exh. 118]

121. On November 30, 2009, Riggins and Respondent filed a Reply re: August 28 Bias Challenge to Judge Reeves. That reply was printed on Respondent's pleading paper, but Riggins signed for herself and on Respondent's behalf.

122. Also on November 30, 2009, Riggins and Respondent filed a Memorandum re: Delay caused by Prosecution and Court. [Exh. 120] That memorandum was printed on Respondent's pleading paper, but Riggins signed for herself and on Respondent's behalf.

123. On December 2, 2009, Division One of the Arizona Court of Appeals entered an order declining to accept jurisdiction of the special action that Respondent filed on Varela II's behalf against Judges Nelson and Bartlett. [Exh. 121]

124. On December 14, 2009, Riggins and Respondent filed a Reply Regarding Third and Sixth Bias Challenges to Judges Gould and Bartlett/Reply Regarding Evidentiary Development/Reply Regarding Sanctions. [Exh. 122] That reply was printed on Respondent's pleading paper, but Riggins signed for herself and on Respondent's behalf. That reply stated in part:

> "Mr. Varela II alleges bias and prejudice, or the appearance thereof, for the following reasons:
>
> A) The Judges inexplicably treat Mr. Varela II different and worse compared to other defendants, and the prosecution, by violating the tenets of Rules 1O.1(c) and 10.6;
>
> B) The judges insulate themselves from discovery and evidentiary hearings by denying challenges to themselves;
>
> C) The rules violations exhibit undue favoritism for the prosecution, and unwarranted hostility and ill-will toward Mr. Varela II; and,
>
> D) The judges make no findings of fact/law as required, ignore the record substantiating Mr. Varela II's claims and make findings in contravention of the record." [SBA001046, lines 4-13]

125. Also on December 14, 2009, the Attorney General's Office filed a State's Response to Defendant's Supplemental Bias Challenge - And - State's Request for Sanctions. [Exh. 123]

126. Also on December 14, 2009, Riggins and Respondent filed a Fourth Bias Challenge to Judge Gould/Additional Bias Challenge to Judge Nelson. [Exh. 124]

127. On December 17, 2009, Judge Nelson entered an order denying Defendant's Additional Bias Challenge to Judge Nelson. [Exh. 125]

Judge Nelson found the following:

(a) " Following the filing of the above order and on December 14, 2009, Defendant filed a successive Additional Bias Challenge for Cause of the undersigned in which there are virtually no new facts alleged in support of the new challenge." [SBA001069, lines 1-4]

(b) "The court finds the most recent challenge for cause is again without merit, frivolous and filed in bad faith. Defendant's previous challenges for cause of the undersigned[,] which were filed by Respondent,] have been resolved by Judge Bartlett. Defense counsel [Respondent] apparently intends to continue to challenge the undersigned and Judge Bartlett with repetitive, redundant and hence frivolous challenges for cause." [SBA001069, lines 4-10]

On December 24, 2009, Riggins and Respondent filed a Fifth Bias Challenge to Judge Gould/Additional Bias Challenge to Judge Nelson, which set forth various reasons why Judge Gould and Judge Nelson were biased and/or prejudiced in the Varela II case. [Exh. 126] That bias

challenge was printed on Respondent's pleading paper, but Riggins signed for herself and on Respondent's behalf.

128. On January 4, 2010, Riggins and Respondent filed a Motion for Citation to the Record/Motion for Clarification of Contested Claims/Motions for Evidentiary Hearing Regarding All Contested Claims. [Exh. 127] That motion was printed on Respondent's pleading paper, but Riggins signed for herself and on Respondent's behalf. That motion requested (a) a court order requiring the Attorney General's Office to cite to pleadings, transcripts and exhibits supporting its statements about Respondent's conduct in the Varela II case; (b) findings of fact and law regarding the Attorney General's Office's "allegations" regarding Respondent's conduct in the Varela II case; and (c) and evidentiary hearing at which he could attempt to disprove the Attorney General's Office's statements about Respondent's conduct in the Varela II case.

129. On October 18, 2010, Judge Nelson entered an order denying Riggins and Respondent's August 28, 2009, supplemental bias challenge as to Judge Reeves. [Exh. 128 and 129]

130. On or about January 5, 2011, Judge Reeves dismissed without prejudice the indictment against Varela II. [Exh. 130]

131. Respondent did not contact Deputy Yuma County Attorneys Roger Nelson or Brent Levi Gunderson (Gunderson) prior to filing a bias challenge against Judge Nelson on January 20, 2009.

132. Gunderson is not related to Judge Nelson, did not have any personal relationship with Judge Nelson outside of court during the period of time from

2008 through 2010. Gunderson did not attend any religious congregation in Yuma, Arizona during the period of time from 2008 through 2010. [Gunderson hearing testimony]

133. Roger Nelson is not related to Judge Nelson and did not have any personal relationship with Judge Nelson outside of court during the period of time from 2008 through 2010. During the period of time from 2008 through 2010, Roger Nelson and Judge Nelson belonged to the Church of Jesus Christ of Latter Day Saints, which is often referred to as the Mormon Church, but they never attended the same congregation. [Roger Nelson hearing testimony]

134. Respondent's various bias motions adversely affected the case flow of the Yuma County Superior Court. For example, Judge Nelson, who was assigned to the Juvenile Court, took time from his Juvenile Court caseload to rule on various motions filed by Respondent. [SBA Exh. 232 (SBA002292, lines 4-21; SB002301, line 21 through SBA002302, line 10; SBA002302, lines 11-25] Also, various pleadings/motions filed by Respondent were referred to Judge Bartlett, who was not part of the Yuma County Superior Court. [SBA Exh. 232 (SBA002292, lines 4-21; SB002301, line 21 through SBA002302, line 10] In addition, Judge Gould stated, "[T]he more times you have to assign a case out [for a ruling on a bias motion], it certainly, you know, slows down the case. . . . But in terms of our operation and the number of judges we have, you know, it just requires more administrative work to get the case assigned to a new judge." [SBA Exh. 230 (SBA002233, line 13 through SBA002234, line 2]

135. Other than the Varela II case, Judge Gould never had to refer a bias motion to a judge in another county. [SBA Exh. 230, SBA002234, lines 13-18]

136. Judge Gould did not treat any of Respondent's bias motions in the Varela II case any differently than he treated bias motions in other cases. [SBA Exh. 230, SBA002234, lines 19-22]

137. Judge Nelson did not observe anything that the Yuma County Attorney's Office did that affected the case flow. [SBA 232, SBA002304, line 24 through SBA002305, line 1]

138. Judge Nelson never discussed with the subject judge any of Respondent's bias motions prior to ruling on them. [SBA Exh. 232, SBA002292, line 23 through SBA002293, line 1]

139. Judge Nelson ruled on the State's motion to quash the subpoena served upon Judge Reeves, but had not determined what his ruling would be prior to the conclusion of the hearing he had scheduled regarding that motion. [SBA Exh. 232, SBA002293, lines 2-17]

140. While a Yuma County Superior Court judge, Judge Reeves has always read the entirety of motions, responses thereto and replies prior to ruling on them. [SBA Exh. 233, SB002314, lines 12-17]

141. While presiding over the Varela II case, Judge Reeves did not treat Varela II differently than he treated other litigants. [SBA Exh. 233 (SB002315, lines 2-6]

142. While presiding over the Varela II case, Judge Reeves did not treat Varela II or his counsel any differently that he treated the Yuma County Attorneys. [SBA Exh. 233, SB002315, lines 7-10] While presiding over the Varela II

case, Mohave County Superior Court Judge Bartlett did not treat Varela II differently than he treated other litigants. [SBA Exh. 234, SBA002329, lines 7-10] While presiding over the Varela II case, Mohave County Superior Court Judge Bartlett did not treat Varela II's counsel any differently than he treated other counsel or the Yuma County Attorneys. [SBA Exh. 234, SBA002329, lines 11-15]

143. While Judge Bartlett was the presiding Superior Court judge for Mohave County, a period of approximately five years, he estimated that a maximum of two or three cases were referred to Mohave County Superior Court by the Yuma County Superior Court. [SBA Exh. 234, SBA002331, lines 13-20]

144. Since November 2, 2009, Judge Bartlett has not discussed the bias litigation in the Varela II case with Judge Nelson. [SBA Exh. 234, SBA002336, line 23 through SBA002337, line 1]

Dale Wren, Esq. Testimony before the Panel

Mr. Wren testified that he was admitted to practice in approximately 1990 or 1991 and began his legal career as an AAG. He later moved to Yuma in 1992 and went into private practice handling mostly criminal and domestic relation cases. He also had an indigent work contract with Yuma County and with the federal district court in Arizona as a public defender and held various court appointments. In addition, Mr. Wren stated he would handle some civil litigation on occasion when required by a client.

Mr. Wren stated he first met or had contact with Respondent when Respondent represented a client in a PCR matter in approximately mid 1995-1997, but did not form any impressions of his as an attorney at that time. In the

underlying criminal matter, Mr. Wren testified he did not consider client Varela matter to be a referral. He stated that Mr. Varela was referred to the public defender's office and at that time he had been removed from representing Mr. Varela in the criminal matter but continued to represent him in a civil and a domestic relations matter. Mr. Wren stated that his client, Mr. Varela asked him for the names of two attorneys that could represent him in the criminal matter. Mr. Wren stated he contacted one of the attorneys who then recommend he contact Respondent. Mr. Varela ultimately hired Respondent to represent him in the criminal matter.

Mr. Wren verified that in May or June of 2007, he was still representing Varela II and continued to represent him in the criminal matter until the judge's order disqualified him in May or June 2008. Mr. Wren stated he also filed a Notice of Claim to preserve Mr. Varela's appeal.

Mr. Wren stated he was aware there were some bias challenges filed in the Varela matter, but he did not read those challenges as they did not apply to him. He later became aware that Judge Reeves assigned the bias challenges to Judge Nelson.

Mr. Wren stated it was common knowledge at the Yuma County courthouse that prosecutors Levi Gunderson and Roger Nelson and Judge Nelson are of the Mormon faith. Mr. Wren further stated he spoke with Bruce Crowe who said his mother, Rose Crowe was approached at church by the prosecutor in a criminal matter. Mr. Wren testified however, he does not recall telling Respondent about that conversation. Mr. Wren stated however, that he did advise his client, Mr.

Varela, of that contact during his representation of him, but he is not sure how that information was relayed to Respondent.

IV. CONCLUSIONS OF LAW

The Panel finds clear and convincing evidence is present that Respondent violated Rule 42, Ariz.R.Sup.Ct, specifically ERs 3.1, 4.4(a), 8.2(a), 8.4(d) and current Rule 54(c).[4]

Respondent violated ER 3.1 by filing repeated and sequential bias challenges against judges without a good faith basis in fact or law; violated 4.4(a) by filing repeated sequential bias challenges against judges with no substantial purpose other than to embarrass, delay or burden any other person; violated ER 8.2 by making a statement with reckless disregard as to its truth or falsity concerning the qualifications of integrity of Judge Nelson; violated ER 8.4(d) by filing repeated, sequential, and non-meritorious bias challenges against judges that consumed precious judicial time and the court's resources; and knowingly violated Rule 54(c) when he failed to comply with Judge Reeves' Order filed July 24, 2009.

First, Respondent filed bias challenges without a reasonable basis for making such statements. No investigation was undertaken to determine the truth of Respondent's allegations and he continued with his bias challenges (through attorney Riggins) despite being removed as Knapp counsel in 2009. Respondent should have carefully and thoroughly investigated his concerns of bias in order to avoid ethical rule violations.

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[4] Former Rule 53(c), Ariz.R.Sup.Ct.

Second, Respondent's repeated, sequential and non-meritorious bias challenges were attempts to remove assigned judges because of unfavorable rulings and embarrassed the judges, delayed the proceedings, wasted the courts time and burdened other participants in the matter. Third, Respondent's statements regarding Judge Nelson's ability to be unbiased because of a *perceived* conflict were made recklessly and without factual substantiation. Respondent was on notice that the court found his multiplicity of motions and arguments were inappropriate, yet he persisted in making them.

Respondent's testimony that his Motion to Reconsider was based on his "personal experience" growing up with "Mormon members" is that they were guided by their church, gave rise to a rank opinion that could easily boarder on bigotry. His position that the Church of Latter Day Saints was controlling the actions of both a judge as well as the deputy county attorney is based on nothing but his own prejudice. Respondent's bias against Mormons (later adding Baptists and Catholics) is troubling by itself, and supported by nothing more than Respondent's imagination, since he provided no evidence in any forum, including this one.

Discussion and Relevant Case Law

This a troubling case. Among other things, it demonstrates the need for an attorney to fully understand and appreciate the tensions that may exist in judicial proceedings between an attorney's duty towards his client as contrasted with his duties as an officer of the Court. Here, unfortunately, the evidence reveals that Respondent failed to either comprehend or comply with his duties to the Court or the judicial process or engaged in simply zealotry resulting in unethical and unprofessional conduct in the Superior Court as well as before this Hearing Panel.

For the reasons set forth herein, this Panel is unable to agree with the State Bar's recommendation that a suspension for a period of six months, rather than a longer period, is warranted and necessary with regards to this Respondent.

Respondent filed numerous, sometimes overlapping bias motions against judges arguing the following: that his client received disparate treatment and the judges failed to make detailed findings and conclusions upon request and when findings were made, they were factually incorrect, the judges failed to address misconduct by the Yuma County Attorney's Office, gave that office preferential treatment, discussed the matter with other judges, ruled on motions without a hearing, violated Rule 10.1, and made rulings inconsistent with the law. Respondent further made disparaging remarks concerning Judge Nelson.

In Arizona, the presiding judge of a superior count within Arizona has the authority to assign bias challenges to a judge for ruling, even when the presiding judge is personally disqualified to rule on any substantive matter or the merits of a case due to bias. Rule 10.6, Ariz. R. Crim. Proc. ("[I]f the named judge is the presiding judge, that judge shall continue to perform the functions of the presiding judge"); *State v. Eastlack*, 180 Ariz. 243, 883 P.2d 999 (1994) ("We held in *State v. Watkins*, 125 Ariz. 570, 611 P.2d 923 (1980), that it was proper for a presiding judge, who was himself successfully challenged for cause, to reassign the case to another judge."). Furthermore, any bias of the assigning judge is not imputed to the assigned judge. *Eastlack* at 254, 883 P.2d at 1010.

There is also a presumption that judges are not biased and a party must show more than contrary rulings to overcome the presumption that a trial judge is without bias. "Judges are presumed to be impartial, and the party moving for

change of judge must prove a judge's bias or prejudice by a preponderance of the evidence." *State v. Smith*, 203 Ariz. 75, 79 ¶13, 50 P.3d 825, 829 (2002) (citing *State v. Carver*, 160 Ariz. 167, 172, 771 P.2d 1382, 1387 (1989)).

Criteria has also been established to determine bias/prejudice and errors alone are not sufficient to establish bias or prejudice. A bias challenge must be based upon "concrete facts and specific allegations" and not simply on "speculation, suspicion, apprehension, or imagination." *State v. Rossi,* 154 Ariz. 245, 248, 741 P.2d 1223, 1226 (1987). "It is generally conceded that the bias and prejudice necessary to disqualify a judge must arise from an extra-judicial source and not from what the judge has done in his participation in the case." *Smith v. Smith*, 115 Ariz. 299, 303, 564 P.2d 1266, 1270 (App. 1977) (citing *United States v. Grinnell Corp.*, 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966)).

"[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Liteky v. United States*, 510 U.S. 540, 555, 114 S. Ct. 1147, 1157, 127 L.Ed.2d 474, ___ (1994). "[T]here is a great deal of difference between ruling on questions of law and demonstrating bias and prejudice. We do not believe that even an erroneous ruling necessarily demonstrates a judge's bias toward a litigant." *Hill* at 324, 848 P.2d at 1386. Furthermore, a judge's failure to rule on a motion does not generally demonstrate bias or prejudice. *See Hill* at 323, 848 P.2d at 1385.

"Bias and prejudice mean a hostile feeling or spirit of ill will, or undue friendship or favoritism, toward one of the litigants." *State v. Hill*, 174 Ariz. 313, 322, 848 P.2d 1375, 1384 (1993) (citing *In re Guardianship of Styer*, 24 Ariz.App. 148, 151, 536 P.2d 717, 720 (1975)). However, a judge's "expressions of

impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women . . . sometimes display," does not establish bias or partiality. *Liteky*, 510 U.S. at 555, 114 S. Ct. at 1157.

Furthermore, judicial disqualification rules are "given strict construction to safeguard the judiciary from frivolous attacks upon its dignity and integrity and to ensure the orderly function of the judicial system." *State v. Perkins*, 141 Ariz. 278, 286, 686 P.2d 1248, 1256 (1984), overruled on other grounds, *State v. Noble*, 152 Ariz. 284, 731 P.2d 1228 (1987). "If the facts are not such as would warrant the affiant as a reasonable person in honestly believing that the questioned judge is biased . . ., the application should be denied as a matter of law." *State v. Neil*, 102 Ariz. 110, 114, 425 P.2d 842, 846 (1967).

A presumption exists that judges rulings are correct and that they know and follow the law. *State v. Medrano*, 185 Ariz. 192, 196, 914 P.2d 225, 229 (1996) (judges are presumed to consider all relevant sentencing information before them) (citing *Walton v. Arizona*, 497 U.S. 639, 653, 110 S.Ct. 3047, 3057, 111 L.Ed.2d 511 (1990); *State v. Everhart*, 169 Ariz. 404, 407, 819 P.2d 990, 993 (App. 1991)). *See also State v. Alvarado*, 178 Ariz. 539, 543, 875 P.2d 198, 202 (App. 1994) (quoting *Walton v. Arizona*, 497 U.S. 639, 653, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990)) ("Trial judges are presumed to know the law and to apply it in making their decisions."); *Feuchter v. Bazurto*, 22 Ariz. App. 427, 429, 528 P.2d 178, 180 (1974) (citing *Mozes v. Daru*, 4 Ariz. App. 385, 420 P.2d 957 (1966)) (a ruling granting a motion for summary judgment is presumed to be correct).

The record supports that Respondent filed repeated, sequential, non-meritorious pleadings/motions without a good faith basis in violation of ER 3.1. An

argument is considered frivolous and without merit when any reasonable attorney would agree the argument is totally and completely without merit. *See Evans v. Arthur*, 139 Ariz. 362, 363 n. 1, 678 P.2d 943 (1984) ("A frivolous issue on appeal is one that 'indisputably has no merit — when any reasonable attorney would agree that the appeal is totally and completely without merit.'") (quoting *Price v. Price*, 134 Ariz. 112, 114, 654 P.2d 46, 48 (App. 1982), which quoted *In re Marriage of Flaherty*, 31 Cal.3d 637, 650, 183 Cal.Rptr. 508, 516, 646 P.2d 179, 187 (1982).

"[A]lthough the objective reasonableness of a legal claim is the standard to determine whether it is frivolous under E.R. 3.1, the rule also requires a subjective good faith motive by the client and a subjective good faith argument by the lawyer. . . . Therefore, if an improper motive or bad faith argument exists, respondent will not escape ethical responsibility for bringing a legal claim that may otherwise meet the objective test of a non-frivolous claim." *In re Levine*, 174 Ariz. 146, 153, 847 P.2d 1093, 1100 (1993) (footnote and citation omitted). "[E]ven where respondent claims that an objectively arguable ground for a legal claim exists, his subjective purpose in bringing the action is relevant to whether a violation of E.R. 4.4 occurred." *Levine* at 154, 847 P.2d at 1101.

Regarding "good faith," Geoffrey C. Hazard, Jr., and W. William Hodes have stated the following in a highly respected treatise:

> Although "good faith argument" is not a self-defining term, it has come to mean an argument that responsible lawyers would regard as being seriously arguable. Adoption of this standard does not mean that a lawyer's state of mind is irrelevant, for due process concerns dictate that a lawyer not be punished unless his conduct is knowing, and therefore culpable. On the other hand, an objective standard assumes that a genuinely frivolous claim will be known to be frivolous by most lawyers. Indeed, the definition of "knowing" set forth in the

> Terminology section of the Model Rules states that knowledge "may be inferred from the circumstances." In many cases, therefore, it will be possible to "infer from the circumstances" of a frivolous litigation maneuver that the lawyer had actual knowledge of its frivolous character.

Geoffrey C. Hazard, Jr., & W. William Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* 331 (Student Ed. 1985).

Generally, "[d]etermining a person's mental state requires the resolution of questions of fact." *In re Clark*, 207 Ariz. 414, 417 ¶14, 87 P.3d 827, 830 (2004). "In most cases, what constitutes good faith participation is a matter of fairness and common sense." *Lane v. Serrano*, 202 Ariz. 306, 309, 44 P.3d 986, 989 (2002) (party failed to appear at an arbitration hearing). The supreme court stated, "A good faith effort at appropriate participation is a factual determination to be made on a case-by-case basis. *Id.*

However, in attorney discipline matters, good faith is not always a complete defense to allegations of misconduct. *In re Wolfram*, 174 Ariz. 49, 847 P.2d 94 (1993) ("good faith" does not always preclude a finding that a lawyer acted with a knowing or intentional mental state). In certain circumstances, however, "good faith" may preclude a finding of misconduct if the relevant ethical rule requires a knowing or intentional mental state.

In this case, Respondent argues that the Judge Reeves did not make findings of fact and law as required. Neither Rule 10.1 nor Rule 10.6, Ariz. R. Crim. Proc., requires a judge to prepare findings of fact or conclusions of law, however, even if requested by a prosecutor or a defendant. In criminal matters, despite the fact that defendant has a right to a "record of sufficient completeness" to ensure meaningful review, *Draper v. Washington*, 372 U.S. 487, 497 (1963) (citing

Coppedge v. United States, 369 U.S. 438, 446 (1962)), "[t]here is no criminal rule of procedure for requiring findings of fact and conclusions of law," *State v. Jones*, 95 Ariz. 230, 233, 388 P.2d 806, 808 (1964). The Arizona Supreme Court has however, strongly urge[d] trial courts to include in the record the reasons for their decisions so that appellate courts may review those decisions in a more directed and efficacious manner." *State v. Fisher*, 141 Ariz. 227, 236 n. 1, 686 P.2d 750, 759 (1984) ("trial court did not include in the record its reasons for denying the defendant's motion to suppress"). Appellate courts "are obliged to affirm the trial court's ruling if the result was legally correct for any reason." *State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984) (failure to give a *Willits* instruction) (citing *State v. Dugan*, 113 Ariz. 354, 555 P.2d 108 (1976) and *State v. Claxton*, 122 Ariz. 246, 594 P.2d 112 (App.1979)). ."

Even though a court need not provide findings of fact and conclusions of law when requested by a party, such a request will result in the party getting what it has requested (i.e., findings of fact and conclusions of law) or will preserve the issue for appeal. *Trantor v. Fredrikson*, 179 Ariz. 299, 301, 878 P.2d 657, 659 (1994).

Respondent's conduct in the Superior Court demonstrates clearly and convincingly, his ignorance or disregard of the well settled legal principles. Accordingly, there is ample record support for the conclusion that Respondent violated the ethical rules.

V. SANCTIONS

In determining an appropriate sanction, courts generally utilizes the American Bar Association's *Standards for Imposing Lawyer Sanctions* ("*Standards*") as a guideline. Rule 58(k), Ariz.R.Sup.Ct. The appropriate sanction depends on the facts and circumstances of each case.

Analysis under the ABA *Standards*

When imposing a sanction, consideration is given to the duty violated, the lawyer's mental state, the actual or potential injury caused by the misconduct and the existence of aggravating and mitigating factors. *In re Peasley*, 208 Ariz. 27, 33, 35, 90 P.3d 764, 770 (2004). *See* also *Standard* 3.0.

The *Standards* however, do not account for multiple charges of misconduct, and advise that the ultimate sanction imposed should at least be consistent with the sanction for the most serious instance of misconduct among a number of violations: it might well be and generally should be greater than the sanction for the most serious misconduct. *See* 1992 amended *Standards, Theoretical Framework, p.* 7.

In this matter, Respondent violated duties that he owed to the legal system and as a professional. Respondent does not disagree that at least some of his conduct may have violated specific ethical rules. Respondent asserts however, that his ethical violations were the result of negligence due to the degree of difficulty in representing his client. These arguments are refuted by the entire record which clearly and convincingly demonstrate that his misconduct was knowing and caused actual harm to the legal system as well as the legal profession. The Panel applies the following *Standards* to Respondent's particular misconduct:

Standard 6.2, *Abuse of the legal Process* is applicable to Respondent's violations of ERs 3.1, 4.4(a), 8.4(d) and Rule 54(c) (formerly 53(c)). *Standard* 6.22 provides:

> Suspension is appropriate when a lawyer knowingly violates a court order or rule, and there is injury or potential injury to a client or a party, or interference or potential interference with a legal proceeding.

Standard 6.1, *False Statements, Fraud and Misrepresentation* is applicable to Respondent's violation of ER 8.2(a). *Standard* 6.12 provides:

> Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

Standard 6.13 provides:

> Reprimand is generally appropriate when a lawyer is negligent either in determining whether statements or documents are false or in taking remedial action when material information is being withheld, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

After a lawyer's misconduct has been established, aggravating and mitigating factors may be considered in determining the appropriate sanction.

***Standard* 9.0, Aggravating and Mitigating factors**

Aggravating factors in attorney discipline proceedings need only be supported by reasonable evidence. *Matter of Peasley*, 208 Ariz. 27, 90 P.3d 764 (2004). The Panel has determined, based on the record evidence, that he following aggravating factors exist in this case:

9.22(b) dishonest or selfish motive;

9.22(c) a pattern of misconduct;

9.22(d) multiple offenses;

9.22(g) refusal to acknowledge wrongful nature of conduct; and

9.22(i) substantial experience in the practice of law.

The Panel also finds the following mitigation factors are present:

9.32(a) absence of prior disciplinary record;

9.32(e) full and free disclosure to disciplinary board or cooperative attitude towards proceedings[5]; and

9.32(j) delay in disciplinary proceedings.

CONCLUSION

Based on the facts in this matter and in consideration of the *Standards* including the aggravating and mitigating factors, the Panel determined that a suspension of two years plus costs of these disciplinary proceedings is the appropriate sanction. The suspension is effective 30 days from the date of this Report and Order.

DATED this 25 day of May, 2012.

William J. O'Neil, Presiding Disciplinary Judge
Office of the Presiding Disciplinary Judge

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[5] The Panel struggled with this factor given the numerous motions and arguments filed before this Panel.

CONCURRING

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Richard L. Brooks, Volunteer Attorney Member

Robert M. Gallo /mps
Robert M. Gallo, Volunteer Public Member

Original filed with the Disciplinary Clerk
of the Office of the Presiding Disciplinary Judge
of the Supreme Court of Arizona
this 25 day of May, 2012.

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