

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA,  
  
Respondent,  
  
v.  
  
BRIAN ALLEN WILKINS,  
  
Petitioner.

) Court of Appeals No.  
)  
) Maricopa County Superior Court  
) Cause No. CR-2008-145947-001 SE

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**PETITION FOR REVIEW**

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In Propria Persona Petitioner

## **INTRODUCTION**

Petitioner Brian Allen Wilkins, proceeding *in propria persona*, brings this Petition for Review after his Petition for Post-Conviction Relief (“PCR”) was summarily dismissed by the Maricopa County Superior Court on September 23, 2009 in a three-sentence order. The trial court had refused to adjudicate said PCR within statutory time limits, pursuant to *13 A.R.S. §§ 4231 & 4236, Ariz. R. Crim. P. 32(c)*, and *Constitution of Arizona Art. 2 § 11* (“Justice in all cases shall be administered openly, and without unnecessary delay”). Not only did the trial court abuse discretion by not adjudicating the PCR by the September 1, 2009 statutory deadline, but abused discretion by failing to rule upon each and every motion and request filed by the *pro-se* Petitioner in support of his PCR. The trial court took no action in said PCR proceedings until a Petition for Special Action was filed in this Court on September 14, 2009 (CA-SA 09-0210). The trial court, once noticed of Special Action, summarily dismissing said PCR, while several motions were still pending without being ruled upon, and while the State did not challenge any of Petitioner’s claims for relief in its response. On October 2, 2009, this Court declined special action jurisdiction.

## **STATEMENT OF THE ISSUES**

Because the trial court summarily dismissed the PCR without any reasoning given in the three-sentence opinion, Petitioner brings most of said claims from the

PCR, and an additional claim presented in the Special Action, in this Petition for Review. Petitioner disagrees with the trial court's opinion stating, "defendant has failed to show any colorable claims for relief," and believes the trial court abused discretion by not only summarily dismissing said PCR, but doing so without providing any legally cognizant reasoning for doing so. Therefore, Petitioner brings the following issues for appellate review: violation of Petitioner's *Sixth Amendment* and *Constitution of Arizona, Art. 2 §§ 23 & 24* right to a public, speedy trial by jury; *Sixth Amendment* ineffective assistance of counsel; violation of Petitioner's *Sixth Amendment "Faretta"* right to self-representation; unlawfully induced plea agreement; violation of Petitioner's *Sixth Amendment* right to counsel at arraignment; several *Fourteenth Amendment* due process violations; State Fabricating and Using False Evidence; State's Unconstitutional Suppression of Evidence; violations of the Constitution of Arizona Art. 2 § 11

### **LEGAL ARGUMENTS**

A trial court's summary dismissal of post-conviction relief proceedings will be reversed only if there is an abuse of discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). A court abuses its discretion if the reasons given for its action are "legally incorrect." *State v. Chapple*, 135 Ariz. 281, 297 n.18, 660 P.2d 1208, 1224 n.18 (1983). An abuse of discretion includes an error of law. *State v. Rubiano*, 214 Ariz. 184, ¶ 5, 150 P.3d 271, 272 (App. 2007). A question of law

[is] subject to...*de novo* review. See *State v. Virgo*, 190 Ariz. 349, 352, 947 P.2d 923, 926 (App. 1997).

**I. Sixth and Fourteenth Amendment; and Constitution of Arizona, Art. 2 §§ 23 & 24 Right To A Public, Speedy Trial By Jury**

In the state of Arizona, three events must take place before a criminal trial may be continued or vacated without violating a Defendant's Sixth Amendment right to a public, speedy trial by jury.

First, a continuance of a trial may be granted on a motion of a party. See *Ariz. R. Crim. P. 8.5(a)*. Any motion **must be in writing** and state with specificity the reasons justifying the continuance. *Id.*, see also e.g., *State v. Kasten*, 170 Ariz. 224, 226-27, 823 P.2d 91, 93-94 (App.1991)(upholding trial court's granting of state's motion for continuance where victim was missing and prosecutor had no knowledge that victim was reluctant to testify).

Second, a continuance of any trial date shall be granted only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interest of justice. See *Ariz. R. Crim. P. 8.5(b)*. And third, if a continuance is granted, the court shall state with specific reasons for the continuance on the record. *Id.*

The record in this case clearly shows that none of the above took place when the Petitioner's January 20, 2009 trial date was vacated on January 12, 2009. The trial court, *sua sponte*, vacated Petitioner's trial without a written motion being filed by the State or defense counsel, without the showing of extraordinary

circumstances, and without specific reasons given on the record by the trial court as to why the Petitioner's trial was vacated. The trial court, on September 22, 2008, specifically ordered that the trial "shall not be continued...unless a written motion is filed at least 5 days before trial." The January 12, 2009 minute entry does not indicate that the Petitioner waived his speedy trial rights, and does not specify any reasons for the continuance, besides "Court and counsel discuss pretrial matters." At the January 12, 2009 Trial Management Conference, State's attorney Lynn Krabbe said the extraordinary circumstances were because, "I'm retiring soon." Said minute entry orders exclusion of all time "from 1/12/2009 through 3/11/2009 (58 days)" without any reasons given, which unconstitutionally extended the last day for trial from February 7, 2009 to April 6, 2009.

Because the Petitioner's trial was unconstitutionally vacated, he could not knowingly and intelligently waive his right to a public speedy trial by jury. Though the Petitioner asserted his speedy trial right to his attorney (see below), said counsel refused to file a special action.

The unconstitutional vacating of Petitioner's trial prejudiced the case, in that it forced the Petitioner's hand into signing a plea. The Petitioner's right to self-representation (see below) had already been violated up to that point, and the arbitrary vacating of his trial only led him to believe the law contrives against him. See *Faretta v. California*, 422 U.S. 834 (1975).

Not only was Petitioner's right to a speedy trial violated, but his right to trial by jury was revoked entirely. Once a defendant establishes a *prima facie* Rule 8 violation, the burden is on the State to show that the delay between arraignment and trial was "excludable" time. *Humble v. Superior Court*, 179 Ariz. 409, 413, 880 P.2d 629, 633 (App. 1993). Because there were no written motions filed by the Defendant (or the State) and no reasons, let alone extraordinary circumstances, given on the record by the trial court for the continuance, the State cannot establish the only category of excludable time left for it to use: delay necessitated by congestion of the trial calendar. *State v. Craig*, 214 Ariz. Adv. Rep. 11 (1996).

Because the Petitioner's right to trial was unconstitutionally revoked, and thus his right to a speedy trial violated, this Court, pursuant to *Ariz. R. Crim. P. 8.6*, must reverse the conviction and dismiss the charges against the Petitioner.

## **II. Ineffective Assistance of Counsel: Sixth Amendment**

Petitioner had a total of three Maricopa County public defenders that represented him. The first was David Allen Brown, whom the Petitioner spoke to for a total of 45 seconds. On July 29, 2008, after Petitioner had already been in jail for a week, Brown offered him a plea agreement for one year in prison. Brown did not know any of the facts of the case and did not know what the Petitioner was even being charged with. Petitioner was later informed by human resources director Jeanne Hyler, at the public defender's office, that Brown had

been the attorney of record in 2,640 cases between January 2008 and June 2009. Brown's caseload for fiscal 2008 vastly exceeded the standards set by the Arizona Supreme Court (*State v. Joe U. Smith*, 140 Ariz. 355, 681 P.2d 1374 [1984]) for public defenders and he should have dismissed himself from the case if he had no intentions of diligently representing the Petitioner. The State argues, in its July 28, 2009 response to the PCR, that Brown is exempt from the *Joe U. Smith* decision. When the Petitioner was indicted on August 1, 2008, the charges of aggravated assault with a deadly weapon and possession of drugs during a gun crime levied by the Tempe Police were dropped, thus counsel should have motioned to modify his release conditions. Petitioner attempted to reach Brown by phone at least seven times from jail, leaving a message each time. Though Brown was the Petitioner's attorney, there was no contact at all with him after the 45 second encounter in court on July 29, 2008. Brown was the Petitioner's counsel of record for arraignment as well, however he did not show up to said arraignment. Petitioner was prejudiced by Brown's ineffective assistance because the same motion to modify release conditions that the subsequent public defender filed, could have been filed by Brown at arraignment and would have freed the Petitioner from jail to gather evidence, interview witnesses, and aggressively represent himself in said proceedings in the early weeks that this prosecution began.

Michael Ziemba was the second public defender assigned to Petitioner's case. Ziemba was the attorney who allowed the Petitioner's trial to be vacated by the trial court, *sua sponte*, on January 12, 2009 without a written motion filed by the State or the public defender, without reasons given by the Court, and without extraordinary circumstances being presented for the continuance. See *Ariz. R. Crim. P. 8.5*. After trial was unlawfully vacated, Ziemba continually threatened the Petitioner with "prison" if he did not sign the expired plea agreement. Ziemba argued in his own motion to modify Petitioner's release conditions (August 29, 2008) that Petitioner was not facing any jail time at trial or with a plea, however, after trial was unlawfully vacated, his stance changed. An effective, competent attorney who believes a defendant is not facing jail time at trial or via a plea would want to take the matter to trial, unless some malicious intent is present. Though Petitioner informed Ziemba that his speedy trial rights were being violated, Ziemba continued the "prison" threats when the Petitioner persisted.

Ziemba failed to obtain Petitioner's phone records from the night he was arrested when he gave Sprint Communications the wrong phone number in a subpoena. Phone records would have provided a hard copy of the extortion notes and physical and racial threats sent that night by the State's alleged victim, Michael Arthur Wood. And though Petitioner still has the electronic

messages in his phone, Ziembra failed to file a motion to admit as evidence the Petitioner's phone which contains the evidence. Ziembra then failed to get a deposition from a witness the Petitioner had identified to him. Said witness's testimony would have contradicted the story told by Wood and the State's alleged witness, Linnette Wittman. Ziembra also failed, as ordered by the Court, to arrange a settlement conference (see September 22, 2008 minute entry) prior to the expiration date of the plea agreement offered by the State. The trial court specifically extended the last day for trial by 30 days, to February 7, 2009, in that same docket, to accommodate the court's order for a settlement conference to take place before October 22, 2008.

The third public defender, William Peterson, allowed Judge Teresa Sanders to enter an expired plea agreement for judgment and conviction of the Petitioner. As noted, the plea agreement had expired on October 22, 2008 (See Appendix A). The State simply crossed out the expiration date with a ball-point pen and changed it to accommodate their agenda. Peterson should have and could have recognized this error, along with recognizing that Petitioner's right to trial by jury had been violated in January, which led to him to signing a plea against his will. Had the Petitioner been interested in signing said plea, he would have done so before said plea expired on October 22, 2008.

Under *State v. Donald*, 198 Ariz. 406, 10 P.3d 1193 (App. 2000), reinstatement of an expired plea offer must be premised on a showing of ineffective assistance of counsel. Further, claims of ineffective counsel may only be brought in Arizona in Rule 32 proceedings. See *State ex. rel. Thomas v. Rayes*, 214 Ariz. 411, 415, ¶ 20, 153 P.3d 1040, 1044 (2007) (“defendant may bring ineffective assistance of counsel claims only in a Rule 32 post-conviction proceeding – not before trial, at trial, or on direct review”). Because the trial court sentenced the Petitioner pursuant to a plea agreement which was expired and said plea could not lawfully be re-instated (because no ineffective counsel claims can be determined pre-trial), said plea agreement is void.

The outcome of the case - in that the Petitioner would have had the opportunity to present evidence in his favor at trial which very likely would have exonerated him - would have been completely different had the Maricopa County public defenders done their constitutionally-standardized duties in an effective manner. *Strickland vs. Washington*, 466 U.S. 668 (1984).

### **III. Sixth Amendment “Faretta” right violation**

The question is whether a State may constitutionally hale a person into its criminal courts and there force a lawyer upon him, even when he insists that he wants to conduct his own defense. The U.S. Supreme Court has concluded that a State may not constitutionally do so. See *Faretta*, supra. In determining

whether a defendant's "Faretta" rights have been respected, the primary focus must be on whether he had a fair chance to present his case in his own way.

*McKaskle v. Wiggins*, 465 U.S. 168 (1984); *Sager v. Maass*, 907 F. Supp. 1412 (D. Or. 1995) (holding trial court's failure to warn petitioner about dangers of self-representation is reversible error), *aff'd*, 84 F.3d 1212 (9th Cir. 1996).

The trial court failed to hold any sort of hearing on the *pro-se* motion to modify release conditions received by the trial court on August 19, 2008, in which the Petitioner indicated he would be representing himself. Said motion was not docketed until after Petitioner filed his PCR; more than 10 months later. Said motion's docket date (September 23, 2008), incorrectly, is more than one month after the trial court actually received said motion. The postmark on the envelopes and date on the motion itself contradicts the trial court's false docket date. The trial court subsequently granted a nearly verbatim motion to modify release conditions filed by Ziembra, further indicating the trial court's contempt for *pro-se* defendants.

The trial court did decide to allow Petitioner his constitutional right to self-representation in PCR proceedings, however, the trial court continued its pattern of ignoring any and all *pro-se* motions filed. Petitioner filed a motion for temporary removal of grand jury transcripts on June 17, 2009; a request for preparation of PCR record on June 19, 2009, specifically requesting transcripts

from the January 12, 2009 hearing which the Petitioner's right to a public, speedy trial by jury was revoked; a motion for discovery on July 13, 2009; and a motion for clarification, which asked the trial court about standby counsel, the pending motions, and the amended PCR. Because the trial court failed to rule on each and every one of said *pro-se* motions, Petitioner was denied due process, standby counsel, and was not given a realistic opportunity to present his case in his own way. The trial court further violated due process rights by summarily dismissing said PCR without ruling on any of Petitioner's motions.

#### **IV. Unlawfully Induced Guilty Plea**

The Petitioner allowed the 30 day time limit to accept the plea agreement offered by the State on September 22, 2008, to expire on October 22, 2008 without signing it at said status conference. The Petitioner's next court date, January 12, 2009, was supposed to be a "trial management conference" where he would select jurors. Instead, as described above, the trial court, *sua sponte*, unconstitutionally vacated his trial. Note, the Petitioner had already been denied his right to represent himself at that point. When Petitioner told public defender Michael Ziembra his speedy trial rights are being violated, Ziembra, again, threatened Petitioner with "prison" if he did not sign a plea. Petitioner was told by Ziembra that the charges could be designated misdemeanors at sentencing and that going to trial would mean "prison time," again, even though Ziembra argued in August that Petitioner

was facing no jail time. Petitioner, realizing that constitutional rights (public speedy trial; self-representation; due process) did not matter in the trial court and that the facts of the case did not seem to matter, could only believe the trial court and State would imprison him regardless of criminal procedures, laws, and constitutional rights. Because counsel continually threatened “prison,” and because Petitioner’s right to trial had already been revoked, and because Petitioner, Probation Dept. of Maricopa County, and public defender William Peterson were under the impression that the charges could be designated misdemeanors at sentencing, signed the plea agreement which expired on October 22, 2008. (Appendix B and Appendix A).

Petitioner could not have knowingly and intelligently waived, *inter alia*, his right to trial by signing a plea because that right had already been unconstitutionally revoked, as state-appointed counsel allowed to happen. Arizona courts recognize that a defendant may seek relief from a conviction on the basis that counsel's ineffective assistance induced a guilty plea. *See, e.g., State v. Ysea*, 191 Ariz. 372, 379, ¶¶ 23-24, 956 P.2d 499, 506 (1998); *State v. Anderson*, 147 Ariz. 346, 351-52, 710 P.2d 456, 461-62 (1985).

## **V. Sixth and Fourteenth Amendment Right To Counsel At Arraignment**

Arraignment has been deemed a “critical stage” of a criminal prosecution by the U.S. Supreme Court (See PCR). When the Petitioner was arraigned on August

11, 2008, the charges he was facing in the supervening indictment were significantly different than what the Tempe Police tried to charge him with. All of the Class 3 and 4 felonies were dropped and Petitioner was now charged with four Class 6 felonies. Petitioner was prejudiced by not having counsel at arraignment because his release conditions could have been modified at the arraignment hearing, instead of 35 days later when Petitioner filed a *pro-se* motion to modify release conditions, than state-provided counsel filed another, which the trial court honored. Because Petitioner was incarcerated, he missed out on opportunities to interview witnesses, gather evidence, and be in better position to represent himself in said case. Had Petitioner's charges not changed significantly at arraignment, the State could argue "harmless error" in not providing counsel. However, the change in charges levied against Petitioner required the State to provide counsel at arraignment.

#### **VI. Fourteenth Amendment Due Process Violation (Malicious Prosecution) By State Fabricating and Using False Evidence**

Because the Petitioner's right to trial was unconstitutionally revoked, he was convicted and sentenced based solely on the evidence the State presented. The State fabricated two key pieces of evidence to present aggravating factors for sentencing purposes and allege "dangerousness" on the charges. State's attorney Lynn Krabbe conjured an arbitrary prior criminal charge of "fraud" allegedly committed by the Petitioner. As Petitioner has made clear, the person involved in

this crime is clearly and unequivocally not him and Petitioner was never arrested, convicted, or even questioned for this alleged crime (See Appendix B, supra).

Krabbe then alleged there were “multiple victims” involved in the crimes allegedly committed by the Petitioner on July 22, 2008. The police report clearly and unequivocally states there was only one alleged victim (Appendix C).

A conviction obtained by the knowing use of false evidence is fundamentally unfair. *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959); *United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342 (1976); *Miller v. Pate*, 386 U.S. 1, 7, 87 S.Ct. 785, 788, 17 L.Ed.2d 690 (1967). The false evidence used by State’s attorneys was not only used as aggravating factors in sentencing, but also used to alleged “dangerousness” for the charges levied against the Petitioner. The State amended its indictment to alleged “dangerousness” on September 5, 2008 on the same day it alleged the “multiple victims” aggravating factor. The U.S. Supreme Court requires reversal of convictions obtained through the use of false evidence that was known to be false by representatives of the State. See *Napue*, supra.

## **VII. State’s Unconstitutional Suppression of Evidence**

The prosecution's suppression of exculpatory evidence...violates due process if that evidence is material to guilt, irrespective of the good or bad faith of the prosecution. *Brady v. Maryland*, 373 U.S. 83 (1963). To establish a Brady

violation, petitioner must show the prosecution suppressed material evidence favorable to him. See e.g. *Banks v. Reynolds*, 54 F.3d 1508, 1516 (10th Cir.1995).

The State not only fabricated and used false evidence against the Petitioner, but also suppressed key pieces of evidence. Because the Petitioner's motion to remove grand jury transcripts from the trial court for observation was ignored, and thus denied, Petitioner does not know whether the State disclosed to the grand jury that its alleged victim, Michael Arthur Wood, was on probation for criminal simulation (counterfeiting money)(See Appendix D) the night the Petitioner was arrested, and that Wood extorted and assaulted the Petitioner the night of the arrest. The State's alleged victim was also intoxicated the night of the arrest, which would have been a third probation violation in one night (See Appendix C: police report). It is highly unlikely the State's alleged victim would have shown up for trial because he would have had to incriminate himself under oath because the police report clearly declares he was intoxicated, and Petitioner still is in possession of the extortion notes. The Petitioner can only believe that Judge Emmet Ronan - who vacated Petitioner's trial, took over the proceedings in this case without a reassignment order being issued, and who signed orders for prosecutor Lynn Krabbe when he was not the presiding judge of authority in this case – took into account the fact the State's alleged victim was flawed for trial purposes, thus unconstitutionally vacated Petitioner's trial. The Petitioner maintains he had to

defend himself from harm the night he was arrested, and the aforementioned evidence, which the State was well aware of, favored the Petitioner's position.

### **VIII. Violations of Constitution of Arizona Art. 2 § 11**

This article of the Arizona Constitution reads as follows: "Justice in all cases shall be administered openly, and without unnecessary delay." Though there are no exact timelines for trial courts to rule on general motions and requests made by parties, by the time Petitioner filed his special action on September 14, 2009, in hopes of compelling the trial court to adjudicate his PCR and/or *de novo* review by this Court, an unreasonable 60-78 days had gone by without the trial court ruling on Petitioner's *pro-se* motions filed between June 17, 2009 and July 13, 2009.

There are, however, statutory timelines which the State Legislature enacted, for the trial court to abide by for PCRs. The statutory deadline for the trial court to rule on the PCR was September 1, 2009 (See Special Action CA-SA 09-0210). It was not until the trial court was noticed of special action that it dispositioned the PCR; 23 days after the statutory deadline. The trial court summarily dismissed the PCR without ever ruling on any of the aforementioned motions.

The unnecessary delay, in the trial court not adjudicating the PCR and not ruling on any of Petitioner's motions, caused the Petitioner to take the extra step of Special Action, which should not have been necessary to compel the trial court to perform a ministerial act which it has no discretion in the manner of its

performance. A deliberate attempt by the government to use delay to harm the accused, or governmental delay that is 'purposeful or oppressive,' is unjustifiable. . . The same may be true of any governmental delay that is unnecessary, whether intentional or negligent in origin." *Dickey v. Florida*, 398 U.S. 30, 51, 90 S.Ct. 1564, 1576, 26 L.Ed.2d 26 (1970) (BRENNAN, J., concurring).

### **STAY OF EXECUTION OF SENTENCE PENDING APPEAL**

Pursuant to *Ariz. R. Crim. P. 31.6*, Petitioner moves the Court to stay any and all fines which Petitioner was sentenced to pay. Petitioner has been unemployed since being arrested because of an "arrest and felony conviction," and does not have the means to pay fines anyway.

Pursuant to *Ariz. R. Crim. P. 7.2(c)(A)*, Petitioner move the Court to order the State, pending appeal, to execute Petitioner's release conditions subsequent to his arraignment, which, after modification was granted on September 17, 2008, consisted of bi-weekly telephone check-ins with a pre-trial service officer. Petitioner would also abide by all conditions pursuant to *Ariz. R. Crim. P. 7.3* (he has already submitted DNA to the Tempe Police). Petitioner was not sentenced to prison in this case, but placed on probation. Petitioner's physical condition, in that he's suffered from a chronic flu-like virus which he loses large amounts of blood, for several months without means for treatment, must isolate himself from others for fear of spreading whatever it is he was. The foregoing, and the fact State

officials have already attempted to obstruct Petitioner’s right to appeal – particularly Maricopa County probation supervisor John Wertsching threatening to “send [you] to prison” because of the appeals processes (See PCR Petition) – militates against confinement via probation and the outdoor labor Petitioner was sentenced to do. See *State v. Hawkins*, 140 Ariz. 88, 90, 680 P.2d 522, 524 (App. 1984). The fact Petitioner has filed, *pro-se*, a Notice and Petition for PCR, a federal Petition for Writ of Habeas Corpus, a Petition for Special Action in this Court, a pending reconsideration motion for federal habeas corpus, two federal civil lawsuits against Tempe Police and Maricopa County, and now this Petition for Review signifies the Petitioner will and has diligently prosecuted the appeals process. See *Ariz. R. Crim. P. 7.2(c)(2)*.

### **CONCLUSION**

This Petition for Review should be granted so to protect the constitutional rights of not only *pro-se* defendants, but also indigent defendants who must trust in state-provided counsel. Several of the issues, particularly *Ariz. R. Crim. P. 32.6(c)* and the related state statutes, and *Ariz. R. Crim. P. 8.5* and the trial court revoking Petitioner’s right to trial, are matters of law which have not been addressed by the appellate courts, thus an opportunity to resolve these issues, which will likely occur, again is presented herein. The trial court’s assertion that “defendant has failed to show any colorable claim for relief” is legally incorrect, thus the Court

should grant review. The trial court further abused discretion by dismissing the PCR without ruling on any of Petitioner's motions supporting PCR.

Petitioner requests the Court review the record as necessary in this case, grant review, grant preliminary relief, and grant relief by reversing the trial court summary dismissal of the PCR, and remanding for dismissal of all charges and thus discharge the Petitioner from the adverse consequences of the conviction and judgment in this case.

DATED this \_\_\_\_\_ day of October, 2009.

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In Propria Persona Petitioner

**CERTIFICATE OF SERVICE**

I hereby certify that on October \_\_\_\_\_, 2009, one (1) copy of the foregoing document and appendix was mailed/delivered to:

Maricopa County Attorney's Office  
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Brian A. Wilkins

