

APPLICATION FOR JUDICIAL OFFICE

**SECTION I: PUBLIC INFORMATION
(QUESTIONS 1 THROUGH 65)**

PERSONAL INFORMATION

1. Full Name: **Michael Paul McGill**

2. Have you ever used or been known by any other name? **No**

3. Office Address: **255 East Gurley Street, Prescott, AZ 86301**

4. How long have you lived in Arizona? **14 years**
What is your home zip code? **86315**

4. Identify the county you reside in and the years of your residency.
I currently reside in Yavapai County and have done so for over seven years.

6. If appointed, will you be 30 years old before taking office? yes no

If appointed, will you be younger than age 65 at the time of appointment?
 yes no

7. List your present and any former political party registrations and approximate dates of each:
Republican Party – 2016-Present; Independent – 2010-2016; Democrat Party– 1998-2010

8. Gender: **Male**
Race/Ethnicity: **White**

EDUCATIONAL BACKGROUND

9. List names and locations of all post-secondary schools attended and any degrees received.

**Western New England College (now University) School of Law
Springfield, MA
08/2002-05/2005
Degree earned: Juris Doctorate**

**Western New England College (now University)
Springfield, MA
08/2000-05/2002
Degree earned: Bachelor of Science in Criminal Justice**

**University of Massachusetts at Boston
Boston, MA
08/1998-05/2002
No degree earned, general studies**

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

**Law School
Extracurricular Activities - Philip R. Jessup International Moot Court Team,
2004-2005**

**In my third year of law school I worked as student prosecutor pursuant to
Massachusetts Supreme Judicial Court Rule 3:03. In that role, I handled
bail hearings, pre-trial motions, and evidentiary hearings in criminal
misdemeanor cases.**

**Undergraduate
Western New England College:
Major – Criminal Justice
Extracurricular Activities – Criminal Justice Association, Member;
Intramural Basketball**

**University of Massachusetts at Boston:
Extracurricular Activities – Varsity Football 1998, 1999; NCAA Student
Athlete Advisory Board, 1998, 1999**

11. List scholarships, awards, honors, citations and any other factors (e.g., employment) you consider relevant to your performance during college and law school.

In law school I was part of the four-member Philip R. Jessup International Moot Court team. In the fall of 2004, the team submitted written Memorials (Briefs). In the spring of 2005, the team reached the semifinals of the Northeast regional competition held at the United States District Courthouse in Concord, NH. The team won the award for Best Memorial in the Northeast Region which included teams from Harvard Law School, Boston College Law School, New England School of Law, Suffolk Law School, Syracuse Law School, and the University of Vermont Law School.

I was named to the Dean’s List in the Spring 2001, Fall 2001, and Spring 2002 semesters of my final years of college.

In college and into law school I worked various times throughout the school years at Tucker Mechanical. One significant project I was assigned was maintaining the Material Safety Data Sheets (MSDS) notebooks. This was a considerable task of updating the information for various products on a regular basis. These sheets are required by the Occupational Safety and Health Administration (OSHA) and must be updated no more than every three years. There are MSDS for every product that contains any type of chemical, no matter how innocuous the product is. A jobsite could require 100’s or more MSDS in its notebook. More important to company business, OSHA requires each job site, regardless of size, to have updated and accurate information. No two jobsites were identical, and products used on site changed frequently. Failure to comply with this requirement could have resulted in fines against the company levied by OSHA.

PROFESSIONAL BACKGROUND AND EXPERIENCE

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

Supreme Court of Arizona, admitted January 2006

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13. a. Have you ever been denied admission to the bar of any state due to failure to pass the character and fitness screening? **No**. If so, explain.
- b. Have you ever had to retake a bar examination in order to be admitted to the bar of any state? **No**. If so, explain any circumstances that may have hindered your performance.
14. Describe your employment history since completing your undergraduate degree. List your current position first. If you have not been employed continuously since completing your undergraduate degree, describe what you did during any periods of unemployment or other professional inactivity in excess of three months. Do not attach a resume.

EMPLOYER	DATES	LOCATION
Yavapai County Attorney's Office	11/2011 – Present	Prescott, AZ
Mohave County Attorney's Office	11/2005 – 11/2011	Kingman, AZ
Conn. State's Attorney's Office, Hartford Judicial District (paid internship)	05/2004 – 08/2004	Hartford, CT
Tucker Mechanical	05/1999 – 05/2004	Meriden, CT

Between 2002 and 2005 I worked part-time while I also attending law school. I participated in a paid internship at the Connecticut State's Attorney's Office for the summer of 2004 as noted above.

Upon graduating from law school in May 2005, I moved to Arizona, studied for the bar exam and awaited the results before beginning my work in Mohave County in November 2005. During that period, I worked part-time jobs for a Holsum bread distributor in the Glendale/Peoria area when help was needed.

15. List your law partners and associates, if any, within the last five years. You may attach a firm letterhead or other printed list. Applicants who are judges or commissioners should additionally attach a list of judges or commissioners currently on the bench in the court in which they serve.

Please see Attachment A for a list of all attorneys who have been employed with the Yavapai County Attorney's Office within the last five years.

16. Describe the nature of your law practice over the last five years, listing the major areas of law in which you practiced and the percentage each constituted of your

total practice. If you have been a judge or commissioner for the last five years, describe the nature of your law practice before your appointment to the bench.

For the last five years I have been a criminal prosecutor handling felony cases in Yavapai County. My practice has been 100% criminal law. In 2014 I was assigned to the Charging Bureau responsible for reviewing cases for possible criminal charges. As a charging attorney I had to decide not only whether probable cause existed that the crime was committed but also whether a reasonable likelihood of conviction existed in the given case. I also reviewed search warrants prior to being presented to a magistrate, grand jury subpoenas for approval, and consulted with law enforcement on various issues which arose in investigations.

Since January 2015 I have been assigned to the Prescott Felony Trial Group prosecuting cases assigned to me. These include serious and violent offenses, such as violent assaults, sex crimes, child sex crimes, and homicides. I am responsible for the post-charging handling of the cases to include pre-trial motion practice, evidentiary hearings, and conducting jury trials through sentencing. In these last four years in the Felony Trial Group, I have tried to verdict felony cases including homicides, child sex crimes, child pornography cases, child prostitution, and assaults. Part of my duties as a trial attorney include responding to Petitions for Post-Conviction Relief and, in limited instances, responding to or filing appeals following trial.

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

Having worked in two County Attorney's Offices in my career, I have only practiced criminal law. For 12 of the 13.5 years I have been a prosecutor, I have been assigned a felony caseload.

18. Identify all areas of specialization for which you have been granted certification by the State Bar of Arizona or a bar organization in any other state.

I have not sought any specialization from the State Bar of Arizona.

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

A significant portion of my job as a criminal prosecutor involves negotiating plea agreements, successful or not. Cases which do not resolve in plea agreements are resolved through the trial process. I

estimate that I have engaged in plea negotiations in over 1,000 cases in more than 13 years. This estimate is made due to the frequency with which plea offers and agreements are discussed in criminal cases.

As for drafting important legal documents, part of my role as a prosecutor is to respond to various substantive motions filed by a defendant. These motions include Motions to Suppress, Motions to Dismiss, or other challenges to evidence. Given the volume and types of cases assigned to me in more than 13 years, I would conservatively estimate that I have responded to more than 100 substantive motions.

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

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

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

Sole Counsel: **Not applicable**

Chief Counsel: **Not applicable**

Associate Counsel: **Not applicable**

21. Have you handled any matters that have been arbitrated or mediated? **No**
If so, state the approximate number of these matters in which you were involved as:

Sole Counsel: **Not applicable**

Chief Counsel: **Not applicable**

Associate Counsel: **Not applicable**

22. List at least three but no more than five contested matters you negotiated to settlement. State as to each case: (1) the date or period of the proceedings; (2) the names, e-mail addresses, and telephone numbers of all counsel involved and the party each represented; (3) a summary of the substance of each case; and (4) a statement of any particular significance of the case.

As a criminal prosecutor, I frequently negotiate plea agreements attempting

to resolve a case without the need for a trial. In this capacity, it is difficult to estimate the number of cases in which I have tendered a plea offer and/or negotiated terms of the offer with an attorney representing a charged defendant. Plea agreements in almost all cases in the Justice Courts were negotiated with a *pro per* defendant. Counsel would be typically be appointed or retained for DUI cases in the Justice Courts.

23. Have you represented clients in litigation in Federal or state trial courts? **Yes, I've represented the State of Arizona in state trial courts.** If so, state:

The approximate number of cases in which you appeared before:

Federal Courts: **0**
State Courts of Record: **1000+**
Municipal/Justice Courts: **500+**

The approximate percentage of those cases which have been:

Civil: **0%**
Criminal: **100%**

The approximate number of those cases in which you were:

Sole Counsel: **1000+**
Chief Counsel: **Not applicable**
Associate Counsel: **2**

The approximate percentage of those cases in which:

You wrote and filed a pre-trial, trial, or post-trial motion that wholly or partially disposed of the case (for example, a motion to dismiss, a motion for summary judgment, a motion for judgment as a matter of law, or a motion for new trial) or wrote a response to such a motion: **25%**
You argued a motion described above **25%**
You made a contested court appearance (other than as set forth in the above response) **20%**

You negotiated a settlement:	92%
The court rendered judgment after trial:	5%
A jury rendered a verdict:	3%

The number of cases you have taken to trial:

Limited jurisdiction court	75+
Superior court	39
Federal district court	0
Jury	46

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

It is difficult to give an exact number of cases I've taken to trial in the Justice Courts because nearly all misdemeanor offenses are bench trials which are set with great frequency. Having been assigned rotations several Justice Courts in the past, it is difficult to estimate as I did not keep an exact record of those cases. I believe an estimate of 75 bench trials in the Justice Courts to be an accurate estimate.

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

The approximate number of your appeals which have been:

Civil:	0
Criminal:	3 appeals excluding Petitions for Review for Post-Conviction Relief
Other:	0

The approximate number of matters in which you appeared:

As counsel of record on the brief:	3
Personally in oral argument:	Not applicable

25. Have you served as a judicial law clerk or staff attorney to a court? **No** If so, identify the court, judge, and the dates of service and describe your role. **Not applicable**
26. List at least three but no more than five cases you litigated or participated in as an attorney before mediators, arbitrators, administrative agencies, trial courts or appellate courts that were not negotiated to settlement. State as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency and the name of the judge or officer before whom the case was heard; (3) the names, e-mail addresses, and telephone numbers of all counsel involved and the party each represented; (4) a summary of the substance of each case; and (5) a statement of any particular significance of the case.

State of Arizona v. Kris Raymond McClain

Yavapai County Superior Court Cause No. P1300CR201300130

Judge Tina R. Ainley, Division 3

Jury Trial: February 3, 2016 through February 19, 2016

Pamela Nicholson representing Kris Raymond McClain

pam@pnlaw.net

(602) 253-2900

Thomas Dean representing Kris Raymond McClain

attydean@gmail.com

(602) 635-4990

On January 22, 2013, a vehicle driving by T.B. was struck from behind while at an intersection in Prescott Valley. T.B.'s daughter H.S. was sitting in the front passenger seat and was killed instantly due to the impact. T.B.'s 18-month old granddaughter was on the back seat restrained in a car seat. The granddaughter suffered a broken leg and was flown to a hospital in Phoenix. The driver of the vehicle which struck T.B. was identified as Kris McClain. McClain was taken to the hospital due to injuries he sustained. During the investigation it was discovered that McClain was a lawful medical marijuana cardholder. The results of a blood draw showed elevated levels of THC and lorazepam. McClain was convicted of several offenses including Manslaughter, Aggravated Assault, and Aggravated DUI. The convictions were affirmed in a Memorandum Decision by the Court of Appeals, Division 1. I was the sole attorney assigned to the case at the time of trial.

This case presented significant legal issues which required pre-trial

motions and hearings. Issues included the lawfulness of an officer travelling in an ambulance with McClain, the admissibility of statements made in the ambulance, establishing a time of blood draw due to inconsistent evidence, and other act evidence under Rule 404, Arizona Rules of Evidence. One issue at trial was whether McClain had taken the lorazepam prior to driving or whether it was administered by hospital staff despite no documentation that it had been administered at the hospital. This required the testimony of not only the Physician's Assistant who tended to McClain but also a nurse who had participated in the treatment of McClain. Their testimony went into detail about the procedures and protocols for the administration of medicine at the hospital. The most significant issue in the case was whether McClain was impaired by the marijuana or not. To rebut the State's expert testimony, the defense retained an expert who testified regarding his many years of prescribing marijuana as a physician in California. This case was significant to Yavapai County not only because a young woman lost her life but because it was the first vehicular homicide involving medical marijuana following the passage of the Arizona Medical Marijuana Act.

State of Arizona v. Jack Bates Rider III

Yavapai County Superior Court Cause No. V1300CR201280534

Judge Joseph C. Butner (retired), Division Pro Tem B

Jury Trial: April 12, 2016 through May 4, 2016

Matthew Springer

L.matthew.springer@hamplaw.com

(928)753-6868

In July 2007, K.W. and her boyfriend R.F. went to the Beasley Flats area on the Verde River in Camp Verde. R.F.'s friend, Jack Rider, went with them. At approximately 4 p.m. that day, R.F. called 911 indicating that K.W. had drowned in the river. When police and medical staff arrived R.F. was having a panic attack and Rider offered to bring R.F. home. Prior to leaving, R.F. and Rider had indicated that K.W. had slipped, fell, hit her head, and drowned. Initially, the case was deemed an accidental drowning, in part, due to the Dr. Phillip Keen's opinion as medical examiner ruling this an accident. There was little physical evidence to be collected. In 2012, R.F. was charged with criminal offenses. He offered to provide information about the incident in 2007 indicating it was a murder and not an accident. R.F. reported that something happened between K.W. and Rider at the river, that R.F. ran back to their location and saw Rider intentionally holding K.W. under the water until she stopped struggling. They both pulled K.W. out of the water and attempted CPR. After reporting

this in 2012, R.F. agreed to conduct a number of confrontation calls with Rider. Rider made several suspicious statements that were not consistent with an accident. Detectives flew to Florida to interview Rider where he gave several more suspicious statements. Rider was arrested for the murder of K.W. Rider was convicted of Second Degree Murder. The conviction was affirmed in a Memorandum Decision by the Court of Appeals, Division 1. I was acting as co-counsel with a supervising attorney on this case but handled the case at trial. The supervising attorney handled many of the pre-trial evidentiary hearings though I drafted several motions and responses.

This case presented interesting issues regarding expert testimony. As part of the new investigation in 2012, a detective brought the case file to Dr. Fischione, the Yavapai County Medical Examiner at that time. Dr. Fischione reclassified the incident as a homicide concluding that none of the other manners of death applied. This led to both experts testifying at pre-trial evidentiary hearings and in trial to offering differing opinions.

State of Arizona v. Buren Jarret Burgess

Yavapai County Superior Court Cause No. P1300CR201401170
Judge Tina R. Ainley, Division 3

Jury Trial: October 20, 2016 through October 21, 2016 and October 26, 2016

Bruce Griffen representing Buren Burgess

griffen@flagstaff-lawyer.com

(928) 226-0165

In November 2014, Buren Burgess responded to an ad for prostitution on backpage.com. During phone conversations, Burgess agreed to a price for acts with two girls who identified themselves as minors but said he did not want to engage in sex acts. Burgess arrived at the hotel with the money and cigarettes as requested. While Burgess began undressing he made a comment about having sex with the girls. Burgess was arrested. The two underage minor prostitutes were undercover detectives. Burgess was convicted of two counts of Child Prostitution. At sentencing, I argued Burgess had two historical prior felony convictions under the language of A.R.S. §13-3212 and should be sentenced accordingly. The trial court found both convictions constituted a single prior felony conviction under the language of A.R.S. §13-703. The State appealed the sentence. I was the sole attorney assigned to the case at the time of trial.

This was the first ever Child Prostitution case involving an undercover officer to be tried in Yavapai County. While the facts of this case were

mundane in the context of this type of case, this case led to a published opinion from the Arizona Court of Appeals. See *State v. Buren Burgess*, 1 CA-CR 16-0857 / 1 CA-CR 16-0923 (consolidated), 428 P.3d 192 (Div.1 2018). The Court of Appeals, adopting the argument made by the State at the trial, found that the sentencing scheme under A.R.S. §13-3212 was separate and distinct from the scheme under A.R.S. §13-703. The Court of Appeals affirmed the convictions but modified the sentences to increase the length of each term of incarceration imposed.

State of Arizona v. Steven Eugene Tracey

Yavapai County Superior Court Cause No. P1300CR201400619

Judge Michael R. Bluff, Division 7

Jury Trial: December 7, 2016 through December 9, 2016

Jury Trial: January 4, 2017 through January 20, 2017

Matthew Cochran representing Steven Tracey

Matthew.Cochran@yavapai.us

(928) 771-3588

Andrew Falick representing Steven Tracey

Andrew.Falick@yavapai.us

(928) 771-3588

T.C. had met Steven Tracey in Utah while Tracey was working as a truck driver. They developed a relationship and T.C. moved into Tracey's home in Prescott Valley with her children. T.C. brought her 9 year old daughter G.W., 10 year old daughter C.W., 11 year old son K.W., and 15 year old son G.T. In June 2014, T.C. reported to the police that Tracey had molested her daughters. During the investigation, forensic interviews with both daughters were conducted. C.W. reported one instance in which Tracey molested her. G.W. however reported many instances in which Tracey molested her. The kids also reported that Tracey had showed them pornography. It was discovered during the pendency of the case that G.T. was also molesting G.W. during the same time period. G.T. later admitted guilt and was adjudicated delinquent for his conduct relating to G.W.

While this case was pending, L.N. a woman in her 30's came forward to report that she had been sexually assaulted by Tracey when she was 12 years old and Tracey was 16. L.N. reported that Tracey provided her alcohol and then engaged in sexual intercourse with her.

The State obtained an indictment for acts involving all alleged victims.

L.N.'s case was severed and went to trial in December 2016 resulting in a

conviction for Sexual Conduct With A Minor. The trial involving C.W. and G.W. began in January 2017. Tracey was convicted in that case of numerous offenses including Sexual Conduct With A Minor, Child Molestation, Continuous Sexual Abuse, Attempted Child Molestation and Furnishing Harmful Items to a Minor. The convictions were affirmed by the Court of Appeals, Division 1. I was the sole attorney assigned to the case at the time of trial.

This case presented many difficult evidentiary issues requiring several hearings prior to trial. One significant issue that arose was whether a defendant can compel testimony of a minor victim at a hearing on proposed other act evidence under Rule 404, Arizona Rules of Evidence. The state successfully moved to quash those subpoenas and preclude the defendant from calling the minor children as witnesses. Another significant issue involved the fact that G.T. admitted his conduct against G.W. The arguments centered on whether this was admissible either as third-party culpability evidence or under the "rape shield" law. Following argument, the court ruled this evidence was not admissible.

The legal issues in this case included: duplicitous and multiplicitous indictments, pre-indictment delay, vindictive prosecution, third party culpability, the "rape shield" law, severance of counts, admission of out of state records, and other act evidence under Rules 404(b) and 404(c), Arizona Rules of Evidence.

State of Arizona v. Matthew Patrick Curl

Yavapai County Superior Court Cause No. P1300CR201700226

Judge Tina R. Ainley, Division 3

Jury Trial: November 8, 2017 and November 15, 2017 through November 17, 2017

M. Alex Harris representing Matthew Curl

alexharrispc@gmail.com

(928)899-6022

In February 2017, police responded to an apartment due to a report of gun shots being fired. When police arrived, they spoke to B.N., T.S., and J.G. B.N. had scrapes and cuts but advised nothing happened at the apartment. T.S. and J.G. advised Curl was in the apartment to confront B.N. and brandished a gun. All three occupants scattered with J.G. and B.N. running into a bedroom. Curl followed but J.G. was able to get out of the apartment. As she was running out, J.G. heard a gunshot. Police found a spent casing in the living room and a 9mm bullet lodged in the joist in the

ceiling for the apartment above. Police looked for Curl at several different residences. Curl was finally located and initially refused to come out to police. After a brief standoff, Curl was detained. During the investigation the gun was never located. However, an empty 9mm handgun box was found in the house where Curl was living with his parents. A live 9mm round was found in Curl's bedroom. Curl was convicted of several charges including Aggravated Assault as to B.N. and Disorderly Conduct With A Deadly Weapon as to T.S. and J.G. The convictions were affirmed in a Memorandum Decision by the Court of Appeals, Division 1. I was the sole attorney assigned to the case at the time of trial.

This case presented difficult legal issues to handle during trial involving the victim/witnesses. These issues required the ability to think and react quickly and to be flexible as is the case in many jury trials. B.N. had told police nothing had occurred and was in the Department of Corrections by the time Curl's trial began. T.S. was arrested the day before Curl's trial and twice refused transport. Neither B.N. nor T.S. testified at trial. J.G. did testify at trial, however she admitted she was drunk and high at the time of the incident. She admitted that what she told the police was accurate at the time, but that she had no independent recollection of what she told the police, despite reviewing her recorded interview during a recess of trial. After some argument, a redacted version of J.G.'s interview with police was then played to the jury though not admitted. *Ariz. R. Evid.*, Rule 803(5). The trial court also had to grapple with the admission of jail video which was fairly new in Yavapai County. Rather than a recorded phone call, the State sought to introduce a video visit between Curl and a friend. Issues regarding relevancy and prejudice to a defendant were argued. The State prevailed in the admission of portions of the video.

27. If you now serve or have previously served as a mediator, arbitrator, part-time or full-time judicial officer, or quasi-judicial officer (e.g., administrative law judge, hearing officer, member of state agency tribunal, member of State Bar professionalism tribunal, member of military tribunal, etc.), give dates and details, including the courts or agencies involved, whether elected or appointed, periods of service and a thorough description of your assignments at each court or agency. Include information about the number and kinds of cases or duties you handled at each court or agency (e.g., jury or court trials, settlement conferences, contested hearings, administrative duties, etc.).

Not applicable

28. List at least three but no more than five cases you presided over or heard as a judicial or quasi-judicial officer, mediator or arbitrator. State as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) the names, e-mail addresses, and telephone numbers of all counsel involved and the party each represented; (4) a summary of the substance of each case; and (5) a statement of any particular significance of the case.

Not applicable

29. Describe any additional professional experience you would like to bring to the Governor's attention.

In addition to my normal duties as a Deputy County Attorney, I have appeared on behalf of the State of Arizona in the Yavapai County Superior Court Veteran's Court. Veteran's Court is a specialty court designed to assist military veterans in their post-conviction affairs to ensure they are being provided the proper resources through the Probation Department.

I have appeared on behalf of the State of Arizona in the Yavapai County Superior Court Drug Court. Drug Court is another specialty program designed to assist probationers in seeking and completing drug treatment, sober living, as well as residential assistance. Typically, the State appears for cases in which probationers who have been accepted into the Drug Court have violated the terms of their probation.

From 2009-2011, I was assigned as a prosecutor with the Mohave Area General Narcotics Team task force. My primary duties included the prosecution of drug sales, transfers, transportation, distribution, and manufacturing cases throughout Mohave County. Additionally, I frequently reviewed search warrants and kept law enforcement apprised in relevant changes to the law.

From 2007-2009, I was assigned as the lone Arizona Automobile Theft Authority (AATA) Vertical Prosecution attorney for all of Mohave County. My duties included prosecuting all offenses involving Theft of Means of Transportation, Unlawful Use of Means of Transportation, and theft of non-traditional vehicles such as watercraft, off-road vehicles, and heavy equipment which would qualify for AATA prosecution. Additionally, I drafted the grant proposals for the office each year to be submitted for review and approval by the Arizona Automobile Theft Authority. Finally, I conducted several presentations on the Watch Your Car Program both for the community at large, and for several classes at the Kingman High School.

BUSINESS AND FINANCIAL INFORMATION

30. Have you ever been engaged in any occupation, business or profession other than the practice of law or holding judicial or other public office, other than as described at question 14? **No**. If so, give details, including dates.
31. Are you now an officer, director, majority stockholder, managing member, or otherwise engaged in the management of any business enterprise? **No**. If so, give details, including the name of the enterprise, the nature of the business, the title or other description of your position, the nature of your duties and the term of your service. **Not applicable**
- Do you intend to resign such positions and withdraw from any participation in the management of any such enterprises if you are appointed? **Not applicable** If not, explain your decision.
32. Have you filed your state and federal income tax returns for all years you were legally required to file them? **Yes** If not, explain.
33. Have you paid all state, federal and local taxes when due? **Yes** If not, explain.
34. Are there currently any judgments or tax liens outstanding against you? **No** If so, explain.
35. Have you ever violated a court order addressing your personal conduct, such as orders of protection, or for payment of child or spousal support? **Not applicable** If so, explain.
36. Have you ever been a party to a lawsuit, including an administrative agency matter but excluding divorce? **Yes**. If so, identify the nature of the case, your role, the court, and the ultimate disposition.

I was named as one of several defendants in a civil claim which arose through my role as a prosecutor while employed in the Mohave County Attorney's Office. This claim was filed in the United States District Court,

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District of Arizona. The civil case was filed due to an inappropriate relationship between a law enforcement officer and a defendant in a case I was assigned to prosecute. The plaintiff in the civil case (defendant in the criminal case) alleged that the Mohave County Attorney's Office, the Mohave County Attorney, and I were all negligent in our oversight despite being unaware of this relationship. The case against Mohave County Attorney's Office, the Mohave County Attorney, and me was dismissed with prejudice on December 15, 2011.

37. Have you ever filed for bankruptcy protection on your own behalf or for an organization in which you held a majority ownership interest? **No** If so, explain.
38. Do you have any financial interests including investments, which might conflict with the performance of your judicial duties? **No** If so, explain.

CONDUCT AND ETHICS

39. Have you ever been terminated, asked to resign, expelled, or suspended from employment or any post-secondary school or course of learning due to allegations of dishonesty, plagiarism, cheating, or any other "cause" that might reflect in any way on your integrity? **No** If so, provide details.
40. Have you ever been arrested for, charged with, and/or convicted of any felony, misdemeanor, or Uniform Code of Military Justice violation? **No**
- If so, identify the nature of the offense, the court, the presiding judicial officer, and the ultimate disposition. **Not applicable**
41. If you performed military service, please indicate the date and type of discharge. If other than honorable discharge, explain. **Not applicable**
42. List and describe any matter (including mediation, arbitration, negotiated settlement and/or malpractice claim you referred to your insurance carrier) in which you were accused of wrongdoing concerning your law practice. **Not applicable**
43. List and describe any litigation initiated against you based on allegations of

misconduct other than any listed in your answer to question 42. **Not applicable**

44. List and describe any sanctions imposed upon you by any court. **Not applicable**
45. Have you received a notice of formal charges, cautionary letter, private admonition, referral to a diversionary program, or any other conditional sanction from the Commission on Judicial Conduct, the State Bar, or any other disciplinary body in any jurisdiction? **No** If so, in each case, state in detail the circumstances and the outcome.
46. During the last 10 years, have you unlawfully used controlled substances, narcotic drugs or dangerous drugs as defined by federal or state law? **No** If your answer is "Yes," explain in detail.
47. Within the last five years, have you ever been formally reprimanded, demoted, disciplined, cautioned, placed on probation, suspended, terminated or asked to resign by an employer, regulatory or investigative agency? **No** If so, state the circumstances under which such action was taken, the date(s) such action was taken, the name(s) and contact information of any persons who took such action, and the background and resolution of such action. **Not applicable**
48. Have you ever refused to submit to a test to determine whether you had consumed and/or were under the influence of alcohol or drugs? **No** If so, state the date you were requested to submit to such a test, type of test requested, the name and contact information of the entity requesting that you submit to the test, the outcome of your refusal and the reason why you refused to submit to such a test. **Not applicable**
49. Have you ever been a party to litigation alleging that you failed to comply with the substantive requirements of any business or contractual arrangement, including but not limited to bankruptcy proceedings? **No** If so, explain the circumstances of the litigation, including the background and resolution of the case, and provide the dates litigation was commenced and concluded, and the name(s) and contact information of the parties. **Not applicable.**

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PROFESSIONAL AND PUBLIC SERVICE

50. Have you published or posted any legal or non-legal books or articles? **No** If so, list with the citations and dates.
51. Are you in compliance with the continuing legal education requirements applicable to you as a lawyer or judge? **Yes** If not, explain.
52. Have you taught any courses on law or lectured at bar associations, conferences, law school forums or continuing legal education seminars? **Yes** If so, describe.

**Northern Arizona Regional Training Academy
Report Writing and Courtroom Testimony, 2019**

**Medical Marijuana and Vehicular Collisions
Central Arizona Regional Training Academy, 2018**

**Crash Reconstruction
Advanced DUI Trial Advocacy Course
Arizona Prosecuting Attorney's Advisors Council, 2018**

**Case Study on *State of Arizona v. Kris Raymond McClain*
Arizona Governor's Office of Highway Safety Summer Conference, 2017**

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

Yavapai County Bar Association, member, 2018-Present

National District Attorney's Association, member, 2019

Have you served on any committees of any bar association (local, state or national) or have you performed any other significant service to the bar? **No**

List offices held in bar associations or on bar committees. Provide information about any activities in connection with pro bono legal services (defined as services to the indigent for no fee), legal related volunteer community activities or the like. **Not applicable**

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

**Coyote Springs Elementary School, Prescott Valley, AZ
Volunteer, 2017-Present**

**Prescott Valley Little League, Prescott Valley, AZ
Volunteer coach, 2014-Present**

**Prescott YMCA, Prescott, AZ
Flag Football Volunteer Coach, 2018-Present**

**Republican Women of Prescott
Associate Member, 2018-Present**

**U.S. Vets Veteran Stand Down, Prescott, AZ
Volunteer, 2017, 2018**

**Yavapai Republican Men's Forum
Member, 2016-Present**

**Yavapai Soccer Club, Prescott Valley, AZ
Volunteer Coach, 2014-2017**

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

**Nominee – Felony Prosecutor of the Year Award, Small Jurisdiction
Arizona Prosecuting Attorneys Advisory Council, 2018**

**Felony Prosecutor of the Year Award
Arizona Governor's Office of Highway Safety, 2017**

**Nominee – David R. White Excellence in Victim Advocacy Award
Arizona Prosecuting Attorneys Advisory Council, 2016**

**Felony Prosecutor of the Year Award
Arizona Narcotics Officers Association, 2012**

**Prosecution Unit of the Year Award
Arizona Automobile Theft Authority, 2009**

56. List any elected or appointed public offices you have held and/or for which you have been a candidate, and the dates. **Not applicable**

Have you ever been removed or resigned from office before your term expired? **Not applicable** If so, explain.

Have you voted in all general elections held during the last 10 years? **Yes** If not, explain.

57. Describe any interests outside the practice of law that you would like to bring to the Governor's attention.

While I have committed my professional life to seeking justice as a prosecutor, my priority is and always will be my family. My wife Maricela and I recently celebrated our 11th Anniversary. When I married Maricela I not only gained a strong, supportive partner, but I was lucky enough to join lives with her wonderful son Christian who was 9 years old at the time I met them. Christian, now 21, is an independent, intelligent, responsible, hard-working, and caring man. Maricela and I are focused on raising our son Jacob who is now 9 years old. We have a strong family bond that makes our lives exciting and fun.

When I'm not working, we are likely at one of Jacob's games where I have coached various sports throughout the years. When we aren't at a game or practice, we enjoy time in the outdoors namely hiking the many trails Prescott has to offer or fishing in one of the several lakes in the area. In my own time I not only enjoy watching the day's sporting events but also enjoy reading biographies about historical and political figures.

HEALTH

58. Are you physically and mentally able to perform the essential duties of a judge with or without a reasonable accommodation in the court for which you are applying? **Yes**

ADDITIONAL INFORMATION

59. Provide any information about yourself (your heritage, background, life

experiences, etc.) that you would like the Governor to consider.

I approach every day of my life wanting to be the best husband, father, son, friend, and attorney that I can be. I have committed to working hard, respecting others, being fair, and appreciating all that I have been given and have earned. I learned valuable lessons early from my mother, father and grandfather. My father and grandfather were both tradesmen working as licensed plumbers on various heavy construction jobs ranging from skyscrapers, schools, college campuses, and sewage treatment plants. I learned from them that an honest day's work brings an honest day's pay. My father sometimes worked two or three jobs when construction was slow. But he always provided so that my mother could stay home with my sister and me. My parents enrolled both my sister and me at St. Martha's Catholic School from Kindergarten through 8th grade. It was in these early years where I developed a foundation for compassion and kindness. I participated in various activities including basketball, band, and choir. I cannot recall a time where my father missed a game, concert, or other event, even when he had a nearly 2 hour drive one way to some jobsites. He likewise made every sporting event or concert in high school. Once in college, my parents travelled to every football game I played, traversing much of New England for several months a year. I have had the same joy and commitment in attending my boys' events over the years.

While both my grandfather and father were building objects, they were also building their names and reputations in the industry. When I was in my later years of high school, then into college and law school, I had the opportunity to work for the company my father was employed by. I started travelling to various job sites. During these visits I was lucky to learn from others that my father was a very respected man in his professional community; much more so than he'd ever admit to being. I also learned that he followed in his father's footsteps in this regard. What I also learned is that they both worked with an honesty and integrity in their profession, taking on tasks others didn't want, to make sure the job was completed. They never asked anyone to do anything they wouldn't do themselves. I later had the privilege of working directly with my father in the office setting as an Assistant Project Manager. It was there where I truly learned the man that my father was and, as it relates to my work ethic directly, how to work with others. I saw my father show the receptionist the same respect he showed the president of the company and everyone in between. I have always said I was lucky to learn this example before my professional career began. The opportunity to work with your father is one that my father always cherished greatly as I do now.

Another significant moment in my life came when I met and later married my wife. She and her parents were immigrants from Mexico. My wife and her parents became naturalized United States citizens more than 10 years ago. I have had the privilege and honor of attending two naturalization ceremonies. At these ceremonies I witnessed the joy, excitement, and pride that people from all over the world felt by achieving their dream of becoming a U.S. citizen. To them, it didn't matter where anyone came from, what their background was, or how much money they had. The new citizens all shared the same excitement in their new title. These experiences have stuck with me since those ceremonies, as reminders every day to be grateful for what we have been given. In a professional sense, they remind me to always remember we are dealing with people first and foremost and not just parties in the courtroom.

I have carried these lessons with me and made conscious efforts to implement them in my life. When I became an attorney, I made a choice to never make anything personal. We all play valuable roles under the constitutional protections we enjoy. I can disagree with my colleague on the other side without being disagreeable. When I was assigned to the Justice Courts talking to defendants who were representing themselves, I sat and listened to them. Most of them understood they made a mistake and just wanted to be heard. The time taken to discuss the case with them and answer their questions brought them comfort. As a felony attorney handling serious cases that don't resolve as quickly, I try to keep the victims apprised of what is happening. They want to know their voices are being heard as well. I try to meet with any victim for as long as necessary to answer all their questions and bring some level of comfort to them through the process. Being a prosecutor comes with great responsibility. Simply because the law might allow for a heavy-handed sentence, such a result is not always warranted. Each case must be treated individually; no two cases are ever the same. I was lucky to learn valuable lessons at relatively young ages. It has made all the difference in the person I am both personally and professionally. These traits are what I believe are necessary in a judge: fairness, respect, patience, and hard work. They are what I strive to be every day of my life.

60. Provide any additional information relative to your qualifications you would like to bring to the Governor's attention.

In addition to my legal experience, I have many years of working in various capacities in the private sector for Tucker Mechanical, a mechanical contractor working in large scale construction in Connecticut. The most recent position I held was the title of Assistant Project Manager. In that

role, I was assigned to handle day-to-day operations of multi-million-dollar projects. I was to review project plans and schedules to ensure the work for the day was completed on budget and on time. I had numerous financial responsibilities. I was responsible for making sure that worker contracts were complied with, that legal requirements for the State of Connecticut were met, and that state and federal rules and regulations were followed. Violations could cost the company time and money which would have set the projects back. Projects I worked on as Assistant Project Manager included Rentschler Field which is the University of Connecticut football stadium and the University of Connecticut dormitory retrofit. In this retrofit, I oversaw an average of four different projects on campus. My experience at Tucker Mechanical exposed me to several significant areas including contract law, employment law, and state and federal codes and regulations. The responsibilities taught me the importance of diligence and thoroughness.

61. If selected for this position, do you intend to serve a full term and would you accept rotation to benches outside your areas of practice or interest and accept assignment to any court location? **Yes** If not, explain.

62. Attach a brief statement explaining why you are seeking this position.

Please see Attachment B for a brief statement explaining why I am seeking this position.

63. Attach two professional writing samples, which you personally drafted (e.g., brief or motion). **Each writing sample should be no more than five pages in length, double-spaced.** You may excerpt a portion of a larger document to provide the writing samples. Please redact any personal, identifying information regarding the case at issue, unless it is a published opinion, bearing in mind that the writing sample may be made available to the public.

Please see Attachment C for two professional writings samples which I have personally drafted.

64. If you have ever served as a judicial or quasi-judicial officer, mediator or arbitrator, attach sample copies of not more than two written orders, findings or opinions (whether reported or not) which you personally drafted. **Each writing sample should be no more than five pages in length, double-spaced.** You may excerpt a portion of a larger document to provide the writing sample(s). Please redact any personal, identifying information regarding the case at issue,

unless it is a published opinion, bearing in mind that the writing sample may be made available to the public. **Not applicable**

65. If you are currently serving as a judicial officer in any court and are subject to a system of judicial performance review, please attach the public data reports and commission vote reports from your last three performance reviews. **Not applicable**

Attachment A

List of Associates Within The Last Five Years

The following list contains names of all attorneys which have been employed by the Yavapai County Attorney's office in the last five years. An attorney who has left the office in the last five years is referenced with an "*".

Sheila Polk, Yavapai County Attorney
Charles Hastings, Yavapai County Attorney (retired)
Dennis McGrane, Chief Deputy County Attorney
Bill Hughes, Chief Criminal Deputy County Attorney
Thomas Stoxen, Chief Civil Criminal Deputy Attorney
Jarrod Long, Supervising Deputy County Attorney*
Steven Sisneros, Supervising Deputy County Attorney
Dana Owens, Supervising Deputy County Attorney
Steven Young, Supervising Deputy County Attorney
Patti Wortman, Supervising Deputy County Attorney
Glen Asay
Joy Biedermann
Matthew Black
Martin Brennan
Steve Clark
Michael Cordrey
Lewis Citrenbaum
Amy Drew*
Susan Eazer
Ross Edwards*
Joshua Fisher
Jonathan Hale
Casi Harris
LaTanya Gabaldon*
Kristina Jezairian
Robert Johnson
Carol Kennedy
Benjamin Kreutzberg
William Kunisch
John Lowe
Chris Michalsky
Mike Morrison
Bill Nelson*
Dexton Nye
Larissa Parker
Tyler Pitrat
Janee Pousson*
George Rodriguez
Chris Roll*
Jessica Sabo*
Stephanie Sankey
Danalyn Savage
Henry Whitmer
Ethan Wolfinger

Attachment B

Statement For Why I Am Seeking This Position

Above the entrance of the United States Supreme Court building is carved in stone is the phrase “Equal Justice Under Law”. The “rule of law” ensures that no one is above the law. It creates an equal playing field upon which we as communities interact with freely. The separation of powers established in the Constitution ensures that the “rule of law” is not infringed or impaired. The specific duty of a judge under these principles is to ensure that all people who come before the court are treated fairly, regardless of their background, and that they are heard. A judge does not have the luxury of picking but has the obligation of deciding who is correct based upon what the law says; as unpopular as the decision might be at times.

A prosecutor shares many of the same traits and duties as a judge. But, a prosecutor only represents one side of an issue namely the victim of a crime. I am seeking the appointment of Superior Court Judge because my education, knowledge, and experience in courtrooms has prepared me to help all citizens of Yavapai County through the justice system.

I am seeking this position because a judge’s most important role is to issue rulings and decisions to settle disputes. As a prosecutor I have come to thoroughly enjoy motion practice. I have demonstrated on numerous occasions the ability to thoughtfully and impartially articulate the law as it exists and as it applies to a given set of facts. The ability to critically think and analyze is an important trait for a judge. I have repeatedly demonstrated the ability to do that in my career. I believe a citizen of Yavapai County would appreciate a judge handling their case the way I have routinely approached all my cases as a prosecutor. I look forward to issuing rulings to resolve disputes between parties while having the opportunity to fulfill the obligations and principles set forth in the Constitution.

I am seeking this position because I am a better arbiter than advocate. As a prosecutor I constantly analyze cases. I develop the “good facts” of the case and the “bad facts” of the case. I weigh them against each other, compare them to the applicable statute, determine if any case law decides the dispute, and reach a conclusion. Sometimes I have reached conclusions that, while just and fair, are not popular with a victim or law enforcement. This has sometimes meant dismissing a charge or entire case when necessary. I have never been afraid to explain my decision to the disappointed party. These decisions are made daily in my duties as a prosecutor. I have confident that I can apply the same standards to cases before me as a judge.

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While I have a track record of demonstrating the ability to advocate on behalf of my case, my strength is in the analysis of the case itself to reach the fair and just outcome, not simply a conviction. It is this trait above any other that I believe best qualifies me for the position of Superior Court judge. A judge must maintain an even demeanor, never letting anything or anyone upset him. I am certain that my demeanor is suited to be a judge. As a prosecutor I have routinely proven the ability to make the correct legal argument when appropriate. I also have never been afraid to concede a point when justice requires it or when the law does not support it. Finally, and most significantly, a judge must call the case as he sees it. To use an analogy, I am a better referee than player. All of my experience as a prosecutor has prepared me for the role of Superior Court Judge.

To close, the first right listed in Victim's Bill of Rights contained in Article II, Section 2.1(1) of the Arizona Constitution is the right for a victim "[t]o be treated with fairness respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice system." These are principles I uphold every day as a prosecutor. These principles can and should guide a judge for how to treat every party appearing in a courtroom. I am committed to making sure that all citizens of Yavapai County are treated with fairness, respect, and dignity regardless of which table they are seated at. I believe that all parties should be free from intimidation, harassment, or abuse by the system. I am committed to ensuring that all parties are free to pursue their action as allowed by the law. These principles are what ensures the basic ideal of "Equal Justice Under Law". I have demonstrated the ability to act with this reverence throughout my entire career as a prosecutor and I am committed to doing so if appointed as judge of the Yavapai County Superior Court.

Attachment C

Two Writing Samples

1 **A. Defendant Has No Standing Because Defendant Has No Expectation**
2 **of Privacy In The Images Defendant Placed Onto Social Media**

3 Defendant has no standing to challenge this issue. Defendant has the burden of
4 proving standing to challenge a search. *State v. Hyde*, 186 Ariz. 252, 271, 921 P.2d 655
5 (1996). Defendant cannot prove standing let alone that a violation occurred because
6 notwithstanding the fact that no search occurred as discussed above, Defendant had no
7 reasonable expectation of privacy in the images since he voluntarily shared them over the
8 internet using social media applications. The United States Supreme Court has said:

9
10 “[A] Fourth Amendment search occurs when the government violates a subjective
11 expectation of privacy that society recognizes as reasonable. We have
12 subsequently applied this principle to hold that a Fourth Amendment search does
13 *not* occur – even when the explicitly protected location of a *house* is concerned –
14 unless the individual manifested a subjective expectation of privacy in the object
15 of the challenged search and that society is willing to recognize that expectation as
16 reasonable.”

17 *United State v. Kyllo*, 533 U.S. 27, 31-35, 121 S.Ct. 2038, 2042-43 (2001).

18 Defendant has no reasonable expectation of privacy in the images uploaded to an
19 account maintained by Chatstep, Yahoo! Inc., and/or Microsoft on behalf of Skype. *See*
20 *United States v. Miller*, 425 U.S. 435 (1976) (a depositor has no expectation of privacy in
21 copies of checks and deposit slips retained by his bank); *see also United States v. Payner*,
22 447 U.S. 727, 731-32 (1980) *citing Miller*, 425 U.S. at 437; *see also S.E.C. v. Jerry T.*
23 *O’Brien, Inc.*, 467 U.S. 735, 743 (1984) *citing United States v. Miller*, 425 U.S. at 443
24 (the individual had no Fourth Amendment claim to challenge a subpoena because once he
25 gave his financial information to someone else, “even on the understanding that the
26 communication [wa]s confidential,” he could not object if the third party conveyed that
27 information to law-enforcement authorities); *In re Grand Jury Proceedings (Marsoner) v.*

1 *United States*, 40 F.3d 959, 962-63 (9th Cir. 1994) (“In general, an American depositor
2 has no reasonable expectation of privacy in copies of his or her bank records, such as
3 checks deposit slips, and financial statements maintained by the bank.”). “The depositor
4 takes the risk, in revealing his affairs to another, that the information will be conveyed by
5 that person to the Government.” *United States v. White*, 401 U.s. 745, 751-52, 91 S.Ct.
6 1122, 1125-26, 28 L. Ed. 2d 453, 458-59 (1971). The government’s act of obtaining a
7 court order under the Stored Communication Act (SCA), for production of a cell phone
8 carrier’s business records was not a search, and even if it was a search, obtaining records
9 without a warrant was reasonable. *United States v. Davis*, 785 F.3d 498 (11th Cir.)(en
10 banc), *cert. denied*, 136 S.Ct. 479, 193 L. Ed. 2d 349 (2015) (discussing third party
11 doctrine, and rejecting argument that *Jones* GPS tracker case applied to provide any
12 expectation of privacy).

13 Likewise, the Supreme Court’s recent holding *Carpenter v. Jones*, is not applicable.
14 No. 16-402, 585 U.S. __ (2018). The Court said in *Jones*:

15
16 Our decision today is a narrow one. We do not express a view on matters
17 not before us: real-time CSLI or “tower dumps” (a download of information
18 on all the devices that connected to a particular cell cite during a particular
19 interval). We do not disturb the application of *Smith* and *Miller* or call into
20 question conventional surveillance techniques and tools, such as security
21 cameras. Nor do we address other business records that might incidentally
22 reveal location information.

23 *Id.*

24 Important to note is that *Carpenter* does not overturn the third-party doctrine. To
25 this point, the Court stated:

26
27 [T]he Court has drawn a line between what a person keeps to himself and
28 what he shares with others. We have previously held that “a person has no
29 legitimate expectation of privacy in information he voluntarily turns over to

1 third parties.” *Smith*, 442 U.S., at 743-744¹. That remains true “even if the
2 information is revealed on the assumption that it will be used only for a
3 limited purpose.” *United States v. Miller*, 425 U.S. 435, 443 (1976). As a
4 result, the Government is typically free to obtain such information from the
5 recipient without triggering the Fourth Amendment protections.

6 *Id.* at 9.

7 The images sent to NCMEC here were done so by the private third-party entities.
8 The images were obtained from their accounts assigned to Defendant as the user.
9 Defendant gave up his expectation of privacy in the images when he uploaded them to his
10 accounts. Whether Defendant shared the images through the social media application or
11 merely stored them on the application makes no difference for this analysis. Defendant put
12 the suspected image(s) into the possession of a third party thereby eliminating any
13 expectation of privacy which might have existed. Since Defendant has no standing to raise
14 a claim under the third-party doctrine, Defendant’s Motion fails on this ground.

15 **B. No Search Occurred When Private Entities Submitted The**
16 **Suspected Images to NCMEC**

17 The protections of the Fourth Amendment apply to governmental action. *Burdeau*
18 *v. McDowell*, 256 U.S. 475 (1921). Justice Blackmun in his dissent in *Walter v. United*
19 *States*, pointed out that the Court preserved “the integrity of the rule specifically
20 recognized long ago in [*Burdeau*]”. 447 U.S. 649, 662 (1980) (private citizen turned over
21 rolls of motion picture film to police, who then viewed them without a warrant, which
22 was permissible). Justice Blackmun said “[t]hat rule is to the effect that the Fourth
23 Amendment proscribes governmental action, and does not apply to a search or seizure,
24 even an unreasonable one, effected by a private individual not acting as an agent of the
25 Government or with the participation or knowledge of any governmental official.” *Id.*;
26 *see also United States v. Jacobsen*, 466 U.S. 109, 113-114; *State v. Best*, 146 Ariz. 1, 2

¹ *Smith v. Maryland*, 442 U.S. 735, 99 S.Ct. 2577, 61 L. Ed. 2d 220 (1979).

1 (App.Div.2 1985); *State v. Estrada*, 209 Ariz. 287, 291 (App.Div. 2). A “wrongful search
2 or seizure conducted by a private party does not violate the Fourth Amendment” and
3 “such private wrongdoing does not deprive the government of the right to use evidence
4 that is has acquired lawfully.” *Walter v. United States*, 447 U.S. at 656.; *see also*
5 *Coolidge v. New Hampshire*, 403 U.S. 443, 487-490 (1971); *In re U.S. Currency*
6 *\$26,980*, 193 Ariz. 427 (App.Div.2 1998) (University of Arizona employee’s opening of
7 package did not implicate Fourth Amendment).

8 Under the “private search” doctrine, a private entity does not become a state actor
9 simply because it discovers and later reports child pornography on the account of one of
10 its users. *See United States v. Cameron*, 699 F.3d 621, 638 (1st Cir. 2012) (finding
11 Yahoo! Was not acting as an agent of the government in conducting a search of
12 defendant’s account and reporting its findings to NCMEC, stating “if Yahoo! chose to
13 implement a policy of search for child pornography, it presumably did so for its own
14 interests.”); *United States v. Stratton*, No. 15-40084, 229 F.Sup.3d 1230, 2017 U.S. Dist.
15 LEXIS 6372, 2017 WL 169041 at **4-5 (D. Kan. Jan. 17, 2017) (finding Sony was not
16 acting as government agent when it monitored its users’ accounts for child pornography
17 because it was acting to protect its own interests in providing a safe online gaming
18 community); *United States v. Miller*, No. 8:15-CR-172, 2015 U.S. Distr. LEXIS 136187,
19 2015 WL 5824024, at *4 (D. Neb. Oct. 6, 2015) (“Google did not become a state actor by
20 providing the reports required by law.”); *United States v. Reddick*, 900 F.3d 636 (5th Cir.
21 2018) (it was a “private search” when a private company determined that hash values of
22 files uploaded by the defendant corresponded to hash values of known child
23 pornography, which were then sent to NCMEC creating no more of an intrusion than
24 already experienced by private search.); *Smith v. United States*, No. 6:13-CR-52, 6:16-

1 CV-504, 2017 U.S. Dist. LEXIS 182930 (W.D.La. Sept. 15, 2017) (the search of file-
2 sharing software is distinguishable from the search of an email as in *United States v.*
3 *Ackerman*, 831 F.3d 1292 (10th Cir. 2016)).

4 In *Ackerman*, the private company, AOL, received a hash value match on images
5 attached to an email. Rather than opening the email to view each image attached, AOL
6 sent the entire email to NCMEC who then opened the email to view the images. The
7 court in *Ackerman* held that NCMEC, in the capacity of a state actor, was required to
8 obtain a search warrant to open the email to retrieve the images because the email was a
9 personal effect which could have contained other material in which the sender maintained
10 an expectation of privacy in. *United States v. Ackerman*, 831 F.3d at 1307-1308. For
11 reasons discussed below, *Ackerman's* search warrant requirement as related to those
12 particular facts does not apply to this case.

13 Put simply here, NCMEC would have found “nothing else of significance” in the
14 image(s) received from each private entity than the private entity would have already
15 discovered in reporting each image to NCMEC in the first place. *United States v.*
16 *Jacobsen*, 466 U.S. at 119. In *State v. Martinez*, the mother of a defendant’s girlfriend
17 was not acting as a state agent when she took the defendant’s letter out of the girlfriend’s
18 mailbox, opened it, and gave a copy to her attorney, who then gave it to the State. 221
19 Ariz. 383, 212 P.3d 75 (App.Div.2 2009). The court discussed the state actor/private
20 citizen doctrine stating:

21 We examine the following two factors in determining whether a private
22 party acted as a state agent: (1) the government’s knowledge and
23 acquiescence, and (2) the intent of the party performing the search. If either
24 element of this test is not met, then the private citizen was not acting as a
25 state agent. And a private party’s wrongdoing does not deprive the
26 government of the right to use evidence that is has acquired lawfully.

27 221 Ariz. at 391-392.

1 The State has now disclosed Dr. Fischione as a witness to be called in the State’s case-in-
2 chief. Dr. Fischione’s testimony would relate to his professional, expert opinion that this was a
3 homicide. Dr. Fischione would also testify as to the facts and circumstances provided him that
4 led him to that opinion.

5 **II. ARGUMENT**

6 The defendant seeks to preclude the expert opinion of Dr. Mark Fischione. In making his
7 request the defendant suggests the Dr. Fischione cannot make an expert opinion as a board
8 certified forensic pathologist. In support of his request to preclude admission of the expert
9 opinion, the defendant suggests Dr. Fischione cannot meet the standards set out for admissibility
10 of an expert opinion in Rule 702 of the Arizona Rules of Evidence. The defendant has provided
11 no authority to suggest, let alone hold, that a qualified, board-certified medical examiner cannot
12 offer an expert opinion regarding the cause of death. In fact, the cases cited by the defendant
13 have nothing to do with the admission of an expert opinion from a medical examiner. For the
14 reasons that follow, Dr. Fischione’s expert testimony is admissible.

15 **A. DR. FISCHIONE’S EXPERT OPINION IS ADMISSIBLE UNDER RULE 702**

16 Rule 702 of the Arizona Rules of Evidence states:

17 “A witness who is qualified as an expert by knowledge, skill, experience, training, or
18 education may testify in the form of an opinion or otherwise if:

- 19
- 20
- 21
- 22 (a) The expert’s scientific, technical, or other specialized knowledge will help the trier of
fact to understand the evidence or to determine a fact in issue;
- 23
- 24 (b) The testimony is based on sufficient facts or data;
- 25
- 26 (c) The testimony is the product of reliable principles and methods; and
- (d) The expert has reliably applied the principles and methods to the facts of the case.”

1 The Arizona Rule 702, supra, was amended to adopt the *Daubert* standard in 2012. The
2 comment to the amendment states:

3 “The amendment is not intended to supplant traditional jury determinations of credibility
4 and the weight to be afforded otherwise admissible testimony, nor is the amendment
5 intended to permit a challenge to the testimony of every expert, preclude the testimony of
6 experience-based experts, or prohibit testimony based on competing methodologies within
7 a field of expertise. The trial court’s gatekeeping function is not intended to replace the
8 adversary system. Cross-examination, presentation of contrary evidence, and careful
instruction on the burden of proof are the traditional and appropriate means of attacking
shaky but admissible evidence.”

9 “A trial court’s ruling finding an expert’s testimony reliable does not necessarily mean
10 that contradictory expert testimony is not reliable. The amendment is broad enough to
11 permit testimony that is the product of competing principles or methods in the same field
12 of expertise. Where there is contradictory, but reliable, expert testimony it is the province
of the jury to determine the weight and credibility of the testimony.”

13 *Ariz. R. Evid., 702, comment to 2012 amendment.*

14 Division 1 of the Arizona Court of Appeals found that “Rule 702 permits a qualified
15 witness to testify in the form of an opinion if it would assist the trier of fact to understand the
16 evidence or determine a fact in issue”. *Pipher v. Loo*, 221 Ariz. 399, 403, 212 P.3d 91, 95, 551
17 Ariz.Adv.Rep. 27 (2009). “The Rules of Evidence, and Rule 702 itself, erect barriers to
18 admission of all opinion evidence: the evidence must be relevant, the witness must be qualified,
19 and the evidence must be the kind that will assist the jury”. *Id.*

20 Here, Dr. Fischione will testify that he is a board certified forensic pathologist, having
21 been certified since approximately 1999. Dr. Fischione worked at the Maricopa County Medical
22 Examiner’s Office, was acting Chief Medical Examiner in Maricopa County, and now is Chief
23 Medical Examiner in Yavapai County. His testimony regarding his opinion as to the cause of
24 death is based on approximately 20 years of education, training and experience in the forensic
25 pathology field. His testimony, based on all of the facts known to the parties in this case (i.e.
26

1 police reports, autopsy reports, autopsy photo, etc.) would help the trier of fact to understand the
2 evidence in this particular case, namely evidence or lack thereof relating to drowning deaths. Dr.
3 Fischione's information, training, and knowledge are based upon accepted reliable methods and
4 information accepted in the forensic pathology community. Notably, this sort of expert opinion
5 has been upheld as admissible in criminal cases. *See State v. Noleen*, 142 Ariz. 101, 688 P.2d 993
6 (1984); *State v. Villafuerte*, 142 Ariz. 323, 690 P.2d 42 (1984); *State v. Rogovich*, 188 Ariz. 38,
7 932 P.2d 794, 236 Ariz.Adv.Rep. 3 (1997); *State v. Smith*, 215 Ariz. 221, 159 P.3d 531, 505
8 Ariz.Adv.Rep. 36 (2007); *State v. Snelling*, 225 Ariz. 182, 236 P.3d 409, 588 Ariz.Adv.Rep. 20
9 (2010); *State v. Dixon*, 226 Ariz. 545, 250 P.3d 1174 (2011).

11 Dr. Keen's autopsy of the victim in this case was performed after the incident, when it
12 reported as an accidental drowning, with no additional investigation. Dr. Keen noted in his
13 interview with Mr. Sears that the new information, a result of the investigation, would be
14 important information in determining the cause of death. Both Dr. Keen and Dr. Fischione agree
15 that the autopsy report is sufficiently thorough and contains sufficient information to develop an
16 opinion regarding the cause of death. As such, Dr. Fischione's review and reliance upon the
17 autopsy report, photo(s), investigative report, etc. are precisely how a medical examiner performs
18 his job function. It is the review of the information *available at the time the opinion* is made, in
19 conjunction with medical studies, facts, data, research etc., which provides the basis for the
20 opinion. For these reasons, Dr. Fischione, as a qualified expert, should be allowed to offer an
21 expert opinion at trial under Rule 702.

24 **B. DR. FISCHIONE'S OPINION IS ADMISSIBLE AS AN INDEPENDENT**
25 **REVIEW UNDER RULE 703**

26 Dr. Fischione's opinion relating to the cause of death is admissible under Rule 703 of the
Arizona Rules of Evidence. Specifically, not only is his opinion admissible but so are the facts

1 and data he relied upon in reaching his expert opinion. To put it another way, not only can Dr.
2 Fischione testify “what” his opinion is regarding the cause of death, he can also testify to the
3 “how” and “why” he reached his opinion and relay to the jury all of the facts and circumstances
4 he considered in reaching that opinion. Rule 703 of the Arizona Rules of Evidence states:

5 “An expert may base an opinion on facts or data in the case that the expert has been made
6 aware of or personally observed. If experts in the particular field would reasonably rely
7 on those kinds of facts or data in forming an opinion on the subject, they need not be
8 admissible for the opinion to be admitted. But if the facts or data would otherwise be
9 inadmissible, the proponent of the opinion may disclose them to the jury only if their
10 probative value in helping the jury evaluate the opinion substantially outweighs their
11 prejudicial effect.”

12 The Arizona Supreme Court has held that “[e]xpert testimony that discusses reports and
13 opinions of another is admissible under this rule if the expert reasonably relied on these matters in
14 reaching his own conclusion”. *State v. Smith*, 215 Ariz. at 228; *see also State v. Noleen*, 142 Ariz.
15 at 105; *State v. Villafuerte*, 142 Ariz. at 327; *State v. Rogovich*, 188 Ariz. at 41-42; *State v.*
16 *Snelling*, 225 Ariz. at 187; *State v. Dixon*, 226 Ariz. at 553. “The rule does not require that the
17 facts or data used as a basis for an opinion be generated by a qualified, testifying expert.” *State v.*
18 *Rogovich*, 188 Ariz. at 41.

19 In *Rogovich*, Dr. Phillip Keen testified regarding his opinion as to the death of the victim,
20 based upon the autopsy completed by Dr. Shaw. The court pointed out “Dr. Keen’s reliance on
21 Dr. Shaw’s report and opinions cannot seriously be disputed.” *State v. Rogovich*, 188 Ariz. at 42
22 *citing to State v. Lundstrom*, 161 Ariz. 141, 146, 776 P.2d 1067, 1072 (1989)(citing *Hernandez v.*
23 *Faker*, 137 Ariz. 449, 454, 671 P.2d 427, 432 (App.1983)(testifying expert may reasonably rely
24 on medical opinions of a non-testifying doctor)); M. UDALL & J. LIVERMORE, ARIZONA
25 PRACTICE-LAW OF EVIDENCE § 23, AT 12 (2d ed. Supp.1989)(“It is hard to say...that it is
26 not reasonable [for experts] to rely on...shared opinions”).

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The court in *Rogovich* stated:

“Rule 703 merely brings to the courtroom the methods now followed by the learned professions and disciplines. Because of technological advances and the publication and wide dissemination of articles and reports, modern scientists have at their disposal and rely in their work on the findings and reports of colleagues from all over the world. Rule 703 allows a testifying expert to reach and express an opinion in the courtroom in the same manner he or she would in the laboratory or other work place. *Any other rule would produce absurdity.*” (emphasis added)

Id.

The case law governing the admission of expert opinion from a medical examiner is voluminous. This is well established, available law dating back to 1984. These cases clearly swing in favor of the state. It is hard to determine how the cases cited by Defendant could possibly support preclusion of Dr. Fischione, especially in light of the overwhelming amount of cases supporting the admission of this type of expert opinion.

Dr. Fischione is a qualified expert developing an independent opinion based upon facts and data reasonably relied upon by forensic pathologists. The data developed by Dr. Keen, observations during the autopsy, as well as during the investigation is relevant and crucial to the role of a medical examiner. Because Dr. Fischione’s opinion is admissible, so too are the reasons, medically and otherwise, he considered in developing his opinion. Accordingly, Dr. Fischione’s opinion with supporting facts and data are admissible under Rule 703.

C. THE OPINION OF DR. FISCHIONE SUBSTANTIALLY OUTWEIGHS ANY DANGERS OF PREJUDICE AND IT IS RELEVANT TO THE ULTIMATE FACT AT ISSUE UNDER RULES 401, 402 AND 403

Dr. Fischione’s testimony is relevant. Rules 702 and 703 permit an expert to testify as to his opinion in order to assist the trier of fact in dealing with complex issues not generally known to a reasonable juror. Rules 702 and 703 make the evidence relevant and admissible. The language used in Rule 703 is similar to Rule 403 of the Arizona Rules of Evidence. Clearly, a