

IN THE ARIZONA SUPREME COURT

IN THE MATTER OF A MEMBER OF
THE STATE BAR OF ARIZONA,

JUAN M. MARTINEZ, SBN #009510,

Respondent.

No. SB-17-0081-AP

Office of the Presiding

Disciplinary Judge

No. PDJ-2017-9044

State Bar File No. 15-3363

**BRIEF OF *AMICI CURIAE*
AMERICAN CIVIL LIBERTIES UNION OF ARIZONA AND
AMERICAN CIVIL LIBERTIES UNION**

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INTRODUCTION

Juan Martinez, a senior prosecutor in an office long-plagued by rampant prosecutorial misconduct, has yet again been permitted to skate free of discipline for his misconduct and ethical violations. The failure by the Arizona State Bar to act rigorously in seeking and imposing discipline against prosecutors—what should be the primary deterrent to this unacceptable behavior—has reinforced a culture of misconduct and enabled prosecutors to act with impunity. This case exemplifies the problem. The poor prosecution of Martinez, paired with the Bar Discipline Panel’s failure to discipline prosecutor Juan Martinez, sends a clear message that prosecutors will not be held accountable for their ethical violations.

As the Arizona Attorneys for Criminal Justice *amicus curiae* brief, also filed today in this matter, demonstrates, the Bar Panel made critical legal and factual errors, and reversal is required. *Amici* ACLU submit this brief to show the broader context of this error and why corrective action is so necessary by this Court.

IDENTITY AND INTERESTS OF AMICI

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with approximately 2 million members and supporters dedicated to the principles of liberty and equality embodied in the Constitution and the nation’s civil rights laws. The ACLU’s Capital Punishment Project focuses on upholding those rights in the context of death penalty cases. The ACLU of Arizona

is one of the ACLU's statewide affiliates. *Amici* are concerned with prosecutorial misconduct and ethical violations in all criminal proceedings but especially those in which a defendant's life is at stake.

Amici respectfully submit this brief to assist the Court in determining whether the decision of the Presiding Discipline Judge should stand, in light of Deputy County Attorney Juan Martinez's well-documented and clear history of unethical behavior in the record. Given the ACLU's longstanding interest in the protections contained in the Constitution, including a criminal defendant's right to a fair trial and due process—rights impacted by prosecutorial misbehavior – and the integrity of the criminal legal system as a whole, the proper resolution of this case is a matter of substantial importance to the ACLU and its members.

ARGUMENT

I. Prosecutorial Misconduct in Maricopa County and Arizona is a Pervasive and Unaddressed Problem.

Unchecked prosecutorial misconduct and misbehavior pervades the criminal legal system in Arizona, a fact well known to this Court. The State Bar of Arizona is tasked with regulating the ethical behavior of its members not only to ensure that professional standards are followed in individual cases but also to maintain the integrity of the legal system itself. It is a task for which the Bar has all too often fallen short, including in its prosecution of Deputy Maricopa County Attorney Juan Martinez now before this Court.

a. The Crisis of Impunity for Unethical Prosecutorial Behavior.

i. Prosecutorial misbehavior and misconduct in Arizona and Maricopa County is rampant.

A clear pattern of substantial and far-reaching prosecutorial misbehavior exists in Arizona. The Arizona Supreme Court has repeatedly observed prosecutorial misconduct and improprieties in criminal, and especially death penalty, cases. Judge Lawrence Winthrop, sitting by designation, articulated the problem well when he noted that “[a]long with other select jurisdictions, Arizona is notorious for having some of the most aggressive death penalty prosecutors in the country who, at times, have violated ethical rules to obtain a conviction.” *State v. Bush*, 244 Ariz. 575, 605 n.4 (2018) (Winthrop, J., concurring in part and dissenting in part).

In Pima County, former Deputy County Attorney Kenneth Peasley twice intentionally elicited and exploited the same false testimony of a police officer in capital murder trials in 1993 and 1997. *In re Peasley*, 208 Ariz. 27, 41 (2004). Around the same time Peasley presented false testimony, his colleague, Pima County Chief Criminal Deputy Prosecutor David White, withheld hundreds of undisclosed pages of documents, including exculpatory evidence, from defendants in capital prosecutions in 1993 and 2000. A.J. Flick, *Judge Tosses Out Murder Conviction*, Tucson Citizen (Sept. 13, 2003); A.J. Flick, *Compromised Conviction?*, Tucson Weekly (Aug. 27, 2009), <https://www.tucsonweekly.com/tucson/compromised-conviction/Content?oid=1305994>; Kim Smith, *Convicted Killer Nordstrom*

Sentenced to Death, Ariz. Daily Star (Sept. 29, 2009), https://tucson.com/news/local/crime/convicted-killer-nordstrom-sentenced-to-death/article_55fe1a52-a801-5f73-acd8-8f055d30423b.html. White also faced allegations from the State Bar that he made false statements and elicited false testimony in a 1998 capital prosecution. Flick, *Judge Tosses Out Murder Conviction*, *supra*. And in Pinal County, former Chief Deputy County Attorney Richard Wintory had multiple conversations with a confidential intermediary for a defendant's mitigation investigation during a capital trial in 2011. He then lied about these conversations in both oral hearings and written affidavits. *In re Wintory*, 2014 WL 983748, at *1–2 (Ariz. Disp. Comm. Feb. 14, 2014). Just months after returning from a bar suspension in 2014, Wintory reviewed sealed *ex parte* motions by defense counsel in a series of collective actions by the Pinal County Attorney's Office that led Judge Peter Cahill to disqualify the office from representing the State and to remark that the prosecuting attorneys had "set themselves above the law." Order Granting Motion Disqualifying the Pinal County Attorney's Office, *State v. Wilson*, No. CR201201764, at 1-2 (Pinal Co. Super. Ct. July 8, 2014), <http://www.prosecutorialaccountability.com/wp-content/uploads/2014-07-08-ME-Removing-PCAO.pdf>. That same month, the Pinal County Attorney's Office secretly interviewed a defense witness, who was facing charges of his own, without an attorney present and accessed off-limits documents in two other capital cases.

Sean Holstege, *Ethics Concerns in Pinal Death-Penalty Cases*, Ariz. Central (Aug. 4, 2014), <https://www.azcentral.com/story/news/arizona/politics/2014/08/05/pinal-county-prosecutors-hit-barrage-ethics-concerns/13611183/>. Rick Romley, a former Maricopa County Attorney, described the office’s ethical violations as “mind-boggling.” *Id.*

But even among other county attorney offices across the state, the Maricopa County Attorney’s Office in particular stands out for long sanctioning a culture of misconduct, stemming from the top down. Deputy County Attorney Jeannette Gallagher, the longtime head of the Capital Litigation Unit, has committed a string of improprieties documented by the Arizona Supreme Court across multiple cases. Gallagher twice “improper[ly]” implied unethical conduct by an expert witness for the defense in the absence of evidentiary support. *State v. Velazquez*, 216 Ariz. 300, 311–12 (2007). A few years later, she told a female defense attorney “to be careful about contracting gonorrhoea from [the male defendant]” in earshot of the defendant – a statement which this Court found “entirely unprofessional.” *State v. Speer*, 221 Ariz. 449, 458 (2009). She continued this pattern in a more recent case by “making faces” and “rolling [her] eyes” during witness testimony. *State v. Martinez*, 230 Ariz. 208, 214–15, 217 (2012). Again, this Court found her conduct “inappropriate” and further added, “This is unacceptable behavior from any attorney, but especially from a prosecutor.” *Id.* at 216.

Gallagher’s behavior, unfortunately, is not an outlier; rather, it is disappointingly emblematic of other unethical behavior attributable to some of her colleagues in the Maricopa County Attorney’s Office. This collective misconduct has included “improperly inject[ing] the prosecutor’s opinion of the validity of a psychiatric test” into questioning and “intentionally rais[ing] baseless challenges to [an expert witness’s] qualifications.” *State v. Roque*, 213 Ariz. 193, 229 (2006); *see also State v. Manuel*, 229 Ariz. 1, 7 (2011) (finding that the prosecutor improperly “intimate[d] that a defense expert has reached conclusions merely for pecuniary gain” absent any evidentiary support). Another prosecutor “improperly vouched for the State’s evidence” and “question[ed] the integrity of defense counsel.” *State v. Newell*, 212 Ariz. 389, 403 (2006). One prosecutor misstated the law governing mitigation and aggravation. *State v. Prince*, 226 Ariz. 516, 538 (2011). Yet another improperly commented on a defendant’s invocation of his Fifth Amendment rights. *State v. Parker*, 231 Ariz. 391, 405-406 (2013). All the more concerning is that each of these instances of misconduct occurred in a death penalty case, where the stakes are the greatest. It is also worth noting that these instances only came to light because of the automatic appeal provided in capital cases – suggesting that they capture only

a slim fraction of prosecutorial misbehavior in Maricopa County criminal proceedings.¹

The pattern of misconduct at the Maricopa County Attorney's Office reflects a "win at all costs" mentality even when it runs afoul of prosecutors' duty to act as ministers of justice. For example, the misconduct by former Deputy County Attorney Noel Levy, who worked in the office for decades, led to death sentences for two innocent people. Such misconduct is a bitter reminder of the real harm that results from tolerance of such misbehavior. Levy secured a conviction and death sentence against Debra Milke on the testimony of a detective with a frightening record of sexual misconduct, lying, and constitutional violations, none of which Levy disclosed to the defendant as required under the federal and state constitutions. *Milke v. Ryan*, 711 F.3d 998, 1002–03 (9th Cir. 2013). Milke spent 24 years behind bars, including 22 years on death row, before her conviction was overturned and she

¹ While several scholars have expressed the concern that prosecutors are most willing to cut corners in death penalty cases due to the high stakes of these cases, there is no doubt that misconduct exists at all levels of criminal proceedings. *See, e.g.*, Franklin E. Zimring, *The Contradictions of American Capital Punishment* 80 (2003) ("The greater the emphasis on tactical advantage and adversary values, the larger becomes the temptation for prosecutors to cut corners to achieve punishment objectives. These pressures are by no means confined to death penalty prosecutions, but the conception of the appeal process itself as the enemy of the state's penal purposes is confined to cases where the state's punishment objective is the offender's death."). Indeed, in capital cases, there are more opportunities for misconduct to be discovered given the higher scrutiny these cases receive relative to others in the criminal system.

was released. Michael Kiefer, *When Prosecutors Get Too Close to the Line*, Ariz. Republic, Oct. 27, 2013. This breach of Levy's constitutional obligations is startlingly reminiscent of his work in another capital prosecution that similarly resulted in the decade-long imprisonment, including four years on death row, of Ray Krone, an innocent man later exonerated by DNA evidence. *Id.* In Krone's first trial in 1992, Levy only disclosed key evidence against Krone – a video presentation showing questionable bitemark evidence by its star expert witness – on the eve of trial. Defense counsel first asked that the video be precluded due to its late disclosure. When the court denied that request, counsel moved for a continuance or an opportunity to present evidence from another case that had successfully challenged the expert's testimony. The court denied both requests. *State v. Krone*, 182 Ariz. 319, 320–22 (1995). Given the significance of the video to the case, this Court reversed Krone's conviction due to its late disclosure. *Id.* at 323. In the retrial proceedings, Krone's legal team discovered that the late disclosure was only part of the problem: the video included images that “had been manipulated so as to make Krone's teeth match the bite-mark” on the victim. Sarah L. Cooper, *Ray Milton Krone: Once Bitten, Twice Convicted*, 20 Amicus J. 32, 35 (2009). Levy also presented police records that “Krone later contended, in civil proceedings, that detectives had altered . . . so as to link him to the shoe prints left at the crime scene.”

Id. Krone was eventually exonerated when DNA evidence pointed to another perpetrator. *Id.*²

Despite securing death sentences against innocent people in no small part due to his failure to uphold discovery obligations, Levy’s behavior remained unchanged. Levy’s discovery violations continued through his final capital prosecution in 2009, where he “had not disclosed any benefit [one prosecution witness] may have received in exchange for her testimony,” and had affirmatively and repeatedly represented to the court that the witness “‘got no deal’ or any other benefit in exchange for her testimony.” *State v. Orbin*, Nos. 1-CA-CR 10-0057, 1 CA-CR 10-0059, 2011 WL 5299386, at *8–*9 (Ariz. Ct. App. Nov. 3, 2011). In fact, subsequent hearings revealed that

the prosecutor and the detective appeared at various hearings in [the witness’s] case; they spoke to the court at a hearing to modify [the witness’s] release conditions, following which, she was released from jail; they spoke to the court about their concerns for her safety; they spoke at [the witness’s] sentencing and asked for leniency; the State provided [the witness] with approximately sixty days of housing to ensure her safety and her appearance at Defendant’s trial; and that the State provided [the witness] food during that same time period as well as transportation to and from the court during Defendant’s trial.

² In 2015, the city of Phoenix and Maricopa County settled Krone’s civil case for \$4.4 million. *\$4.4M to Arizona Man Wrongly Convicted of Murder—Twice*, Prison Legal News (Jan. 9, 2015), <https://www.prisonlegalnews.org/news/2015/jan/9/44m-arizona-man-wrongly-convicted-murder-twice/>.

Id. at *8. All of this was information, the trial court held, that Levy “should have disclosed . . . prior to trial.” *Id.* at *9.

Juan Martinez is himself an exemplar of the culture of misconduct that has gone unpunished in Maricopa County, as is evidenced by the bar prosecution at issue in this appeal. During closing argument in a 2002 capital prosecution, Martinez raised a prior conviction of the defendant that the judge had precluded him from discussing., *State v. Beemon*, No. CA-CR 05-1161, slip. op. at ¶¶ 24-27 (Ariz. Ct. App. Feb. 21, 2008), <https://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2008/1%20CA-CR%2005-1161-82958.PDF>. The Court of Appeals found his comment “clearly improper in light of the trial court’s ruling precluding use of the robbery conviction for impeachment purposes. Indeed, we are baffled by the prosecutor’s continued insistence at the bench conference that the defendant had no right to ‘withhold information’ regarding the robbery conviction from the jury.” *Id.* at ¶ 27. In the same case, Martinez compared defense counsel’s closing argument with the tactics of Adolf Hitler, which the Court of Appeals found “completely inappropriate . . . improper[,] and unprofessional.” *Id.* at ¶¶ 29, 31. Later, in a 2005 capital prosecution, Martinez improperly “singled out particular jurors and addressed them personally, playing on their sympathy for the victims and fears of the defendant.” *State v. Morris*, 215 Ariz. 324, 337–38 (2007) (footnote omitted). In a 2009 closing

argument, Martinez mischaracterized a witness's testimony and, after the trial judge sustained defense counsel's objection to this misleading argument, "persisted with the line of argument [so that] the trial court twice sustained further objections." *State v. Gallardo*, 225 Ariz. 560, 569 (2010). This Court again found Martinez's conduct "improper." *Id.* Just two years later, in a resentencing trial in the case against Shawn Patrick Lynch, this Court found Martinez "disturbingly made a number of inappropriate comments." *State v. Lynch*, 238 Ariz. 84, 100 (2015). These included "improperly . . . argumentative statements during opening," "aggressive" cross-examination to an extent that "the [trial] court would have been well within its discretion to have . . . required the prosecutor to rephrase his questions in a more civil manner," an "improper remark" suggesting that one expert witness "can vouch for people," "inappropriate remarks" that "intentionally misstat[ed] evidence," and an "improper" comment that "invited the jurors to place themselves in the victim's position and appealed to their fears." *Id.* at 92-100.

Despite these many condemnations of his behavior over many years, Martinez has persisted in his misconduct and improper behavior. Just last year, in another death penalty prosecution, this Court lamented Martinez's "lack of respect, poor courtroom decorum, and unnecessary verbal attacks on defense counsel and experts." *State v. Hulsey*, 243 Ariz. 367, 394 (2018). The Court found his behavior "unbecoming of an Arizona prosecutor, especially one with as much experience as

Mr. Martinez.” *Id.* Apparently frustrated with Martinez’s persisting unprofessionalism, this Court went so far as to “remind prosecutors, and particularly Mr. Martinez (whose misbehavior has been repeatedly noted in prior cases), that they are to act as ministers of justice and exercise professionalism even in the heat of trial.” *Id.* at 394.

A study by the *Arizona Republic* over a ten-year period provides empirical support for the high incidence of prosecutorial misbehavior in the state. Between 2002 and 2013, the Court reviewed 82 capital cases. The study found that death row prisoners raised prosecutorial misconduct as an error on appeal in more than half of those cases. In 38% of the cases in which the issue had been raised, the Court agreed that prosecutors committed “improprieties or outright misconduct.” Michael Kiefer, *Prosecutors Under Scrutiny Are Seldom Disciplined*, *Ariz. Republic*, Oct. 28, 2013, at A1 (underlying data available at <http://archive.azcentral.com/news/projects/prosecutorial-conduct/>). Despite these 16 appellate court findings of misconduct in death penalty cases alone, the Bar sought discipline in only two of them. *Id.*

Even at this high rate of misconduct, the study’s findings, of course, grossly underestimate the prevalence of prosecutorial misconduct occurring in trial courts across the state. First, the Court can only consider prosecutorial impropriety or misconduct when those claims are raised before it. Second, the study only considered

death penalty cases, in which appeals are mandatory. *See* A.R.S. § 13-755(A) (providing automatic Supreme Court review of death sentences). It would be difficult, if not impossible, to conduct a similar study of prosecutorial misconduct in non-capital cases, particularly when, as in the great majority of criminal cases, no appeal is taken, or in cases involving a guilty plea.³

“Because it is so difficult to discover, much prosecutorial misconduct goes unchallenged, suggesting that the problem is much more widespread than the many reported cases of prosecutorial misconduct would indicate. As one editorial described the problem, ‘it would be like trying to count drivers who speed; the problem is larger than the number of tickets would indicate.’” Angela J. Davis, *The Legal Profession’s Failure to Discipline Unethical Prosecutors*, 36 Hofstra L. Rev. 275, 278 (2007). *See also id.* (discussing how the Center for Public Integrity’s comprehensive study only “scratched the surface because they only represent the cases in which prosecutorial misconduct was discovered and litigated”); Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. Law Rev. 721, 749-50 (2001) (the small number of cases reported likely underrepresents prosecutorial misbehavior).

³ *See, e.g.,* Michael Kiefer, *A Star Prosecutor’s Trial Conduct Challenged*, Ariz. Republic, Oct. 29, 2013 (discussing Martinez’s serious misconduct in his prosecution of Douglas Grant – misconduct that was never raised on appeal because Grant had been convicted of the lesser charge of manslaughter).

ii. *Accountability is rare and when sought, lenient.*

Far from receiving bar discipline, prosecutors like Martinez have been rewarded for their record of convictions, no matter how they were obtained, year after year. According to Karen Clark, an ethics expert who prosecuted Ken Peasley in state bar disciplinary proceedings, “[i]t’s a culture that’s set from the top. . . . If you have a bad-apple prosecutor at the bottom, it’s not tolerated. But when it comes from the top, it’s rewarded.” Kiefer, *Prosecutors Under Scrutiny*, *supra*.

The same prosecutors whose improprieties permeate Supreme Court and lower court opinions are perennial winners of the Arizona Prosecuting Attorneys’ Advisory Council’s Prosecutor of the Year Award: Noel Levy, Ken Peasley (twice), David White, Richard Wintory, Juan Martinez.⁴ Levy and Gallagher have won the

⁴ Kiefer, *A Star Prosecutor’s Trial Conduct Challenged*, *supra*, (Noel Levy); Kim Smith, *2-time prosecutor of the year Peasley dies*, *Ariz. Daily Star*, Sept. 9, 2011 (Ken Peasley); Inger Sandal, *For 2nd time, a prosecutor’s actions result in dismissal of murder charges*, *Ariz. Daily Star*, Feb. 23, 2000 (David White); Michael Kiefer, *Prosecutor agrees to 90-day suspension*, *Ariz. Republic*, Feb. 19, 2014 (Richard Wintory); Victoria Harker, *Prosecutor is ‘A Bulldog in Courtroom’ He’s Never Lost a Murder Case*, *Ariz. Republic*, Aug. 15, 1999 (Juan Martinez wins 1999 prosecutor of the year by the Maricopa County Attorney’s Office and the Arizona Prosecuting Attorneys Council). *See also* Kiefer, *When Prosecutors Get Too Close to the Line*, *supra* (noting that between 1990 and 2013, “six different prosecutors who were named prosecutor of the year by the Arizona Prosecuting Attorneys Advisory Committee also were later found by appeals courts to have engaged in misconduct or inappropriate behavior during death-penalty trials”).

Council's Lifetime Achievement Award.⁵ One, David White, is even commemorated with an annual award in his name. *APAAC Award Winners*, Ariz. Prosecuting Attorneys' Advisory Council, <http://apaac.az.gov/research-intro/14-article/awards/44-apaac-award-winners> (last visited Apr. 3, 2019). Martinez was recognized nationally for his work on the Arias trial, winning the "Home Run Hitter Award for Outstanding Prosecution" in 2013 from the National District Attorneys Association. Kiefer, *A Star Prosecutor's Conduct is Challenged*, *supra*.

The repeated warnings, reversals, and criticisms by this Court have done nothing to address the rampant misbehavior in the Maricopa County Attorney's Office, and with Martinez especially. On the contrary, the absence of accountability has only encouraged young prosecutors to emulate these veteran attorneys in the office. Martinez ascended to celebrity status during the high-profile capital prosecution of Jodi Arias in 2008. Even though Martinez's prosecution of Arias has sparked separate disciplinary proceedings of its own,⁶ following his performance in

⁵ APAAC, Lifetime Achievement Award Winners, (Gallagher in 2017; Levy in 2003), <https://www.apaac.az.gov/awards/lifetime-achievement-awards> (last visited Apr. 3, 2019).

⁶ See Lauren Castle & Anne Ryman, *Jodi Arias Prosecutor Juan Martinez Faces Formal Misconduct Complaint from Arizona Bar*, Ariz. Republic (Mar. 5, 2019), <https://www.azcentral.com/story/news/local/phoenix/2019/03/05/jodi-arias-prosecutor-juan-martinez-faces-formal-misconduct-complaint-state-bar-arizona/3066565002/>; Max Walker, *Arizona State Bar Files Formal Complaint Against Arias Prosecutor Juan Martinez*, ABC 15 Central Phoenix News (Mar. 5, 2019), <https://www.abc15.com/news/region-phoenix-metro/central-phoenix/arizona-state-bar-files-formal-complaint-against-arias-prosecutor-juan->

the trial, an attorney with the Maricopa County Public Defender’s Office observed, “All the young prosecutors want to be like Juan Martinez now. . . . He’s a role model. And so was Noel Levy.” Kiefer, *A Star Prosecutor’s Trial Conduct Challenged*, *supra*.

1. *Prosecutorial Misconduct Goes Largely Unchecked by the State Bar*

Despite well-documented instances of prosecutorial misconduct, impropriety, and unprofessionalism, it almost always goes unchecked. In Arizona and across the country, rarely do prosecutors face any sanctions or repercussions for their ethical violations by the State Bar. *See* Bennett L. Gershman, *Reflections on Brady v. Maryland*, 47 S. Tex. L. Rev. 685, 722 (2006) (“[P]rofessional discipline of prosecutors is extremely rare.”). Indeed, former Chief Deputy Attorney for Pinal County Richard Wintory once bragged, “In the 30 years I’ve been a prosecutor, I’ve had many people file complaints and lawsuits against me, but I’ve never been disciplined.” Kiefer, *Prosecutors Under Scrutiny*, *supra*.⁷

martinez; *see also* *Juan Martinez Prosecutor Support Page*, Facebook, <https://www.facebook.com/JuanMartinezProsecutorSupportPage/>.

⁷ Wintory eventually received a temporary suspension from the Arizona State Bar for contacting defense counsel’s confidential intermediary in a case. Sean Holstege, *Pinal County Attorney’s Office Rebuked by Judge*, *Ariz. Republic* (July 16, 2014), <https://www.azcentral.com/story/news/arizona/politics/2014/07/17/pinal-county-attorneys-office-rebuked-judge/12769315/>.

While bar discipline has occurred in a few of Arizona's most extreme instances of prosecutorial misconduct, these rare instances of prosecutorial accountability have addressed only the tip of the iceberg and have been inadequate to combat the pervasive culture of prosecutorial misbehavior. And importantly, much misbehavior has gone unpunished.

The Bar's most extensive proceedings against prosecutors dealt with those involved in Andrew Thomas's unfounded federal civil racketeering lawsuit against the Maricopa County Board of Supervisors and judges on the Maricopa County Superior Court. A special prosecutor, John Gleason, was appointed to handle the prosecutions, which resulted in significant punishment of multiple prosecutors. *In re Andrew P. Thomas, Lisa M. Aubuchon, and Rachel R. Alexander*, PDJ-2011-9002 (Ariz. Disp. Comm. 2011) (disbarring Andrew Thomas and Lisa Aubuchon and suspending Rachel Alexander for six months and one day); *In re Aubuchon*, 233 Ariz. 62 (2013) (affirming disbarment of Lisa Aubuchon); *In re Alexander*, 232 Ariz. 1 (2013) (reducing Rachel Alexander's suspension to six months); *In re Peter S. Spaw*, No. PDJ-2012-9078, 2013 WL 1963875 (Ariz. Disp. Comm. Apr. 5, 2013) (accepting agreement to two-year probation of Peter Spaw). Given the influence and high profile of the prosecutors' targets, the gravity with which the State Bar investigated and punished this misconduct is unsurprising.

Over a decade ago, in 2004, the Bar also secured the disbarment of Deputy County Attorney Kenneth Peasley for his “intentional elicitation of false testimony against two defendants in a capital murder trial in 1993, re-presentation of the same false testimony in the 1997 retrial of one of the defendants, and exploitation of that false testimony in the closing argument in both trials.” *In re Peasley*, 208 Ariz. at 41–42; *see also State v. Minnitt*, 203 Ariz. 431, 433 (2002) (finding that Peasley twice “engaged in extreme misconduct that he knew was grossly improper and highly prejudicial”).

In other cases, though, in which the defendant is poor and, in many cases, on trial for his life, the sanction has not corresponded to the seriousness of the misbehavior, amounting to little more than a slap on the wrist. In 2009, the Bar only suspended Deputy Maricopa County Attorney Ted Duffy for 30 days after he repeatedly disobeyed the court’s instructions not to mention excluded evidence, including a capital defendant’s prior convictions. Kiefer, *Prosecutors Under Scrutiny*, *supra*. More recently, Richard Wintory and the Bar agreed to a 90-day suspension after Wintory made and lied about multiple communications with defense counsel’s confidential intermediary during the capital prosecution of Darren Goldin. *In re Wintory*, 2014 WL 983748 at *1. Here, too, the Bar is only seeking a reprimand against Juan Martinez, despite his repeated and documented misbehavior in case after case, year after year. One scholar’s observation that “prosecutors have

been treated more leniently than other lawyers facing discipline for similar misconduct,” Richard Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. Rev. 693, 733 (1987), has certainly borne out in Arizona.⁸ For Arizona prosecutors, bar discipline, if it exists at all, has a “consistent pattern of leniency.” Rosen, 65 N.C. L. Rev. at 733.

But these instances of discipline only scratch the surface of unethical behavior by Arizona prosecutors. The confidentiality provisions of dismissed or unprosecuted state bar complaints preclude a thorough review of exactly how often the Bar has declined to sanction prosecutors. *See Lawyer Regulation FAQs*, State Bar of Ariz., <https://www.azbar.org/lawyerregulation/clientcomplaints/lawyerregulationfaqs/> (last visited Apr. 3, 2019) (discussing circumstances of confidentiality). There are, moreover, serious disincentives for the public, the defense bar, and even the bench to file complaints against prosecutors in the first place. *See Zacharias*, 79 N.C. Law

⁸ For example, in PDJ No. 2018-9063, an attorney agreed to a reprimand, the same sanction the State Bar seeks against Juan Martinez, for having a brief intimate relationship with a client in a marital dissolution case. After the client and husband reconciled, the attorney helped the client with a stipulation to dismiss the dissolution action. In PDJ 2018-9035, an attorney agreed to a reprimand and probation for two years for 1) billing a client for a brief 30-minute conversation in a bathroom so the attorney could “vape”; and 2) filing a motion to withdraw without certain required information and then disclosing confidential client information in a corrected motion to withdraw. In PDJ-2017-9082, an attorney with no prior disciplinary record was suspended for 90 days and placed on two years of probation upon reinstatement for mismanaging her trust account resulting in a negligent conversion of her client’s funds, which she reimbursed upon learning of the errors.

Rev. at 749 (discussing the many factors which contribute to underreporting of unethical prosecutorial behavior); Radley Balko, *The Untouchables: America's Misbehaving Prosecutors, and the System that Protects Them*, Huffington Post (Aug. 1, 2013), https://www.huffingtonpost.com/2013/08/01/prosecutorial-misconduct-new-orleans-louisiana_n_3529891.html?view=print&comm_ref=false (“Lawyers do not want to report other lawyers for ethics violations. . . . [D]efense attorneys are reluctant to file complaints because of the damage a complaint could do to the working relationships they have with prosecutors.”). But one picture is clear: the stark contrast between Arizona Supreme Court findings of prosecutorial impropriety and prosecutors’ untarnished records demonstrates that discipline against prosecutors in this state is indeed rare.

The State Bar has failed to take disciplinary action, even where a presiding judge has formally referred a prosecutor to the Bar, or in one case, law enforcement, for improper conduct. In perhaps one of the most egregious examples of the failure to pursue bar discipline, Noel Levy was never sanctioned for his misconduct, which led two innocent people to spend decades wrongfully imprisoned – much of that time under threat of execution. Kiefer, *When Prosecutors Get Too Close*, *supra*. The State Bar’s failure to prosecute Levy is more concerning in light of the Ninth Circuit’s referral of its opinion to the U.S. Attorney for the District of Arizona and the Assistant U.S. Attorney General of the Civil Rights Division, for investigation into

Levy's apparent accommodation and concealment of the detective's pattern of misconduct. *Milke*, 711 F.3d at 1016-20.

Neither did the State Bar ever discipline Maricopa prosecutor Robert Shutts for his improper questions and argument in his prosecution of Joe Cornell, even after the Court explicitly referred the matter to the State Bar. *State v. Cornell*, 179 Ariz. 314, 331 n.10 (1994). This Court admonished Shutts, stating, "We strongly disapprove of such conduct by an experienced prosecutor, and we remind the bar that this kind of misconduct can . . . have serious personal consequences." *Id.* at 331 (citations omitted). Nor did the State Bar respond with discipline against the prosecutor to the Court's similar call in *State v. Towery*, 186 Ariz. 168 (1996), where the Court concluded that "when error that is harmless results from prosecutorial misconduct, the proper remedy is to report the offender [Maricopa prosecutor Jon Anderson] to the state bar for possible sanctions, which we have done." *Id.* at 185.

The behavior of Pima Deputy County Attorney Thomas Zawada is a troubling case study of the State Bar's hesitance to punish prosecutorial misconduct and the Bar's leniency when it does pursue discipline. Zawada's misconduct spanned at least two cases over a decade apart before Zawada faced bar discipline of any sort. *Pool v. Superior Court*, 139 Ariz. 98 (1984), and *State v. Hughes*, 193 Ariz. 72 (1998) (discussing Zawada's misconduct). In *Pool*, the Court described Zawada's misconduct, which resulted "in at least two bench conferences and one court

admonishment,” as “so improper that we are compelled to conclude that the prosecutor either knew or should have known of the impropriety.” 139 Ariz. at 106–07. Still, this misconduct provoked no Bar discipline of Zawada. Not until after *Hughes*, in which the Court summarized Zawada’s trial strategy as “ignoring the facts he did not like, relying on prejudice, and arguing that all mental health experts are fools or frauds who say whatever they are paid to say,” *Hughes*, 193 Ariz. at 86, did the State Bar file a complaint against him. Even then, it sought only censure. *In re Zawada*, No. 98-2465, 2001 WL 36208207, at *6 (Ariz. Disp. Comm. Dec. 31, 2001). Only the Supreme Court’s *sua sponte* review ensured that Zawada received a six-month-and-one-day suspension, with a one-year probationary period following reinstatement, rather than the gentle slap on the wrist that was censure. *In re Zawada*, 208 Ariz. 232, 234 (2004).

Juan Martinez’s repeated misbehavior reflects precisely the sort that the Bar has enabled by its neglect. The Bar has been on notice of Martinez’s improprieties for well over a decade, yet has failed to take action until now—and only then in a half-hearted manner. *See, e.g., In the matter of Juan M. Martinez*, No. PDJ-2017-9044, Supplemental Findings of Fact and Conclusions of Law (Sept. 21, 2018) (observing that the prosecution of this complaint was “not well executed”). This Court has been recording Martinez’s misconduct since at least 2007. *Morris*, 215 Ariz. at 337. Such is the pervasiveness of Martinez’s misconduct that then-Justice

Andrew Hurwitz felt compelled during oral argument in a capital case to ask how to “stop [Martinez’s] inappropriate conduct.” Kiefer, *A Star Prosecutor’s Trial Conduct Challenged*, *supra*. Justice Michael Ryan – notably, a former prosecutor himself – joined in the concern and remarked, “This same prosecutor has been accused of fairly serious misconduct, but ultimately, we decided it did not rise to the level of requiring a reversal. . . . There’s something about this prosecutor, Mr. Martinez.” *Id.* Prior to the complaint now before the Court, on at least one prior occasion, the Bar investigated Martinez’s conduct in connection with another case in which he had failed to meet a court deadline. The Bar declined to issue sanctions. Instead, it “sent him an ‘instruction comment’ on filing documents ‘in a timely manner.’” *Id.*

The State Bar’s consistent failure to hold prosecutors like Martinez accountable for misconduct and misbehavior has perpetuated a culture in which prosecutors perceive themselves as above the law that binds other attorneys. The result has been a deep, unremitting harm not only to defendants, and especially those wrongfully convicted,⁹ but to the actual and perceived fairness and integrity of

⁹ Prosecutorial misconduct is a leading factor in the wrongful conviction of innocent people. *See, e.g.*, Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 Wis. L. Rev. 399, 399-401 (2006). This harm is greatest, of course, when a person is wrongfully sentenced to death. Nine innocent people have been released from Arizona’s death row – the sixth highest record of any state. Death Penalty Information Center, *Innocence and the Death Penalty*,

Arizona's courts. "[N]ot only is it misconduct by the representative of the state, but it also calls into question the accuracy of the mechanism by which our society deprives individuals of their freedom and their lives." Rosen, 65 N.C. L. Rev. at 732.

II. The State Bar Must Fulfill Its Unique Role to Regulate Prosecutor Behavior.

A responsible State Bar plays a critical role in keeping prosecutors accountable and deterring unethical behavior. The courts have universally underscored the indispensability of meaningful bar regulation "to insure that prosecutors are mindful of the constitutional rights of persons accused of crime." *Imbler v. Pachtman*, 424 U.S. 409, 429 (1976). Where civil suits, conviction reversals, internal personnel policies, or even criminal liability are unavailable or have failed to deter prosecutorial misbehavior, the Bar *must* uphold its duties to sanction prosecutors for inappropriate and unethical behavior. Without rigorous bar enforcement, the cumulative failure of these mechanisms will, in fact, "leave the public powerless to deter misconduct or to punish that which occurs." *Id.*

Bar discipline is the first and most important defense against unethical behavior by prosecutors. Indeed, the courts have relied on this assumption in limiting

<https://deathpenaltyinfo.org/innocence-and-death-penalty>. Of course, this Court should be concerned not only when prosecutorial misconduct contributes to the conviction of the innocent but also to the conviction of the guilty. Though a prosecutor's conduct in the latter may not affect the outcome of the case, the lack of regulation encourages the misconduct in future cases in which it could.

the availability of civil liability against prosecutors. The Supreme Court, in extending absolute immunity to most prosecutorial activities, stressed the importance of a state bar's regulation as a critical check on prosecutorial misdeeds: "a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers." *Imbler*, 424 U.S. at 429. Subsequent decisions by the Court emphasized that absolute immunity would not give prosecutors a free pass to commit misconduct, when prosecutors face regulation by the bar: "[t]he organized bar's development and *enforcement* of professional standards for prosecutors . . . lessen the danger that absolute immunity will become a shield for prosecutorial misconduct." *Malley v. Briggs*, 475 U.S. 335, 343 n.5 (1986) (emphasis added); *see also Connick v. Thompson*, 563 U.S. 51, 66 (2011) ("An attorney who violates his or her ethical obligations is subject to professional discipline, including sanctions, suspension, and disbarment."). Where civil liability has failed to deter prosecutorial misconduct and misbehavior effectively, the bar must step up to fill the void.¹⁰

¹⁰ Indeed, many scholars have argued that Courts must abandon or severely restrict the availability of immunity defenses for prosecutors in civil cases, given the unfulfilled promise, upon which *Imbler* relies, of robust regulation by bar associations and other checks against prosecutorial misconduct. *See, e.g.,* Margaret Z. Jones, *Unsupportable and Unjustified: A Critique of Absolute Prosecutorial Immunity*, 80 Fordham L. Rev. 509, 535 (2011); Malia N. Brink, *A Pendulum Swung Too Far: Why the Supreme Court Must Place Limits on Prosecutorial Immunity*, 4 Charleston L. Rev. 1 (2009).

The reversal of criminal convictions similarly cannot sufficiently deter prosecutorial misbehavior. This Court has emphasized the inappropriateness of a conviction reversal as a check against prosecutorial misconduct and stressed the critical role of bar discipline for this purpose. *See, e.g., Towery*, 186 Ariz. at 185 (“We are not eager to reverse a conviction on grounds of prosecutorial misconduct as a method to deter such future conduct. . . . [W]hen error that is harmless results from prosecutorial misconduct, the proper remedy is to report the offender to the state bar for possible sanctions, which we have done.”); *Cornell*, 179 Ariz. at 331 n.10 (“We note again that we do not punish the public because of the misdeeds of its lawyer. However, we do not allow serious improper conduct to go unreported. This matter will be reported to the State Bar.” (citation omitted)); *State v. Valdez*, 160 Ariz. 9, 14 (1989) (“Where there has been misconduct but no error, or the error is harmless, or when a defendant has failed to object to a non-fundamental error, the proper remedy is generally not reversal but affirmance followed by appropriate sanctions against the offending actor.”). *See also Mabry v. Johnson*, 467 U.S. 504, 511 (1984) (“The Due Process Clause is not a code of ethics for prosecutors.”). What’s more, prosecutors know well that reversals are rare, even in cases of intentional and obvious misconduct, creating disincentives to discovery disclosure. *See Rosen*, 65 N.C. L. Rev. at 707-708.

Even in the rare instances where convictions have been reversed, this alone does not necessarily incentivize prosecutors to deviate from their unethical behavior. For instance, undeterred by the attachment of double jeopardy to the mistrial for his “intentional, improper conduct” in the capital prosecution of Steven Pool, *Pool*, 139 Ariz. at 108, Thomas Zawada repeated the very same misbehavior in the capital prosecution of Alex Hughes, engaging in a “level of impropriety . . . approximat[ing] that seen in *Pool*,” *Hughes*, 193 Ariz. at 80. In a case involving Juan Martinez, in his first prosecution against Shawn Patrick Lynch, he referred to the single aggravating circumstance in A.R.S. § 13-751(F)(6) (the murder was especially heinous, cruel, or depraved) as “three aggravating factors,” and the trial court instructed the jury accordingly. *State v. Lynch*, 225 Ariz. 27, 42 (2010). This Court reversed Lynch’s sentence due to the error, which it found was not harmless. Despite the reversal, Martinez repeated the same error in the resentencing trial. *See State v. Lynch*, 238 Ariz. 84, 100 (2015) (“[t]he prosecutor struggled at times during voir dire and closing argument . . . in explaining the (F)(6) aggravator...”). This Court did not reverse a second time, due to the trial court’s actions correcting Martinez’s misstatements and its proper instruction this time. *Id.*

When the Bar fails to appropriately investigate and prosecute misconduct, the result is a vacuum of prosecutorial accountability. The consistency with which the Arizona State Bar has ignored prosecutorial misconduct has given the state’s

prosecutors a green light to commit misconduct in even the most serious of cases, so long as their errors, viewed in the totality of the record and against the weight of the evidence against the defendant, do not rise to the level of reversible error. But an error, though it may not meet the level of prejudice necessary for reversal, is still an error that calls into question the professional standards of the prosecutor and the integrity of the system itself. In the absence of regulation by the state bar, civil liability and occasional reversals alone cannot assuage Arizona's crisis of prosecutorial unaccountability. The bar must address it.

III. The Presiding Disciplinary Judge's Decision Must be Reversed.

The instant case illustrates the systemic failures to respond to unchecked prosecutorial misconduct. The State Bar's prosecution was woefully inadequate in this case. *See, e.g.*, Supplemental Findings of Fact and Conclusions of Law, *supra*, at 8 ("the State Bar made no reference to any of the Arizona Rules of Professional Conduct, offered no case law, or Standards analysis to assist the Hearing Panel in this proceeding"); *id.* at 14-16 (detailing broad concerns with the Bar's prosecution of this case); *id.* at 17-18 (noting the Bar's late retention of a key expert witness). Even under this flawed prosecution, the State Bar met its burden of showing misconduct and should have resulted in the imposition of discipline. Martinez evaded discipline only through the Bar Panel's application of erroneous facts and erroneous legal standards. *See Amicus Curiae* Brief of the Arizona Attorneys for

Criminal Justice in Support of the State Bar, filed in this matter. Through this unfortunate marriage of a poor prosecution and the Bar panel's errors, the State Bar has failed to hold Martinez accountable for well-documented unethical and unprofessional behavior in multiple criminal cases across many years. If not corrected, this failure of the State Bar will yet again produce prosecutorial immunity for misbehavior, disincentivizing prosecutors to uphold their ethical obligations and ensuring that the cycle of misconduct continues uninterrupted.

Amici urge this Court to break this cycle of prosecutorial impunity and reverse the Bar Panel decision below, and order a new hearing. This Court should appoint a special prosecutor to handle the prosecution of this complaint against Juan Martinez. *See* Sup. Ct. of Ariz. Admin. Order No. 2018-20, ¶ 4(b) (allowing the Chief Justice to refer a case to independent bar counsel when circumstances exist “which cast into reasonable doubt the ability of the State Bar Lawyer Regulation Office to properly discharge its obligations under the Rules of the Supreme Court of Arizona in connection with the matter.”).

CONCLUSION

This Court should reverse the decision of the Bar Disciplinary Panel and appoint a special prosecutor to handle the bar proceedings against Juan Martinez.

RESPECTFULLY SUBMITTED this 3rd day of April 2019.

By: /s/ Jared Keenan
Jared Keenan
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