

1 Edward F. Novak (#006092)  
enovak@polsinelli.com  
2 Melissa S. Ho (#023269)  
mho@polsinelli.com  
3 Andrew Fox (#034581)  
afox@polsinelli.com  
4 **POLSINELLI**  
CityScape  
5 One East Washington St., Suite 1200  
Phoenix, Arizona 85004  
6 T | F (602) 650-2000 | (602) 264-7033

FILED  
DATE AND TIME:  
7/6/2020 9:46 AM  
DONNA MCQUALITY, CLERK  
BY: E. SIEH  
Deputy

7 J. Andrew Jolley, # 025560  
8 **PRESCOTT LAW GROUP, PLC**  
116 N. Summit Avenue  
9 Prescott, Arizona 86301  
T | F (928) 445-1909; (928) 350-8839  
Email: andy@plgnaz.com

10 *Attorneys for Defendant Michael L. Ham*

11 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
12  
13 **IN AND FOR THE COUNTY OF YAVAPAI**

14 STATE OF ARIZONA

15 Plaintiff,

16 v.

17 MICHAEL L. HAM,

18 Defendant.

Case No. P1300 CR2019 01558

**DEFENDANT’S RESPONSE IN  
OPPOSITION TO STATE’S MOTION  
FOR RECONSIDERATION OF  
COURT’S ORDER REMANDING  
GRAND JURY INDICTMENT FOR A  
NEW DETERMINATION OF  
PROBABLE CAUSE**

(Assigned to the Hon. Tina R. Ainley)

21  
22 Defendant Michael L. Ham (“Dr. Ham”), by and through undersigned counsel, hereby  
23 submits this response in opposition to the State’s Motion for Reconsideration of the Court’s  
24 Order remanding the grand jury indictment for a new determination of probable cause. On  
25 June 10, 2020, the Court granted Dr. Ham’s motion to remand the indictment for a new  
26 determination of probable cause as to all counts. The Court ruled, in part, that a remand was  
27 necessary because the State failed to inform the grand jury that the sole testifying witness and  
28 lead investigator—Agent McClain—was on the State’s *Brady* list. The Court correctly

1 determined that all counts as to Dr. Ham were to be remanded because in failing to notify the  
2 grand jury about Agent McClain’s history of untruthfulness, the State deprived Dr. Ham of  
3 his right to a fair and impartial presentation of the evidence.

4 **ARGUMENT**

5 The State’s Motion for Reconsideration argues that: (1) the Court’s Order remanding  
6 the indictment is contrary to law; (2) the Court erred in finding that the *Brady* material is  
7 clearly exculpatory; (3) the State was unfairly prejudiced by the timing of Dr. Ham’s *Brady*  
8 argument; (4) any error with respect to the presentation of the prescription counts was  
9 harmless; and (5) the Court erred in remanding the entire indictment rather than just the  
10 prescription counts. Each argument is discussed in turn.

11 **I. The Court’s Order is Not Contrary to Law**

12 In support, the State contends that “the [S]upreme [C]ourt’s *Jessen* opinion [] denies a  
13 defendant’s right to disclosure of *Brady* evidence as a trial right that is inapplicable to the grand  
14 jury proceedings.” (*See* State’s Motion for Reconsideration at 4 (hereinafter “State’s Motion”).)  
15 Contrary to the State’s assertion, *Jessen* is not applicable to the case at hand.

16 After being convicted at trial of first-degree murder, the defendant in *Jessen* appealed a  
17 number of the trial court’s decisions, including denial of defendant’s motion for a mistrial and  
18 his motion to remand for a new determination of probable cause. *State v. Jessen*, 130 Ariz. 1, 3  
19 (1981). Central to the defendant’s argument for a mistrial was that a *Brady* violation occurred  
20 when the state failed to inform the defendant prior to trial that reports of witness interviews were  
21 inaccurate. *Id.* at 3-4. Unlike in Dr. Ham’s case, the defendant in *Jessen* did not challenge that  
22 the State failed to inform the grand jury of *Brady* material. Nor did the defendant in *Jessen*  
23 allege that the prosecutor failed to disclose that its only witness—the investigating officer—was  
24 on the *Brady* list for his history of untrustworthiness. The court’s decision in *Jessen* does not  
25 stand for the proposition that a trial court errs, much less abuses its discretion, in remanding an  
26 indictment for a new determination of probable cause under the unique factual circumstances  
27 present in this case. The Court’s ruling in this case is not contrary to the Arizona Supreme  
28 Court’s findings in *Jessen*.

1           The State next turns to federal jurisprudence, citing *United States v. Williams*, 504 U.S.  
2 36 (1992) for the proposition that an indictment may not be dismissed because of the failure of  
3 the prosecution to turn over exculpatory information. (State’s Motion at 4.) *Williams* is not the  
4 law in Arizona. Arizona extends greater protections to defendants’ rights than the federal  
5 courts. Indeed, while *Williams* holds that **federal** prosecutors have no duty to present  
6 exculpatory evidence to the grand jury, Arizona courts have held that **state** prosecutors must  
7 present all clearly exculpatory evidence. *See, e.g., State v. Coconino County Superior Court*,  
8 139 Ariz. 422,425 (1984); *Byers v. Bluff*, No. 1 CA-SA 17-0113, 2017 WL 3765506, at \*2 ¶  
9 8 (App. 2017); *see also State v. Hogan*, 676 A.2d 533, 540-41 (N.J. 1996) (collecting state  
10 court cases not following *Williams*, including Arizona). As further evidence of the fact that  
11 Arizona does not follow *Williams*, the decision is cited by a single Arizona court—*State v.*  
12 *Youngblood*, 173 Ariz. 502, 510 (1993)—for a different, unrelated proposition.<sup>1</sup> Moreover,  
13 nothing in *Williams* supports the State’s contention that a trial court errs in remanding an  
14 indictment where the State fails to notify the grand jury that the investigating and testifying  
15 officer has a history of untrustworthiness.

16           Although the State is correct that *Brady* is a trial right, under certain facts and  
17 circumstances, it is properly applied to preliminary proceedings. *See, e.g., People v. Gutierrez*,  
18 214 Cal. App. 4th 343, 348-49 (Cal. Ct. App. 2013), *cert. denied* 134 S. Ct. 684 (2013) (“the  
19 prosecution’s duty to disclose material evidence that is favorable to the defense (hereafter the  
20 *Brady* obligation) applies to preliminary hearings.”); *United States v. Trass*, 644 F.2d 791, 794  
21 (9th Cir. 1981) (discussing trial court’s application to grand jury proceeding).

---

22  
23           <sup>1</sup> Likewise the State cites to *Lorraine v. United States*, 396 F.2d 335, 339 (9th Cir.  
24 1968). This is also not the law in Arizona. *Lorraine*, which applies federal law, was decided  
25 prior to many of Arizona’s seminal cases on grand jury proceedings—*Crimmins*, *Maretick*,  
26 *Herrell*, and *Trebus* to name just a few. Importantly, **no** Arizona court adopted the Ninth  
27 Circuit’s ruling in *Lorraine* concerning grand juries. Indeed, only a single Arizona court has  
28 cited *Lorraine* favorably—*State v. McDonald*, 117 Ariz. 180, 184 (1977), *vacated by* 117  
Ariz. 159 (1977)—and it was for an unrelated proposition. Moreover, nothing in *Lorraine* can  
be read to hold that a trial court errs for remanding an indictment based on the unique facts  
present in this case.

1           The trial court in *Trass* found “[a]lthough Brady material need not be routinely disclosed  
2 in grand jury proceedings, it is clear that some disclosure may be required under certain  
3 circumstances.” *Trass*, 644 F.2d at 793 (internal citations omitted). Based on the unique facts  
4 in that case, the Court found that “[a]s a matter of basic fairness, available Brady material  
5 relating to credibility of the alleged victims should have been disclosed to the grand jury.” *Id.*  
6 The Government did not appeal this order.

7           On remand, the prosecution “fully informed the grand jury of the reasons for the  
8 dismissal of the first indictment. The order of the trial judge was read in full, and the grand jury  
9 was advised of the government’s intention to abide by it.” *Id.* at 794. The grand jury was also  
10 told the alleged victims themselves may have violated the law and had been so advised by the  
11 agent. *Id.* A second motion to remand was based on differed grounds, none of which were the  
12 prosecution’s failure to present *Brady* material. *Id.* at 794-95. The Ninth Circuit found this  
13 second presentation to the grand jury did not violate the due process clause or justify remand.  
14 *Id.* at 796. Critically, the Ninth Circuit did *not* find that the trial court had erred in remanding  
15 the initial indictment which was based on the prosecution’s failure to provide *Brady* information.  
16 *Id.*

## 17           **II. The Court did Not Err in Finding that Clearly Exculpatory Evidence was** 18           **Withheld**

19           The State argues that matters of witness credibility cannot be clearly exculpatory, relying  
20 on *Trebus*, *Bashir*, and *Bauman*. None of these cases (nor any other Arizona case on grand jury  
21 proceedings) holds that the credibility of the State sole testifying witness and case investigator  
22 is not clearly exculpatory. This case is factually unique.<sup>2</sup> The Court’s order recognized as much:

23           I don’t think the state has an obligation in every case. And I don’t want to  
24           make that the rule. . . . But in this case where exculpatory information or

---

25           <sup>2</sup> The State also argues that “[t]he relevance of McClain’s *Brady* status are [sic] limited  
26 to his credibility and involve facts and circumstances wholly unrelated to the case at bar.”  
27 (State’s Motion at 7.) *Brady* jurisprudence does not limit disclosure requirements to  
28 misconduct in each specific case. Inclusion on the *Brady* list is indicium of general lack of  
trustworthiness. Despite the State’s protest about the age of McClain’s offending conduct, as  
recently as 2015 the State felt like it was necessary to draft a memorandum on the matter.

1 potentially exculpatory information is required the main officer is on a *Brady*  
2 list . . . it's appropriate to send the matter back.

3 *See* June 6, 2020 Transcript at 27 (Attached hereto as **Exhibit A.**)

4 Finally, the State clings to the Court's use of the word "potentially," misconstruing the  
5 Court's finding and trying to recast it as contrary to law. It is not. When a court finds that the  
6 prosecution failed to inform the grand jury of clearly exculpatory evidence, it is making a  
7 judgment call about the potential effect of that evidence on the grand jury. Stated differently,  
8 the court is finding that the withheld evidence is of such weight that if the grand jury were  
9 informed of the information it would deter a finding of probable cause. No court can know the  
10 practical consequence of the grand jury being informed of this information, nor is it required to  
11 know as much.<sup>3</sup>

### 12 **III. The State was Not Prejudiced by Timing of Dr. Ham's *Brady* Arguments**

13 Finding its argument unsupported by the law and the facts, the State endeavors to argue  
14 that it was unfairly prejudiced by the fact that Dr. Ham's motion to remand "did not address  
15 Agent McClain's *Brady* status with respect to the Grand Jury presentation[.]" (*See* State's  
16 Motion at 2.) Although correct as a technical factual assertion, the State's contention, which  
17 seeks to characterize Dr. Ham's motion to remand as something underhanded and nefarious,  
18 conveniently omits that the State, and specifically the Attorney General's Office, has had this  
19 information in its possession since at least 2015. Yet, the information was not produced to Dr.  
20 Ham until **9 days** before oral argument on Dr. Ham's Motion to Remand—after the deadline for  
21 filing his motion and reply had come and gone.<sup>4</sup> This is not to suggest any foul play by the  
22 State, but rather to highlight that any purported prejudice experienced by the State was caused  
23 by its own delay in disclosing the *Brady* material to the defense.

---

24 <sup>3</sup> Even assuming that the Court found the evidence less than clearly exculpatory,  
25 *Trebus* recognizes that "there may be exceptions to the 'clearly exculpatory' evidence  
26 limitation." *Trebus v. Davis*, 189 Ariz. 621, 625 (1997). Here, where the State had available  
27 *Brady* information about its only testifying witness, and investigating agent, presents a case  
warranting such an exception.

28 <sup>4</sup> The defense requested disclosure of this evidence on February 26, 2020, months  
before the briefing on the Motion to Remand was filed.

1           **IV. The State’s Error was not Harmless**

2           The State argues that any finding that it inflamed the jury by unnecessarily presenting  
3 allegations that Dr. Ham inflicted his wife with a certain disease “rings hollow” because Dr.  
4 Ham’s *Trebus* Letter “contained information which showed [Dr. Ham] was afflicted with that  
5 specific disease.” (*Id.* at 2 n.1.) The materials in the *Trebus* letter were presented so that the  
6 grand jury had an understanding as to the motivation for this investigation to have been initiated  
7 it was not presented for the truth of the matter. More importantly, the State ignores the Court’s  
8 ruling, which is that the remand is based, in part, on the State’s error in failing to disclose Agent  
9 McClain’s history of untruthfulness. *See* Exhibit A at 28-29. Therefore, even if the State were  
10 correct in its assertion that any error in presenting the prescription counts in conjunction with  
11 the remaining counts was harmless—it wasn’t—the State has failed to present any argument as  
12 to how the State’s failure to disclose information about Agent McClain’s history of  
13 untruthfulness to the grand jury was harmless.

14           Second, the State incorrectly contends that its error was harmless because Dr. Ham’s  
15 *Trebus* Letter “showed” he was afflicted with the specific disease.<sup>5</sup> Dr. Ham’s *Trebus* letter  
16 makes no mention of genital herpes. Although the State fails to identify the specific information  
17 in the letter to which it refers, based on a review of the *Trebus* letter and accompanying exhibits,  
18 it appears that the State’s argument concerns a flier scandalously alleging that Dr. Ham, among  
19 other things, “slept with prostitutes” and had “genital herpes.” The flier, which was publicly  
20 posted in Prescott to embarrass and harass Dr. Ham, was not attached as an exhibit as evidence  
21 of the truth of the allegations contained therein. Frankly, for the State to argue as much is  
22 misleading and disingenuous. The flier was offered by the defense to show that Dr. Ham and  
23 Erin Ham’s marriage was acrimonious and that any testimony from her is biased. Indeed, the

24 \_\_\_\_\_  
25           <sup>5</sup> The State also argues that at oral argument Dr. Ham’s counsel “focused on testimony  
26 supplied to the Grand Jury regarding the fact Defendant is afflicted with a particular disease.”  
27 (State’s Motion at 2 n.1.) This contention is belied by the record and transcript. As the Court  
28 is well aware, Defense counsel discussed the State’s failure to notify the grand jury that the only  
witness it heard from (and is the individual that interviewed the former employees) has been  
found by his own office to not be credible. Defense counsel also argued that the State failed to  
properly instruct the grand jury on the law with respect to fraud schemes and artifices.

1 defense included the exhibit in support of the contention that “the criminal investigation is being  
2 used in the family law litigation.”

3 **V. The Court Did Not Err In Remanding All Counts**

4 Lastly, the State argues that the Court erred in remanding all counts with respect to Dr.  
5 Ham as opposed to simply remanding the prescription counts. (State’s Motion at 8-10.)  
6 According to the State, the defense’s “motion” and “oral argument” “emphasized the  
7 discrepancy” between Agent McClain’s testimony and “other information in possession of the  
8 State” with respect to the prescription counts only.<sup>6</sup> (*Id.* at 9.) The State further argues that the  
9 Court cannot remand the remaining counts because the basis for the Court’s remand is “wholly  
10 unrelated” to the insurance fraud counts. In support, the State argues that “the evidence  
11 associated with [] insurance fraud included statements from approximately 30 co-defendants  
12 who admitted to have committed fraudulent acts at the direction of [Dr. Ham].” (*Id.* at 10.)

13 As a preliminary matter, the Court’s findings included exculpatory evidence to all counts  
14 against Dr. Ham. The Court found that the State erred in failing to provide the grand jury notice  
15 that the Arizona Attorney General’s Office found Agent McClain to lack trustworthiness. Agent  
16 McClain is the only witness that testified before the grand jury—this includes providing  
17 testimony regarding *all* counts against Dr. Ham.

18 Without the testimony of Agent McClain, no other evidence or statements from other  
19 witnesses would have been presented. Agent McClain procured these statements and  
20 summarized their contents in *his* testimony to the grand jury. The grand jurors are entitled to  
21 know Agent McClain’s history of untrustworthiness in evaluating for themselves whether the  
22

23 \_\_\_\_\_  
24 <sup>6</sup> The State is incorrect in its assertion that the defense only sought remand based on the  
25 discrepancy between what Agent McClain testified to and what the State otherwise knew to be  
26 true regarding the prescription counts only. A quick review of the defense’s motions reveal that  
27 only a select portion of its opening brief discusses the prescription counts, and that its reply in  
28 support does not discuss the matter at all. (*See generally* Dr. Ham’s Motion to Remand; Reply  
in Support of Motion to Remand). This is unsurprising given that the State had already conceded  
the prescription counts were flawed and required remand prior to Dr. Ham’s reply deadline.

1 testimony gathered and presented by him is reliable enough to form a basis for a finding of  
2 probable cause. The Court’s finding is sufficient to remand all counts.<sup>7</sup>

3 In an effort to protect the fundamental fairness of the grand jury proceeding, the State  
4 should not have presented the prescription counts (and the unsupported and inflammatory  
5 allegations) to taint the grand jury’s initial impression of Dr. Ham before presenting the  
6 remaining counts. *See Maretick v. Jarrett*, 204 Ariz. 194, 197 ¶ 10 (2003) (Prosecutors “must  
7 not take advantage of [their] role as the ex parte representative of the state before the grand jury  
8 to unduly or unfairly influence it.”); *Trebus*, 189 Ariz. at 624 (“the prosecutor’s obligation to  
9 make a fair and impartial presentation to the jury has long been recognized.”). After all, the  
10 prescription counts would have been severed from the remaining counts as a matter of law. *See*,  
11 *e.g.*, *State v. Garland*, 191 Ariz. 213, 216-17 ¶¶ 7-18 (App. 1998); *State v. Martinez* No 2  
12 CA-CR 2016-0385, 2018 WL 2771059, at \*1-2 ¶¶ 5-8 (App. 2018); Ariz. R. Crim. P. 13.3(a),  
13 (b). Indeed, the Court found that the State should not have presented these counts in conjunction.  
14 *See Exhibit A at 29* (“My concern . . . is more about whether those two issues should have been  
15 presented together at all.”). Nothing in the Court’s ruling was contrary to Arizona law.

### 16 CONCLUSION

17 The Court’s order to remand the indictment was supported by law and the facts. The  
18 Court should deny the State’s request for reconsideration.

19 Respectfully submitted this 6th day of July 2020.

20  
21  
22  
23  
24 <sup>7</sup> The cases cited by the State—*Fendler* and *Baumann*—are inapposite. In those cases,  
25 the courts remanded all counts that relied upon the flawed presentation. *See State v.*  
26 *Baumann*, 125 Ariz. 404, 409 (1980) (“The trial judge felt that since the erroneous legal  
27 opinion could have misled the grand jury on the conspiracy count *only*, it was unnecessary to  
28 send the entire indictment back for a new finding of probable cause on all counts.”) (emphasis  
added). Here, based on the Court’s finding, the entire presentation was flawed because the  
State’s sole presenting witness (and investigating officer) has a history of untrustworthiness  
that was not introduced to the grand jury.



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**POLSINELLI PC**

By: /s/ Edward F. Novak  
Edward F. Novak  
Melissa S. Ho  
Andrew T. Fox  
*Attorneys for Defendant Michael L. Ham*

**ELECTRONIC FILING VIA EMAIL**

Pursuant to the Court's April 1, 2020 Administrative Order No. 2020-07, the foregoing is deemed the ORIGINAL and it is deemed filed by email this 6th day of July, 2020, to:

The Clerk of the Court  
Filing Counter  
YAVAPAI COUNTY  
120 S Cortez  
Prescott, Arizona 86303  
[COsCe-mailsubmissions-Prescott@courts.az.gov](mailto:COsCe-mailsubmissions-Prescott@courts.az.gov)

COPY of the foregoing emailed this 6th day of July, 2020 to:

Felicia L. Slaton, Judicial Assistant  
Division 2, Yavapai Superior Court  
120 S. Cortez Street  
Prescott, AZ 86303  
Div2@courts.az.gov

Brett Harames  
Assistant Attorney General  
Arizona Attorney General's Office  
2005 North Central Ave.  
Phoenix, Arizona 85004  
brett.harames@azag.gov

/s/ Mark Dawson

1 Edward F. Novak (#006092)  
enovak@polsinelli.com  
2 Melissa S. Ho (#023269)  
mho@polsinelli.com  
3 Andrew Fox (#034581)  
afox@polsinelli.com  
**POLSINELLI**  
4 CityScape  
One East Washington St., Suite 1200  
5 Phoenix, Arizona 85004  
T | F (602) 650-2000 | (602) 264-7033  
6

7 J. Andrew Jolley, # 025560  
**PRESCOTT LAW GROUP, PLC**  
8 116 N. Summit Avenue  
Prescott, Arizona 86301  
9 T | F (928) 445-1909; (928) 350-8839  
Email: andy@plgnaz.com

10 *Attorneys for Defendant Michael L. Ham*

11 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

12 **IN AND FOR THE COUNTY OF YAVAPAI**

13 STATE OF ARIZONA

14 Plaintiff,

15 v.

16 MICHAEL L. HAM,

17 Defendant.

Case No. P1300 CR2019 01558

**EXHIBIT A TO DEFENDANT'S  
RESPONSE IN OPPOSITION TO  
STATE'S MOTION FOR  
RECONSIDERATION OF COURT'S  
ORDER REMANDANDING GRAND  
JURY INDICTMENT FOR A NEW  
DETERMINATION OF PROBABLE  
CAUSE**

(Assigned to the Hon. Tina R. Ainley)

18  
19  
20  
21  
22  
23  
24  
25  
26  
27 **EXHIBIT A**  
28

5 FILED  
O'Clock P.M.

JAN 10 2020 ✓

TRANSCRIPT OF PROCEEDINGS

DONNA McQUALITY, Clerk  
By: K. GLENN

BEFORE THE 86TH STATE GRAND JURY

IN RE:

P1300CR201901558 – MICHAEL LEE HAM	P1300CR201901559 – LAURA LYNN CRAIN
P1300CR201901560 – TRICIA KAY FAGELMAN	P1300CR201901561 – JENNIFER LYNN HEAD
P1300CR201901562 – SHERADRI ANN COMPSON	P1300CR201901563 – ELIZABETH NANCY PRICE
P1300CR201901564 – JESSICA LYNN ERKS	P1300CR201901565 – ANN MARIE NELSON
P1300CR201901566 – HEIDI JUNE ELMER	P1300CR201901567 – BETHANY JILL PACHEL
P1300CR201901568 – HOLLIE REBECCA TOMASZYCKI	P1300CR201901569 – LINDSAY BROOKE RADER
P1300CR201901570 – JENNAFER EILEEN TOPITZHOFER	P1300CR201901571 – RENEE L AZZARELLO
P1300CR201901572 – JOSE LUIS ALVAREZ	P1300CR201901573 – SHAWNEE ANDREA CLARIDA
P1300CR201901574 – TAYLOR MICHELLE HAHN	P1300CR201901575 – NINA MARIE KINSEY
P1300CR201901576 – JESSICA NICOLE BICKER	P1300CR201901577 – SARAH MARIE DUNCANSON
P1300CR201901578 – NATASHA FLORENCE KLEIN	P1300CR201901579 – THERESA MARIE VELASCO
P1300CR201901580 – JANA E LYNNE FURR	P1300CR201901581 – SAMANTHA TUESDAY DENNY
P1300CR201901582 – CHRISTOPHER JON BOHN	P1300CR201901583 – LINDSAY RENEE MARTELL
P1300CR201901584 – AMBER DAWN HAVENNER	P1300CR201901585 – MIRANDA SHANEE KENDALL
P1300CR201901586 – BOBBIE JO SCARBOROUGH	P1300CR201901587 – KELSI JAYNE BENTLEY
P1300CR201901588 – SARAH ANNE MORGAN	P1300CR201901589 – KATALINA REDA
P1300CR201901590 – JEFFREY SCOTT HARRIS	P1300CR201901591 – KATHERINE PAIJE CHAPMAN
P1300CR201901592 – ALEXIS SARAH ANNE FAGG	P1300CR201901593 – GABRIEL MONIQUE ANDERSON
P1300CR201901594 – BROOKE C.L. CROY	P1300CR201901595 – CLARISSA FAYE WALL
P1300CR201901596 – DAINA MARIE CHRISTIAN	P1300CR201901597 – JEFFREY THOMAS CHAMBERS
P1300CR201901598 – JORDAN ALYSON MONTTOYA	P1300CR201901599 – DANIEL PAUL GAGNON
P1300CR201901600 – DANIELLE RENEE PASCOE	P1300CR201901601 – CARLOS GARCIA
P1300CR201901602 – DINUSHA INDRA BANDARANAYAKE	P1300CR201901603 – MONICA ZAVALA
P1300CR201901604 – DONALDA SUE STICKA	

1 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
 2 IN AND FOR THE COUNTY OF MARICOPA  
 3

4		)	
5	PROCEEDINGS BEFORE THE 86th	)	
6	STATE GRAND JURY	)	
7		)	
8	IN RE:	)	86 SGJ 33
9	MICHAEL LEE HAM (001)	)	Yavapai County
10	LAURA LYNN CRAIN (002)	)	
11	TRICIA KAY FAGELMAN, aka	)	
12	TRICIA KAY McMILLAN (003)	)	
13	JENNIFER LYNN HEAD (004)	)	
14	SHERADRI ANN COMPSON, aka	)	
15	SHERADRI KHAN (005)	)	
16	ELIZABETH NANCY PRICE aka	)	
17	ELIZABETH KIEREN (006)	)	
18	JESSICA LYNN ERKS (007)	)	
19	ANN MARIE NELSON (008)	)	
20	HEIDI JUNE ELMER (009)	)	
21	BETHANY JILL PACHEL (010)	)	
22	HOLLIE REBECCA TOMASZYCKI	)	
23	(011)	)	
24	LINDSAY BROOKE RADER (012)	)	
25	JENNAFER EILEEN TOPITZHOFFER	)	
	aka JENNAFER HARRISON (013)	)	
	RENEE L. AZZARELLO (014)	)	
	JOSE LUIS ALVAREZ (015)	)	

1 SHAWNEE ANDREA CLARIDA (016)  
2 TAYLOR MICHELLE HAHN aka  
3 TAYLOR LAVINE (017)  
4 NINA MARIE KINSEY (018)  
5 JESSICA NICOLE BICKER aka  
6 JESSICA CHURCH (019)  
7 SARAH MARIE DUNCANSON (020)  
8 NATASHA FLORENCE KLEIN aka  
9 NATASHA AHO (021)  
10 THERESA MARIE VELASCO aka  
11 THERESA RUPP (022)  
12 JANA E LYNNE FURR (023)  
13 SAMANTHA "SAM" TUESDAY DENNY  
14 (024)  
15 CHRISTOPHER JON BOHN (025)  
16 LINDSAY RENEE MARTELL (026)  
17 AMBER DAWN HAVENNER (027)  
18 MIRANDA SHANEE KENDALL aka  
19 MIRANDA GUFFEY (028)  
20 BOBBIE JO SCARBROUGH (029)  
21 KELSIE BENTLEY aka KELSIE JAYNE  
22 POPIK (030)  
23 SARAH ANNE MORGAN (031)  
24 KATALINA REDA (032)  
25 JEFFREY SCOTT HARRIS (033)  
KATHERINE PAIJE CHAPMAN aka  
KATHERINE GOLLEDGE (034)  
ALEXIS SARAH ANNE FAGG (035)  
GABRIEL MONIQUE ANDERSON (036)

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

BROOKE C.L. CROY aka BROOKE  
SCHMALZ (037)

CARISSA FAYE WALL (038)

DAINA MARIE CHRISTIAN (039)

JEFFREY THOMAS CHAMBERS (040)

JORDAN ALYSON MONTTOYA (041)

DANIEL PAUL GAGNON (042)

DANIELLE RENEE PASCOE (043)

CARLOS GARCIA (044)

DINUSHA INDRA BANDARANAYAKE  
(045)

MONICA ZAVALA aka MONICA  
CHAVEZ (046)

DONALDA SUE STICKA (047)

Defendants.

---

Phoenix, Arizona  
December 18, 2019

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Janell E. Rose, CSR No. 7249  
Certified Court Reporter  
Certificate No. 50455

1 would be a heart and lung examination noted. And then  
2 there would be an electronic signature by the optometrist  
3 or ophthalmologist.

4 Q. You talked about some information in the visual  
5 exam reports; they're generated via patient appointments  
6 at Kokopelli, correct, that's what you're describing?

7 A. Yes, sir.

8 Q. Over the course of your investigation, did you  
9 identify forged visual examination reports involving  
10 Snellen Visual Acuity Tests?

11 A. I did.

12 Q. Those Snellen Visual Acuity Tests, are those eye  
13 exams that have results like 20/20, 20/25, 20/30, 20/40  
14 and 20/60, and so on; is that right?

15 A. That is correct, sir.

16 Q. That test is determined by a series of letters  
17 arranged in rows in descending size from top to bottom; is  
18 that right?

19 A. Yes, sir.

20 Q. The same type of eye charts you see in an  
21 elementary school nurse's office or your garden variety  
22 primary care physician's office?

23 A. Yes, sir.

24 Q. Another permutation of the fraud that you  
25 discovered in your investigation was what's called a quote

1 "glare," end quote test; is that right?

2 A. Yes, sir.

3 Q. A glare test, does that involve one of the op  
4 techs that we are talking about, essentially, introducing  
5 a light source directly into a patient's eye and  
6 conducting a visual Snellen Visual Acuity Test while that  
7 light is being directed in the patient's eye?

8 A. Yes.

9 Q. Based on your experience and your investigation  
10 in this case, those visual scores or results determined by  
11 virtue of a glare test is, generally speaking, more  
12 deficient than the visual acuity tests, in general?

13 A. Can you reword that question please?

14 Q. Glare test results are usually worse than a  
15 regular visual acuity test results; is that correct?

16 A. Yes, sir.

17 Q. Another permutation of the fraud would be -- and  
18 I think you mentioned this earlier -- the inclusion of an  
19 assertion that a heart and lung examination was conducted  
20 of a particular patient, and their heart and lungs were  
21 deemed to be sufficiently healthy for the prospective  
22 cataract or laser surgery to be done at Kokopelli Eye  
23 Institute; is that right?

24 A. That is correct.

25 Q. Dr. Ham is the only surgeon, at least in your



1 investigation, that was conducting these cataract and/or  
2 laser surgeries at Kokopelli?

3 A. Yes, sir.

4 Q. I think I said this earlier, but your  
5 investigation lasted approximately 18 months in this case?

6 A. It did.

7 Q. And it included op techs, former and current,  
8 from different offices in different years of experience at  
9 Kokopelli; is that right?

10 A. That is.

11 Q. Is it fair to say that the only two constant  
12 employees from 2009 to 2018 that you were able to  
13 ascertain in your investigation was Dr. Michael Ham and  
14 Ms. Laura Crain?

15 A. Those are the only two, yes.

16 Q. Now, we talked a little bit, we mentioned briefly  
17 insurance providers or third-party providers, did your  
18 investigation uncover multiple -- what I'll call public  
19 insurance providers -- as well as a number or half a dozen  
20 private healthcare insurers?

21 A. Yes.

22 Q. Now, all of those entities, both public and  
23 private, have certain threshold requirements, policies,  
24 standards, that they use as guides to determine whether a  
25 patient, based on their visual acuity report results, are

1 STATE OF ARIZONA )  
2 ) ss.  
3 COUNTY OF MARICOPA )  
4  
5

6 C E R T I F I C A T E  
7

8 I, Janell E. Rose, RPR, a Certified Reporter  
9 in the State of Arizona, do hereby certify that the  
10 foregoing 210 pages constitute a full, true, and accurate  
11 transcript of the proceedings had in the foregoing matter,  
12 all done to the best of my skill and ability.

13 SIGNED and dated this 7th day of January,  
14 2020.

15  
16 Janell Rose/s/ \_\_\_\_\_

17 -----  
18 JANELL E. ROSE, CSR No. 7249  
19 Certified Court Reporter  
20 Certificate No. 50455  
21  
22  
23  
24  
25