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STATE v. BLEVINS

Cite as, Ariz.App., 623 P.2d 853

Ariz. 853

[2] The trial court, in a proceeding in which review is sought by way of writ of certiorari, is limited in its scope of review. The court is not permitted to weigh the evidence but may only consider whether there is any evidence revealing that the inferior court acted within its jurisdiction. *Reid v. Ford*, 73 Ariz. 190, 239 P.2d 1079 (1952); *Cox v. Pima County Law Council*, 25 Ariz.App. 349, 543 P.2d 470 (1975) and see A.R.S. Sec. 12-2006. It is only when no evidence exists to support the administrative agency's decision that the agency decision is in excess of its jurisdiction; if any evidence supports it, the search for jurisdiction is ended. *Reid v. Ford*, supra; *Cox v. Pima County Law Council*, supra.

[3] Review of the record of the council hearing reveals that there was evidence before the council to the effect that the salaries of all deputy sheriffs were standardized by the board of supervisors in July of 1970 and that classification as deputy sheriff would require the payment of a specific salary.

As no jurisdictional fact is in dispute, the trial court did not err in granting appellees' motion for summary judgment.

Affirmed.

HATHAWAY, C. J., and RICHMOND, J., concur.

No. CR-103421, Howard V. Peterson, J., of vehicular manslaughter and leaving scene of an accident involving injury or death of another, and he appealed. The Court of Appeals, O'Connor, J., held that: (1) circumstantial evidence, supplemented by opinions of expert witnesses, provided substantial evidence that defendant committed one or more unlawful acts, which did not amount to a felony and which caused victim's death, and, thus, the evidence was sufficient to sustain the conviction of vehicular manslaughter, but (2) failure to instruct jury on the issue of defendant's knowledge of the personal injury of victim was fundamental error requiring reversal of the conviction of leaving the scene.

Affirmed in part; reversed in part; remanded.

1. Criminal Law ⇐552(4)

The substantial evidence required to warrant a conviction may be either circumstantial or direct, and probative value of evidence is not reduced simply because it is circumstantial. 17 A.R.S. Rules of Criminal Procedure, Rule 20.

2. Criminal Law ⇐552(1)

Conviction may be sustained on circumstantial evidence alone. 17 A.R.S. Rules of Criminal Procedure, Rule 20.

3. Criminal Law ⇐552(3)

Prosecution is not required to negate every conceivable hypothesis of innocence in cases based wholly on circumstantial evidence. 17 A.R.S. Rules of Criminal Procedure, Rule 20.

4. Automobiles ⇐355(13)

Circumstantial evidence, supplemented by opinions of expert witnesses, provided substantial evidence that defendant committed one or more unlawful acts, which consisted of speeding, following too closely or driving while intoxicated, which did not amount to a felony and which caused victim's death, and, thus, the evidence was

STATE of Arizona, Appellee,

v.

Tennis Brian BLEVINS, Appellant.

No. 1 CA-CR 4497.

Court of Appeals of Arizona,
Division 1,
Department C.

Jan. 27, 1981.

Defendant was convicted before the Superior Court, Maricopa County, Cause



5. Automobiles — 355(8)

6. Automobiles ← 357

In proceeding in which defendant was convicted of leaving scene of an accident involving injury or death of another and in which the chief issue was the extent of defendant's knowledge of personal injury of victim or of facts that would lead one to reasonably anticipate that personal injury had resulted from the collision, failure to instruct jury on the issue of defendant's knowledge of the personal injury was fundamental error requiring reversal of such conviction. A.R.S. §§ 28-661, 28-661, subd. A, 28-663.

Debus & Busby, Ltd. by Larry L. Debus
and Lawrence I. Kazan, Phoenix, for appel-
lant.

OPINION

O'CONNOR, Judge.

Based on events arising out of a collision between an automobile and a motorcycle in the early morning hours of May 27, 1978, Tennis Brian Blevins was charged with vehicular manslaughter in violation of A.R.S. §§ 13-455, 13-456(A)(3)(b) and 13-

457(C)(2),¹ and leaving the scene of an accident involving injury or death of another in violation of A.R.S. §§ 28-661 and 28-663. The first trial ended in a mistrial. At the second trial, the jury found Blevins guilty of both counts. Following entry of judgment of guilt, sentence was suspended on both counts and Blevins was given a one year period of probation. He has appealed from the judgments and suspended sentences. We have jurisdiction of his appeal from the judgments of guilt, the convictions, and the suspended sentences. A.R.S. §§ 13-4031, 13-4033.

On appeal in a criminal case we must view the evidence in a light most favorable to sustaining the conviction, resolving all reasonable inferences in favor of the State. *State v. Acree*, 121 Ariz. 94, 588 P.2d 836 (1978). The relevant facts are summarized below. James Larry Payne, the victim, and appellant were both members of the United States Air Force, stationed at Luke Air Force Base west of Phoenix. On the evening of May 26, 1978, some personnel from the base met at Hank's Bar in celebration of good results on a recent inspection. After the bar closed, 12 to 15 people bought some beer and began to drink outside. One witness observed appellant drinking a mixed drink at the bar and four to six beers after closing. Appellant told this witness that he had been at Hank's since approximately 10:00 P.M. At approximately 1:30 A.M. on the morning of May 27, the victim arrived outside the bar and began drinking also. The last of the group began to disperse around 3:45 A.M., at which time appellant was "drunk" in the opinion of one witness. The victim left the area, headed east on Glendale Avenue, riding a motorcycle. Shortly thereafter appellant also began driving east on Glendale Avenue in an automobile. Appellant testified at trial that while he was driving down Glendale Avenue, something appeared in his headlights and he swerved to avoid it. He testified that he slammed on his brakes and hit

nal Code, October 1, 1978.

[illegible]

Around 4:30 A.M. Sheriff's Department contacted by a witness lying near Glendale accompanied the witness found James Larry edge of Glendale Road. He exhibited no vital signs. It was testified at trial that Payne's fracture of the cervical vertebrae was consistent with the impact of the rear of a motorcycle by an automobile at a rate of speed that

Deputy Jacobs of Sheriff's Department went to the accident scene at approximately 7:20 A.M., took charge of the injured man, contacted appellant, and with two other detectives transported him to the hospital. He testified at trial that

a motorcycle that was lying in the road. He stated that he saw no one on the motorcycle. He jumped out of his car and ran around to the front and saw that the motorcycle was stuck in his right front fender. He attempted to pull the motorcycle from his fender, but was unable to do so. He looked around the immediate area and failed to see anyone. He then attempted to shake the motorcycle loose from his vehicle by driving on and off the road. His continued efforts were futile and his tire eventually went flat, forcing him off the road and into a tree near the New River bridge. A passerby helped him out of the vehicle and took him to a telephone booth where he called his roommate. The roommate testified that he received the phone call at approximately 4:30 A.M., and arrived at the telephone booth to pick up appellant around 4:50 A.M. Together, the two drank some coffee at a nearby restaurant for approximately an hour. They then drove toward where appellant had left his car but were stopped by a Maricopa County Sheriff's Office roadblock. They did not contact any officers at the roadblock because appellant had been drinking was afraid to do so. They returned home.

Around 4:30 A.M., a Maricopa County Sheriff's Department deputy had been contacted by a witness who had seen a man lying near Glendale Road. The deputy accompanied the witness to the location and found James Larry Payne laying near the edge of Glendale Road. Payne's body exhibited no vital signs. A pathologist testified at trial that Payne had died from a fracture of the cervical spine. The injury was consistent with the State's theory that Payne's motorcycle had been struck in the rear by an automobile traveling at a greater rate of speed than his motorcycle.

Deputy Jacobs of the Maricopa County Sheriff's Department arrived at the accident scene at approximately 4:30 A.M., and took charge of the investigation. A deputy contacted appellant at his home at approximately 7:20 A.M., by telephone, and two detectives transported him to the location of his automobile. One of the deputies testified at trial that appellant had the odor

of alcohol on his breath at that time. When appellant was brought back to the scene, deputy Jacobs gave him his "Miranda" warnings and discussed the accident with him. Appellant admitted owning and driving the automobile involved, and said that he had had one beer at Hank's after work and nothing to drink after the accident. He said that he did not know he had struck a motorcycle, and that he had walked home from the scene of the accident.

At trial, deputy Jacobs and Lamont Skousen testified for the State as motor vehicle accident reconstruction experts. They described the scene as they found it on that morning, including the damage to the two vehicles, the location of the two vehicles after they had come to rest, the location of the victim's body, the debris in the roadway, and the size and location of gouge, skid, and scuff marks on the pavement. Based on all the physical evidence, their measurements and computations, and their experience in the field of accident reconstruction, it was their opinion that appellant's automobile was traveling at a speed of 54 to 58 miles per hour, conservatively estimated, at the time of impact. The posted speed limit in that area of Glendale Avenue was 50 miles per hour. The speed of the victim's motorcycle immediately prior to impact was estimated at approximately 45 miles per hour. From examination of filaments in the damaged headlight of the automobile and the damaged taillight and brake light of the motorcycle, it was the witnesses' opinion that immediately prior to impact, the automobile headlights were on, the motorcycle taillight was on, and the motorcycle brake light was not on. From the damage to the two vehicles and remnants of a decal from the motorcycle which was found on the automobile, and from a fabric impression from the victim's clothing which was found on the hood of the automobile, it was their opinion that the motorcycle was upright and moving with the victim riding it when it was struck, and that it was struck directly from the rear by the automobile in a straight line, or at a 180 degree angle. Partly due to the location of

2. A.R.S. § 28-663 imposes

vehicle involved in an acc

forthwith return to and in every event shall remain at the scene of the accident until he has fulfilled the requirements of § 28-663.² Every such stop shall be made without obstructing traffic more than is necessary.

In *State v. Porras*, 125 Ariz. 490, 610 P.2d 1051 (App.1980), this Court determined that liability under A.R.S. § 28-661 attaches only where a defendant has actual knowledge of the personal injury or knowledge that the accident was of such a nature that one would reasonably anticipate that it resulted in personal injury. In this case, the jury was instructed in terms of a verbatim recitation of A.R.S. § 28-661(A). A general intent instruction was also given, as follows:

You are further instructed, ladies and gentlemen, that to constitute a crime there must be a combination of act forbidden by law and an intent to do the act. Intent may be inferred from the defendant's voluntary commission of an act forbidden by law, and it is not necessary to establish that the defendant knew his act was a violation of the law.

No such instruction was given on the crucial element of knowledge of personal injury or knowledge from which one would reasonably anticipate personal injury to another. Appellant did not request an instruction as to the knowledge requirement of A.R.S. § 28-661(A).

In matters of a fundamental nature, the trial judge is required to instruct the jury on his own motion, even if not requested by the defense, and failure to instruct the jury on a matter vital to the rights of the defendant creates fundamental error [citation omitted]

State v. Miller, 120 Ariz. 224, 226, 585 P.2d 244, 246 (1978). See also *State v. Arnett*, 119 Ariz. 38, 579 P.2d 542 (1978); *State v. Evans*, 109 Ariz. 491, 512 P.2d 1225 (1973).

At trial, appellant vigorously contested his knowledge of any injury to a person on the motorcycle. While he admitted hitting the motorcycle, he denied ever seeing any

one or knowing that anyone had been injured and maintained consistently that the motorcycle had been lying down in the road when he hit it. The extent of appellant's knowledge of a personal injury or of facts which would lead one to reasonably anticipate that personal injury had resulted from the collision was the chief issue of the case relating to the charge of leaving the scene of the accident. An instruction on the issue was vital to the rights of the appellant on these facts. Failure to instruct the jury on the issue of the knowledge required was fundamental error in this instance. The conviction for leaving the scene of an accident must be reversed.

The conviction and imposition of probation on count one, vehicular manslaughter, are affirmed. The conviction and imposition of probation on count two, leaving the scene of an accident involving injury or death to another, are reversed. Count two is remanded for a new trial.

OGG, P. J., and WREN, J., concur.



The STATE of Arizona, Appellee,

v.

Mitchell Floyd BALLANTYNE,

Appellant.

2 CA-CR 1986.

Court of Appeals of Arizona,
Division 2.

Jan. 27, 1981.

Defendant was convicted before the Superior Court, Cochise County, No. 10044, Lloyd C. Helm, J., of assaulting a police officer and resisting arrest, and he appeal-

2. A.R.S. § 28-663 imposes on the driver of any vehicle involved in an accident causing injury

or vehicle damage a duty to give information and render aid to the injured.

LEVEL 1 - 7 OF 28 CASES

MAGMA COPPER COMPANY, SAN MANUEL DIVISION;
PLAINTIFF-APPELLANT, v. ARIZONA DEPARTMENT OF ECONOMIC
SECURITY, AN AGENCY, AND JOE H. ORTIZ, DEFENDANTS-APPELLEES.

No. 1 CA-UB 056

COURT OF APPEALS OF ARIZONA, DIVISION ONE, DEPARTMENT C

SLIP OPINION

JANUARY 20, 1981

APPEAL FROM THE ARIZONA DEPARTMENT OF ECONOMIC SECURITY

(UNEMPLOYMENT INSURANCE APPEALS BOARD NUMBER 6883-79, B-397-79)

AFFIRMED

THITTY, SIEVWRIGHT & MILLS, BY: N. DOUGLAS GRIMWOOD, ATTORNEYS FOR
PLAINTIFF-APPELLANT, PHOENIX

SLIP OPINION JANUARY 20, 1981

ROBERT K. CORBIN, THE ATTORNEY GENERAL, BY: DAVID RICH, ASSISTANT ATTORNEY
GENERAL, ATTORNEYS FOR DEFENDANT-APPELLEE ARIZONA, DEPARTMENT OF ECONOMIC
SECURITY, PHOENIX

JOE H. ORTIZ, DEFENDANT-APPELLEE PRO PER, TUCSON

D'CONNOR

D'CONNOR, JUDGE

THE QUESTION IN THIS REVIEW OF A DECISION OF THE UNEMPLOYMENT INSURANCE
APPEALS BOARD OF THE ARIZONA DEPARTMENT OF ECONOMIC SECURITY IS WHETHER THE
EMPLOYER MET ITS BURDEN OF PROVING THAT APPELLEE, THE EMPLOYEE, WAS DISCHARGED
FOR MISCONDUCT IN CONNECTION WITH THE EMPLOYMENT. WE FIND THAT THE RECORD
SUPPORTS A DETERMINATION THAT THE EMPLOYER DID NOT MEET THAT BURDEN AND
THEREFORE, AFFIRM THE DECISION OF THE BOARD.

APPELLEE, JOE H. ORTIZ, WAS DISCHARGED FROM HIS EMPLOYMENT WITH APPELLANT
MAGMA COPPER COMPANY FOR ABSENTEEISM WHEN, AFTER SEVERAL WARNINGS FOR
ABSENTEEISM, HE FAILED TO SHOW UP FOR WORK BECAUSE HE WAS TEMPORARILY IN

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FOUND THAT APPELLEE'S LAST ABSENCE WAS BEYOND HIS CONTROL DUE TO INCARCERATION AND THAT APPELLEE WAS, THEREFORE, ELIGIBLE FOR UNEMPLOYMENT BENEFITS. - THE EMPLOYER TOOK THE QUESTION TO AN APPEAL TRIBUNAL WHICH, AFTER THE PARTIES FAILED TO APPEAR AT THE SCHEDULED HEARING, REACHED THE SAME CONCLUSION AS THE DEPUTY BASED ON THE DOCUMENTS IN THE FILE. THE APPEALS BOARD, AFTER REMANDING FOR AN EVIDENTIARY HEARING, AFFIRMED THE DECISION OF THE TRIBUNAL. THIS APPEAL FOLLOWED:

N1 THE EMPLOYER DOES NOT ARGUE THAT THE DISCHARGE WAS DUE TO THE NATURE OF THE CRIMINAL VIOLATION COMMITTED BY APPELLEE. - SEE A.C.R.R. R6-3-51490, "VIOLATION OF LAW."

AN ABSENCE OCCASIONED BY INCARCERATION WHICH RESULTS IN DISCHARGE FROM EMPLOYMENT DOES NOT NECESSARILY DISQUALIFY THE WORKER FOR UNEMPLOYMENT BENEFITS. THE ARIZONA DEPARTMENT OF ECONOMIC SECURITY HAS DEVELOPED GUIDELINES BY WHICH THE DISQUALIFYING NATURE OF ABSENCE DUE TO INCARCERATION IS JUDGED. THESE GUIDELINES ARE FOUND IN BENEFIT POLICY RULE A.C.R.R. R6-3-5115(E) WHICH PROVIDES:

E ABSENCE DUE TO INCARCERATION (MISCONDUCT 15.25)

SLIP OPINION JANUARY 20, 1981

1 A DISCHARGE FOR ABSENCE DUE TO INCARCERATION IS DISQUALIFYING WHEN:

A THE CLAIMANT DID NOT PROPERLY NOTIFY, OR FAILED TO MAKE A REASONABLE EFFORT TO PROPERLY NOTIFY THE EMPLOYER OF HIS ABSENCE; OR

B THE EVIDENCE CLEARLY INDICATES THAT THE CLAIMANT COULD HAVE AVOIDED HIS INCARCERATION BY THE PAYMENT OF A FINE; OR

C THE CLAIMANT WAS INCARCERATED FOR A SECOND TIME WHILE WORKING FOR HIS FIRST EMPLOYER; OR

D THE CLAIMANT WAS CONFINED FOR A PERIOD IN EXCESS OF TWENTY-FOUR HOURS, AND THE AVAILABLE EVIDENCE TENDS TO ESTABLISH THAT HE COMMITTED THE OFFENSE FOR WHICH HE WAS CONFINED.

2 A CLAIMANT WHO IS DISCHARGED BECAUSE OF AN ABSENCE OR FAILURE TO GIVE NOTICE DUE TO INCARCERATION IS CONSIDERED TO HAVE BEEN DISCHARGED FOR NON-DISQUALIFYING REASONS AND THE EMPLOYER IS SUBJECT TO CHARGES WHEN:

A HIS ABSENCE WAS DUE TO INCARCERATION FOR A FIRST OFFENSE AND PROPER NOTICE OF HIS ABSENCE WAS FURNISHED TO THE EMPLOYER; OR

SLIP OPINION JANUARY 20, 1981

B HIS ABSENCE WAS DUE TO INCARCERATION FOR A FIRST OFFENSE AND HE WAS UNABLE BECAUSE OF CIRCUMSTANCES BEYOND HIS CONTROL TO FURNISH NOTICE OF HIS ABSENCE.

3 IF A CLAIMANT WAS DISCHARGED BECAUSE OF THE OFFENSE WHICH CAUSED HIS INCARCERATION THE DETERMINATION SHOULD BE BASED ON RULE R6-3-51490, "VIOLATION OF LAW."

THE EVIDENCE WAS UNDISPUTED THAT APPELLEE DID PROPERLY NOTIFY HIS EMPLOYER, AN ADVANCE OF THE SHIFT, THAT HE WOULD BE ABSENT DUE TO INCARCERATION; THAT APPELLEE COULD NOT HAVE AVOIDED HIS INCARCERATION BY THE PAYMENT OF A FINE; AND THAT HE WAS NOT INCARCERATED FOR A PERIOD IN EXCESS OF TWENTY-FOUR HOURS BUT REPORTED FOR WORK ON THE NEXT SHIFT. HOWEVER, APPELLANT ARGUES THAT THE EMPLOYEE DID NOT SHOW THAT THIS WAS THE FIRST INCARCERATION WHILE WORKING FOR THIS EMPLOYER AND THAT IT WAS THE EMPLOYEE'S BURDEN TO SHOW THAT HIS ABSENCE DUE TO INCARCERATION WAS NOT DISQUALIFYING. WE DO NOT AGREE.

WHILE A CLAIMANT GENERALLY HAS THE BURDEN OF SHOWING THAT HE IS ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS, THAT RULE DOES NOT APPLY WHEN THE EMPLOYER HAS DISCHARGED THE CLAIMANT FOR ALLEGED MISCONDUCT IN CONNECTION WITH WORK. IN SUCH A CASE, THE EMPLOYER BEARS THE BURDEN OF SHOWING THAT THE CLAIMANT WAS DISCHARGED FOR REASONS THAT SHOULD DISQUALIFY HIM FOR UNEMPLOYMENT BENEFITS.

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~~ARIZONA DEPARTMENT OF ECONOMIC SECURITY V. MAGNA COPPER CO., 125 ARIZ. 389, 609 P.2d 1089 (APP. 1980) BENEFIT POLICY RULE A.C.R.R. R6-3-51190 PROVIDES IN PERTINENT PART:~~

~~B. BURDEN OF PROOF AND PRESUMPTION (MISCONDUCT-190.1)~~

~~2. THE BURDEN OF PROOF RESTS UPON THE INDIVIDUAL WHO MAKES A STATEMENT.~~

~~B. WHEN A DISCHARGE HAS BEEN ESTABLISHED, THE BURDEN OF PROOF RESTS ON THE EMPLOYER TO SHOW THAT IT WAS FOR DISQUALIFYING REASONS. THIS BURDEN MAY BE DISCHARGED BY AN ADMISSION BY THE CLAIMANT, OR HIS FAILURE OR REFUSAL TO DENY THE CHARGE WHEN Faced WITH IT.~~

~~C. AN EMPLOYER WHO DISCHARGES A WORKER AND CHARGES MISCONDUCT BUT REFUSES OR FAILS TO BRING FORTH ANY EVIDENCE TO DISPUTE A DENIAL BY THE CLAIMANT DOES NOT DISCHARGE THE BURDEN OF PROOF. IT IS IMPORTANT TO KEEP IN MIND THAT HERE ALLEGATIONS OF MISCONDUCT ARE NOT SUFFICIENT TO SUSTAIN SUCH A CHARGE.~~

~~IN THIS CASE IT WAS THE BURDEN OF APPELLANT EMPLOYER TO SHOW THAT APPELLEE WAS DISCHARGED FOR ABSENTEEISM THAT AMOUNTED TO MISCONDUCT. ABSENCE DUE TO INCARCERATION CAN DISQUALIFY AN EMPLOYEE FOR UNEMPLOYMENT BENEFITS UNDER THE CIRCUMSTANCES SET FORTH IN A.C.R.R. R6-3-5115(E). IT WAS, THEREFORE,~~

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~~APPELLANT'S BURDEN TO SHOW THAT THE ABSENCE DUE TO INCARCERATION WAS DISQUALIFYING UNDER THE RULE.~~

~~APPELLANT ALSO ARGUES THAT BY SHOWING A COURSE OF CONDUCT, REPEATED ABSENCES CULMINATING IN THE FINAL ABSENCE DUE TO INCARCERATION, APPELLANT HAS DEMONSTRATED MISCONDUCT IN CONNECTION WITH THE EMPLOYMENT WHICH SHOULD DISQUALIFY APPELLEE FOR BENEFITS.~~

~~REPEATED AND FREQUENT INSTANCES OF ABSENCE FROM WORK OR TRADINESS CONSTITUTE WILFUL OR NEGLIGENT MISCONDUCT CONNECTED WITH THE EMPLOYMENT. A.R.S. § 23-619.01; GARDINER V. ARIZONA DEPARTMENT OF ECONOMIC SECURITY, 1 CA-UB 041 (FILED NOV. 25, 1980). HOWEVER, IN THE INSTANT CASE THE EMPLOYER'S REPRESENTATIVE TESTIFIED THAT THE EMPLOYEE WOULD NOT HAVE BEEN DISCHARGED IF HIS FINAL ABSENCE HAD BEEN EXCUSED, AND THAT IT WAS THE EMPLOYER'S POLICY THAT ABSENCE FOR INCARCERATION IS ALWAYS AN UNEXCUSED ABSENCE. IT CAN BE ARGUED THAT AS A MATTER OF PUBLIC POLICY A.C.R.R. R6-3-5115(E) SHOULD BE AMENDED TO PROVIDE THAT ABSENCE FROM EMPLOYMENT DUE TO ANY LAWFUL PERIOD OF INCARCERATION IN CONNECTION WITH A CRIMINAL CHARGE IS GROUNDS FOR A DISCHARGE OF THE EMPLOYEE FOR MISCONDUCT. WE NEVERTHELESS, ARE REQUIRED TO VIEW THE EVIDENCE IN THE LIGHT OF THE STATUTES AND ADMINISTRATIVE REGULATIONS WHICH HAVE BEEN ADOPTED. IT IS A MATTER FOR THE LEGISLATURE AND THE DEPARTMENT OF ECONOMIC SECURITY TO REVIEW AND TO MAKE ANY CHANGES IN THE EXISTING STATUTES AND REGULATIONS UNDER THE FACTS~~

~~SLIP OPINION JANUARY 20, 1981~~

~~OF THIS CASE AND THE EXISTING REGULATION, THE EMPLOYEE'S INCARCERATION FOR LESS THAN 24 HOURS COUPLED WITH THE PRIOR NOTICE TO THE EMPLOYER, DOES NOT CONSTITUTE GROUNDS FOR DISQUALIFICATION FOR BENEFITS. THE COMPANY POLICY OF THE EMPLOYER DOES NOT CONTROL WHETHER AN ABSENCE IS DISQUALIFYING FOR PURPOSES OF UNEMPLOYMENT INSURANCE BENEFITS. WE STATED IN ARIZONA DEPARTMENT OF ECONOMIC SECURITY V. MAGNA COPPER CO.:~~

~~WE FOR DISCUSSION OF CASES INVOLVING DISCHARGES FOR REASON OF INCARCERATION SEE [1976] 1B UNEMPL. INS. REP. (CCH) P1970: 973 AND ANNOT., 58 A.L.R. 3d 674, 791 (1974). SEE ALSO SHERMAN/BERTRAM, INC. V. CALIFORNIA DEPARTMENT OF EMPLOYMENT, 202 CAL APP 2d 733, 21 CAL Rptr. 130 (1962), HOLDING THAT THE CLAIMANT'S IMPRISONMENT FOR HIS OWN WILFUL AND FELONIOUS ACT WAS TANTAMOUNT TO A VOLUNTARY LEAVING WITHOUT GOOD CAUSE, AND THAT HE WAS NOT "UNEMPLOYED THROUGH NO FAULT OF HIS OWN" SO AS TO BE ENTITLED TO BENEFITS.~~

~~WE ALSO NOTE THAT CLAIMANT WAS DISCHARGED BECAUSE OF HIS FIVE UNEXCUSED ABSENCES WITHIN SIX MONTHS WHICH CONSTITUTED A VIOLATION OF COMPANY RULES. WHILE THIS COULD BE SUFFICIENT BASIS TO DISCHARGE CLAIMANT INsofar AS LABOR RELATIONS AND PERHAPS OTHER THINGS ARE CONCERNED, IT IS INSUFFICIENT AS A MATTER OF LAW FOR DISQUALIFICATION FROM UNEMPLOYMENT INSURANCE BENEFITS.~~

~~125 ARIZ. AT 394, 609 P.2d AT 1094.~~

~~SLIP OPINION JANUARY 20, 1981~~

~~A DISCHARGE FROM EMPLOYMENT MAY BE FOR MISCONDUCT, AND, THEREFORE, DISQUALIFYING IF IT IS FOR AN ALLEGED COMMISSION OF A CRIMINAL OFFENSE UNDER THE CIRCUMSTANCES SET FORTH IN A.C.R.R. R6-3-51490. N3 HOWEVER, THE APPELLANT EMPLOYER HAS NOT ARGUED THAT THE EMPLOYEE WAS DISCHARGED FOR THE ALLEGED COMMISSION OF THE OFFENSE AND THE EMPLOYER'S REPRESENTATIVE STATED AT THE HEARING THAT THE ONLY REASON FOR THE TERMINATION WAS THE EMPLOYEE'S FINAL ABSENCE FROM EMPLOYMENT DUE TO HIS INCARCERATION. THAT FINAL ABSENCE WAS NOT SHOWN TO BE VOLUNTARY, NOR HAVE ANY OF THE FACTORS MAKING THE ABSENCE DISQUALIFYING UNDER A.C.R.R. R6-3-5115(E) BEEN SHOWN. THE FINAL ABSENCE WAS NOT, THEREFORE, A PART OF THE PRIOR "COURSE OF CONDUCT" OF VOLUNTARY ABSENTEEISM.~~

~~N3 A.C.R.R. R6-3-51490 PROVIDES IN PART:~~

~~1. DISCHARGE FROM EMPLOYMENT MAY OCCUR BECAUSE OF A WORKER'S ALLEGED VIOLATION OF A LAW, PUBLIC RULE OF CONDUCT, OR REFUSAL TO VIOLATE A LAW OR PUBLIC RULE. THE LAW MAY BE A CIVIL OR CRIMINAL STATUTE, A PUBLIC RULE OF A DULY QUALIFIED COMMISSION, OR OTHER AUTHORITY WHICH REGULATES THE EMPLOYER'S OPERATION, E.G., INTERSTATE COMMERCE COMMISSION, MOTOR VEHICLE DIVISION, CORPORATION COMMISSION, ETC.~~

~~SLIP OPINION JANUARY 20, 1981~~

~~3. WHEN THE DISCHARGE IS BECAUSE OF AN ALLEGED VIOLATION OF LAW OR PUBLIC RULE, THE FOLLOWING FACTORS MUST BE CONSIDERED:~~

~~A. IS THE ACT OF WHICH THE CLAIMANT IS ACCUSED, OR THE RESULTS OF OR POTENTIAL RESULT OF SUCH ACT CONNECTED WITH THE WORK?~~

~~B. DID THE DISCHARGE RESULT FROM THE VIOLATION, RELATED ACTS, OR A COMBINATION OF THE VIOLATION AND RELATED ACTS?~~

~~C. DOES THE SERIOUSNESS OF THE ACT WARRANT A FINDING OF MISCONDUCT?~~

~~4. AN ACT COMMITTED ON THE EMPLOYER'S PREMISES DURING DUTY HOURS USUALLY IS CONNECTED WITH THE WORK. AN ACT COMMITTED DURING OFF-DUTY HOURS MAY BE CONNECTED WITH THE WORK IF COMMITTED ON THE EMPLOYER'S PREMISES. AN ACT COMMITTED DURING OFF-DUTY HOURS AND AWAY FROM THE EMPLOYER'S PREMISES MAY BE CONNECTED WITH THE WORK IF IT COULD REASONABLY BE EXPECTED TO HAVE A SUBSTANTIAL ADVERSE EFFECT ON THE EMPLOYER'S INTEREST, SUCH AS: HIS REPUTATION, THE PUBLIC'S TRUST, ETC. THEREFORE, WHEN A WORKER'S ACT BEARS SUCH A RELATIONSHIP TO HIS JOB AS TO RENDER HIM UNSUITABLE FOR HIS WORK, HIS ACT WOULD BE CONNECTED WITH THE WORK. SEE R6-3-5185.~~

~~SLIP OPINION JANUARY 20, 1981~~

~~FOR THE REASONS STATED ABOVE, THE DECISION OF THE UNEMPLOYMENT INSURANCE APPEALS BOARD IS AFFIRMED.~~

~~SANDRA D. O'CONNOR, JUDGE~~

~~CONCURRING~~

~~WACK L. OGG, PRESIDING JUDGE~~

~~DEPARTMENT C~~

~~LAURANCE T. WREN, JUDGE~~

STATE OF ARIZONA; APPELLEE, V. ELDON EVERETT SCHOONOVER,
APPELLANT.

No. 1 CA-CR-4688

COURT OF APPEALS OF ARIZONA, DIVISION ONE, DEPARTMENT C

SLIP OPINION

JANUARY 29, 1981

AN APPEAL FROM THE SUPERIOR COURT OF MARICOPA COUNTY

CAUSE NO. CR-107908

THE HONORABLE ROBERT L. MYERS, JUDGE

AFFIRMED

ROBERT K. CORBIN, THE ATTORNEY GENERAL, BY WILLIAM J. SCHAFER III, CHIEF COUNSEL, CRIMINAL DIVISION AND BARBARA A. JARRETT, ASSISTANT ATTORNEY GENERAL, ATTORNEYS FOR APPELLEE, PHOENIX.

SLIP OPINION JANUARY 29, 1981

ROSS P. LEE, MARICOPA COUNTY PUBLIC DEFENDER, BY JAMES L. EDGAR, DEPUTY PUBLIC DEFENDER, ATTORNEYS FOR APPELLANT, PHOENIX.

D'CONNOR

D'CONNOR, JUDGE

PURSUANT TO THE TERMS OF A WRITTEN PLEA AGREEMENT, ELDON EVERETT SCHOONOVER PLED GUILTY TO A CHARGE OF SEXUAL ASSAULT, A CLASS 2 FELONY, IN VIOLATION OF A.R.S. §§ 13-1401, 13-1406, 13-701, 13-702, AND 13-801. #1 THE OFFENSE WAS BASED ON CONDUCT OCCURRING WITH SCHOONOVER'S FIFTEEN-YEAR-OLD DAUGHTER. FOLLOWING ENTRY OF JUDGMENT OF GUILT, HE WAS SENTENCED TO THE PRESUMPTIVE TERM OF SEVEN YEARS IMPRISONMENT. WE HAVE JURISDICTION OF HIS APPEAL FROM THE JUDGMENT OF CONVICTION AND SENTENCE. A.R.S. §§ 13-4031, 13-4033.

#1 REFERENCES ARE THE STATUTORY DESIGNATIONS UNDER THE NEW ARIZONA CRIMINAL CODE, EFFECTIVE OCTOBER 1, 1978.

APPELLANT FIRST CONTENTS THAT THE TRIAL COURT ERRED IN DENYING HIS MOTION TO DEPOSE CERTAIN WITNESSES WHO HAD REFUSED TO SPEAK WITH HIM OR HIS ATTORNEY PRIOR TO THE SENTENCING HEARING. THE STATE VIGOROUSLY ARGUES THAT THE DISCOVERY PROVISIONS OF RULE 15.3, RULES OF CRIMINAL PROCEDURE, AUTHORIZE ONLY PRETRIAL

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DEPOSITIONS, AND NOT DEPOSITIONS PRIOR TO THE SENTENCING HEARING. WHILE WE DISAGREE WITH THE STATE'S CONTENTION, WE FIND NO VIOLATION OF APPELLANT'S RIGHT TO DISCOVERY IN THIS SITUATION.

DURING THE PREPARATION OF THE PRESENTENCE REPORT IN THE CASE, APPELLANT'S WIFE, THE MOTHER OF THE VICTIM, GAVE MANY STATEMENTS TO THE ADULT PROBATION DEPARTMENT OFFICER WHICH CAN ONLY BE DESCRIBED AS DAMAGING TO APPELLANT'S CHANCES FOR PROBATION. BASICALLY, SHE STATED THAT BOTH SHE AND HER CHILDREN HAD BEEN LIVING IN FEAR OF THEIR LIVES FROM THE DEFENDANT BECAUSE HE HAD A "QUICK TEMPER" AND HAD BOTH PHYSICALLY AND VERBALLY ABUSED THEM FOR MANY YEARS. SHE EXPRESSED GREAT FEAR FOR HERSELF AND HER CHILDREN IN THE EVENT THAT APPELLANT WOULD BE GRANTED PROBATION. SHE REQUESTED MAXIMUM INCARCERATION FOR APPELLANT.

PRIOR TO THE SENTENCING HEARING, BUT AFTER ENTRY OF APPELLANT'S PLEA, HIS ATTORNEY FILED A MOTION FOR ORAL DEPOSITION, SEEKING A COURT ORDER TO ALLOW HIM TO TAKE THE DEPOSITION OF BOTH APPELLANT'S WIFE AND HIS OLDEST DAUGHTER, A SISTER OF THE VICTIM. THE MOTION CONTAINED THE FOLLOWING ALLEGATIONS:

COUNSEL ADVISALS [sic] THAT THE ABOVE WITNESSES ARE MATERIAL TO COUNSEL'S PREPARATION FOR DEFENDANT'S PRESENTENCING HEARING IN THAT [APPELLANT'S WIFE] HAS PERSONALLY WRITTEN THE COURT #2 AND THE MARICOPA COUNTY ADULT PROBATION OFFICE AND IN DOING SO HAS MADE MANY REPRESENTATIONS THAT THE DEFENSE CONTENTS ARE

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UNTRUTHFULLY STATED AND MISLEADING TO THE COURT. FURTHER THAT THE [SISTER OF VICTIM] IS THE OLDEST DAUGHTER OF THE DEFENDANT AND HAS LIVED IN THE SAME HOUSEHOLD WITH THE DEFENDANT AND [APPELLANT'S WIFE] AND CAN IMPERCH THE MANY MISREPRESENTATIONS MADE BY [APPELLANT'S WIFE].

N2 ANY LETTERS FROM APPELLANT'S WIFE TO THE TRIAL COURT HAVE NOT BEEN INCLUDED IN THE RECORD BEFORE US ON APPEAL, AND THEREFORE HAVE NOT BEEN CONSIDERED IN OUR DISPOSITION.

COUNSEL FURTHER AVOWALS [SIC] THAT [VICTIM'S SISTER] WAS NOT A WITNESS AT DEFENDANT'S PRELIMINARY HEARING AND THAT [APPELLANT'S WIFE] TESTIFIED AT THE PRELIMINARY HEARING ONLY FOR THE LIMITED PURPOSE OF ESTABLISHING THE LEGAL COMPETENCY OF ANOTHER DAUGHTER AND VICTIM IN THIS MATTER. COUNSEL FURTHER AVOWALS [SIC] BY ATTACHED AFFIDAVIT THAT NEITHER WITNESS WILL COOPERATE IN GRANTING A PERSONAL INTERVIEW.

THE STATE FILED A RESPONSE TO THE MOTION, CONTENDING THAT THE CRIMINAL RULES ALLOWING FOR ORAL DEPOSITION APPLIED ONLY TO PRETRIAL PROCEEDINGS, AND WERE NOT APPLICABLE TO PREPARATION FOR A SENTENCING HEARING. THE TRIAL COURT DENIED THE MOTION OF THE DEFENSE BY A MINUTE ENTRY, WITHOUT COMMENT.

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RULE 15.1, ARIZONA RULES OF CRIMINAL PROCEDURE, PROVIDES IN PART AS FOLLOWS:

~~E. DISCLOSURE BY ORDER OF THE COURT. UPON MOTION OF THE DEFENDANT SHOWING THAT HE HAS SUBSTANTIAL NEED IN THE PREPARATION OF HIS CASE FOR ADDITIONAL MATERIAL OR INFORMATION NOT OTHERWISE COVERED BY RULE 15.1, AND THAT HE IS UNABLE WITHOUT UNDUE HARDSHIP TO OBTAIN THE SUBSTANTIAL EQUIVALENT BY OTHER MEANS, THE COURT IN ITS DISCRETION MAY ORDER ANY PERSON TO MAKE IT AVAILABLE TO HIM. THE COURT MAY, UPON THE REQUEST OF ANY PERSON AFFECTED BY THE ORDER, VACATE OR MODIFY THE ORDER IF COMPLIANCE WOULD BE UNREASONABLE OR OPPRESSIVE.~~

RULE 15.3, ARIZONA RULES OF CRIMINAL PROCEDURE, PROVIDES:

~~A. AVAILABILITY. UPON MOTION OF ANY PARTY OR A WITNESS, THE COURT MAY IN ITS DISCRETION ORDER THE EXAMINATION OF ANY PERSON EXCEPT THE DEFENDANT UPON ORAL DEPOSITION UNDER THE FOLLOWING CIRCUMSTANCES:~~

~~(2) A PARTY SHOWS THAT THE PERSON'S TESTIMONY IS MATERIAL TO THE CASE OR NECESSARY ADEQUATELY TO PREPARE A DEFENSE OR INVESTIGATE THE OFFENSE, THAT HE WAS NOT A WITNESS AT THE PRELIMINARY HEARING, AND THAT HE WILL NOT COOPERATE IN GRANTING A PERSONAL INTERVIEW. [EMPHASIS ADDED]~~

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RULE 26.8, ARIZONA RULES OF CRIMINAL PROCEDURE, PROVIDES:

~~A. NOTICE OF OBJECTIONS. PRIOR TO THE DAY OF THE PRE-SENTENCING HEARING, EACH PARTY SHALL NOTIFY THE COURT AND ALL OTHER PARTIES OF ANY OBJECTION IT HAS TO THE CONTENTS OF ANY REPORT.~~

~~B. SPECIAL DUTY OF THE PROSECUTOR. THE PROSECUTOR SHALL DISCLOSE ANY INFORMATION IN HIS POSSESSION OR CONTROL, NOT ALREADY DISCLOSED, WHICH WOULD TEND TO REDUCE THE PUNISHMENT TO BE IMPOSED.~~

~~COMMENT~~

~~THIS RULE EXTENDS THE POLICY OF DISCOVERY OF RULE 15 TO THE PRE-SENTENCING HEARING.~~

~~WE BELIEVE THAT THESE RULES AND COMMENTS THERETO, WHEN READ IN CONJUNCTION, INDICATE THAT THE DISCRETION GRANTED TO THE TRIAL COURT UNDER RULE 15.3 TO ORDER DEPOSITIONS OF WITNESSES SHOULD, IN APPROPRIATE CASES, BE EXERCISED TO GRANT DISCOVERY FOR A CRIMINAL DEFENDANT PRIOR TO THE SENTENCING HEARING, AS WELL AS PRIOR TO THE TRIAL.~~

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IN STATE V. GREEN, 117 ARIZ. 92, 570 P.2d 1265 (APP. 1977), MODIFIED IN PART 116 ARIZ. 587, 570 P.2d 755 (1977), IT WAS RECOGNIZED THAT THE RIGHT TO CONFRONT AND CROSS-EXAMINE TRIAL WITNESSES GRANTED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION DO NOT APPLY AT A SENTENCING HEARING, AND THAT RELIABLE HEARSAY MAY BE PROPERLY CONSIDERED. SEE WILLIAMS V. PEOPLE OF STATE OF NEW YORK, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949). IN STATE V. MAXWELL, 116 ARIZ. 564, 570 P.2d 506 (APP. 1977), IT WAS HELD THAT A DEFENDANT HAS NO FUNDAMENTAL RIGHT TO CROSS-EXAMINE A PROBATION OFFICER WHO PREPARED THE PRESENTENCE REPORT. THEREFORE, IN ORDER TO SECURE A REVERSAL FOR FAILURE TO ALLOW SUCH CROSS-EXAMINATION, AN APPELLANT MUST SHOW THAT THE QUESTION WAS PRESERVED FOR APPEAL AND THAT THE REFUSAL TO ALLOW SUCH CROSS-EXAMINATION WAS PREJUDICIAL. SEE ALSO STATE V. NICHOLS, 24 ARIZ. APP. 329, 538 P.2d 416 (1975). FINALLY, IN STATE V. DONAHOE, 118 ARIZ. 37, 574 P.2d 830 (APP. 1977), IT WAS HELD THAT THE RIGHT TO DISCOVERY MAY ATTACH TO A SENTENCING HEARING. WHILE FOLLOWING THE GENERAL RULE THAT THE RIGHTS OF CONFRONTATION AND CROSS-EXAMINATION GENERALLY DO NOT APPLY TO A SENTENCING HEARING, THE COURT IN DONAHOE DISTINGUISHED SITUATIONS WHERE THE STATE ACTUALLY CALLS A WITNESS TO TESTIFY AT THE SENTENCING HEARING. UNDER SUCH CIRCUMSTANCES THE RIGHT TO CROSS-EXAMINATION EXISTS AND IT MAY NOT BE UNDULY RESTRICTED. ALSO, THE COURT INDICATED THE DEFENSE HAD A RIGHT TO DISCOVER THE WRITTEN REPORT OF A POLICE WITNESS AT THE SENTENCING HEARING TO GUARANTEE EFFECTIVE CROSS-EXAMINATION. THE COURT NOTED THAT WHILE THE TRIAL JUDGE NEED NOT FOLLOW STRICT RULES OF EVIDENCE

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AT SENTENCING HEARINGS. SUCH HEARINGS MUST BE CONDUCTED CONSISTENT WITH BASIC CONCEPTS OF FAIRNESS, JUSTICE AND IMPARTIALITY. ID. AT 46, 574 P.2d AT 839.

ALTHOUGH THE DEFENDANT MAY REQUIRE SOME PRESENTENCE DISCOVERY, IT WAS ALSO BEEN HELD IN STATE EX REL. BERGER V. SUPERIOR COURT IN AND FOR MARICOPA COUNTY, 21 ARIZ. APP. 320, 519 P.2d 73 (1974) THAT

RULE 15.3(A)(2) REQUIRES SOME SHOWING BY THE PARTIES SEEKING DISCOVERY THAT THE PERSON'S TESTIMONY TO BE DEPOSED "IS MATERIAL TO THE CASE OR NECESSARY ADEQUATELY TO PREPARE A DEFENSE OR INVESTIGATE THE OFFENSE." THUS THE RULE WAS NOT DESIGNED TO PERMIT A TOUR OF INVESTIGATION IN WISHFUL ANTICIPATION THAT HELPFUL EVIDENCE WILL APPEAR. ID. AT 323, 519 P.2d AT 76.

THE ORDERING OF DEPOSITIONS UNDER RULE 15.3 IS DISCRETIONARY WITH THE TRIAL COURT. STATE V. MONCAYO, 115 ARIZ. 274, 564 P.2d 1241 (1977). WE DO NOT FIND THAT THE TRIAL COURT ABUSED ITS DISCRETION IN THIS CASE. THE APPELLANT'S "MOTION FOR ORAL DEPOSITION" MERELY CONTENDED THAT THE DEFENSE DISAGREED WITH STATEMENTS MADE BY APPELLANT'S WIFE AND THAT ONE OF APPELLANT'S DAUGHTERS COULD IMPEACH THOSE STATEMENTS MADE BY THE WIFE. IT DID NOT SHOW THE BASIS FOR THAT DISAGREEMENT NOR ANY WAYS IN WHICH AN ORAL DEPOSITION WOULD CLARIFY IT. THE TWO WITNESSES IN QUESTION DID NOT TESTIFY AT THE SENTENCING HEARING FOR THE STATE.

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NOR DID APPELLANT CHOOSE TO CALL THEM TO TESTIFY UNDER OATH. RULE 26.7(B), ARIZONA RULES OF CRIMINAL PROCEDURE, PROVIDES AS FOLLOWS:

NATURE, TIME AND PURPOSE OF THE PRE-SENTENCING HEARING. A PRE-SENTENCING HEARING SHALL NOT BE HELD UNTIL THE PARTIES HAVE HAD AN OPPORTUNITY TO EXAMINE ANY REPORTS PREPARED UNDER RULES 26.4 AND 26.5. AT THE HEARING ANY PARTY MAY INTRODUCE ANY RELIABLE, RELEVANT EVIDENCE, INCLUDING HEARSAY, IN ORDER TO SHOW AGGRAVATING OR MITIGATING CIRCUMSTANCES, TO SHOW WHY SENTENCE SHOULD NOT BE IMPOSED, OR TO CORRECT OR AMPLIFY THE PRE-SENTENCE DIAGNOSTIC OR MENTAL HEALTH REPORTS. THE HEARING SHALL BE HELD IN OPEN COURT AND A VERBATIM RECORD OF THE PROCEEDINGS MADE. THE APPELLANT TOOK ADVANTAGE OF THIS PROCEDURE, CALLING SEVERAL WITNESSES WHO TESTIFIED TO HIS PRIOR GOOD CHARACTER AND CONDUCT AS A FAMILY MAN. THIS TESTIMONY AS TO APPELLANT'S GOOD RELATIONSHIP WITH HIS FAMILY WAS USED TO REBUT THE HEARSAY FROM HIS FAMILY FOUND IN THE PRESENTENCE REPORT.

FINALLY, WE NOTE THAT APPELLANT, WHO HAD COMMITTED A SERIOUS OFFENSE AGAINST HIS OWN DAUGHTER, AND WHO HAD A PRIOR FELONY CONVICTION AND SEVERAL MISDEMEANOR CONVICTIONS WAS SENTENCED TO THE PRESUMPTIVE TERM. THE APPELLANT HAS NOT INDICATED HOW HE WAS PREJUDICED BY THE DENIAL OF THE RIGHT TO DEPOSE HIS WIFE AND DAUGHTER. HE HAS NOT EVEN IDENTIFIED PARTICULAR STATEMENTS OF HIS WIFE WHICH HE BELIEVED COULD BE IMPEACHED. THEREFORE, EVEN IF THE TRIAL COURT HAD

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ERRED IN DENYING THE TAKING OF A DEPOSITION, IT WOULD BE DIFFICULT TO FIND THAT APPELLANT HAS SUFFERED PREJUDICE. WE FIND NO ERROR.

APPELLANT'S SECOND AND FINAL CONTENTION IS THAT THE TRIAL COURT ERRED IN FAILING TO ADVISE HIM OF THE "CONSTITUTIONAL RIGHTS" WHICH HE WAIVED BY PLEADING GUILTY, AS REQUIRED BY RULE 17.2(C). HE POINTS SPECIFICALLY TO THE FACT THAT HE WAS NOT ORALLY ADVISED THAT HE WAS GIVING UP THE RIGHT TO HAVE THE STATE SECURE A UNANIMOUS JURY VERDICT OF GUILT AND THE RIGHT TO HAVE THE PROSECUTION PROVE HIM GUILTY BEYOND A REASONABLE DOUBT.

RULE 17.2, ARIZONA RULES OF CRIMINAL PROCEDURE, PROVIDES AS FOLLOWS:

BEFORE ACCEPTING A PLEA OF GUILTY OR NO CONTEST, THE COURT SHALL ADDRESS THE DEFENDANT PERSONALLY IN OPEN COURT, INFORMING HIM OF AND DETERMINING THAT HE UNDERSTANDS THE FOLLOWING:

C. THE CONSTITUTIONAL RIGHTS WHICH HE FOREGOES BY PLEADING GUILTY OR NO CONTEST, INCLUDING HIS RIGHT TO COUNSEL IF HE IS NOT REPRESENTED BY COUNSEL;

THE "CONSTITUTIONAL RIGHTS" MENTIONED IN THE RULE ARE REFERENCES TO THE REQUIREMENTS OF *BOYKIN V. ALABAMA*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). UNDER *BOYKIN*, A CRIMINAL DEFENDANT NEED BE INFORMED OF ONLY THREE

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RIGHTS WHEN ENTERING HIS PLEA, NAMELY, THE PRIVILEGE AGAINST SELF-INCRIMINATION, THE RIGHT TO A JURY TRIAL, AND THE RIGHT TO CONFRONT HIS ACCUSERS. THEREFORE, THESE ARE THE ONLY THREE RIGHTS WHICH MUST BE EXPLAINED IN ORDER TO INSURE COMPLIANCE WITH RULE 17.2(C). *STATE V. TIZNADO*, 112 ARIZ. 156, 540 P.2d 122 (1975); *STATE V. MILLER*, 110 ARIZ. 304, 518 P.2d 127 (1974); *STATE V. ARANDA*, 118 ARIZ. 21, 574 P.2d 489 (APP. 1978).

WITH REFERENCE TO THE *BOYKIN* RIGHTS, ALL OF THEM WERE SET FORTH IN THE WRITTEN PLEA AGREEMENT WHICH WAS SIGNED BY DEFENDANT, WHICH HE ACKNOWLEDGED READING, AND WHICH HE SAID THAT HIS ATTORNEY EXPLAINED TO HIM. THE TRIAL JUDGE QUESTIONED APPELLANT CONCERNING HIS PRIVILEGE NOT TO TESTIFY AND TO REMAIN SILENT, HIS RIGHT TO A TRIAL BY JURY, HIS RIGHT TO BE REPRESENTED BY COUNSEL AT TRIAL, AND HIS RIGHT TO CONFRONT AND CROSS-EXAMINE ANY WITNESSES AGAINST HIM. THE APPELLANT STATED HE UNDERSTOOD HIS RIGHTS AND HAD AGREED TO GIVE THEM UP IN THE PLEA AGREEMENT.

HAVING FOUND NO ERROR, WE AFFIRM THE JUDGMENT OF CONVICTION AND THE SENTENCE.
SANDRA D. O'CONNOR, JUDGE
CONCURRING
JACK L. OGG, PRESIDING JUDGE
DEPARTMENT C
LAURANCE T. WREN, JUDGE

LEVEL 1 - 3 OF 28 CASES

STATE OF ARIZONA, APPELLEE, v. GAIL (TOBY) MORGAN,
APPELLANT

No. 1 CA-CR 4474

COURT OF APPEALS OF ARIZONA, DIVISION ONE DEPARTMENT C

SLIP OPINION

FEBRUARY 10, 1981

AN APPEAL FROM THE SUPERIOR COURT OF MARICOPA COUNTY

CAUSE No. CR-107117

THE HONORABLE JOHN H. SEIDEL, JUDGE

AFFIRMED

ROBERT K. CORBIN, THE ATTORNEY GENERAL, BY: WILLIAM J. SCHAFER III, CHIEF
COUNSEL, CRIMINAL DIVISION, BARBARA A. JARRETT, ASSISTANT ATTORNEY GENERAL,
ATTORNEYS FOR APPELLEE, PHOENIX

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THEODORE C. JARVI, ATTORNEY FOR APPELLANT, SCOTTSDALE

O'CONNOR

O'CONNOR, JUDGE

APPELLANT WAS CONVICTED OF ONE COURT OF ASSAULT WITH A DEADLY WEAPON OR
DANGEROUS INSTRUMENT IN VIOLATION OF A.R.S. 13-1203(A)(2) AND 13-1204(A)(2)
AND (B), FOLLOWING A TRIAL BY JURY. SHE WAS SENTENCED TO SERVE FIVE YEARS IN
THE ARIZONA STATE PRISON. SHE TIMELY FILED HER NOTICE OF APPEAL AND RAISES FIVE
ISSUES FOR OUR CONSIDERATION: 1) WHETHER SHE WAS ENTITLED TO INSTRUCTIONS ON THE
OFFENSES OF THREATENING OR INTIMIDATING, AND ENDANGERMENT, AS LESSER INCLUDED
OFFENSES OF ASSAULT; 2) WHETHER SHE WAS DENIED A SPEEDY TRIAL; 3) WHETHER THE
PROSECUTOR IMPROPERLY COMMENTED UPON HER REFUSAL TO TESTIFY IN CLOSING ARGUMENT;
4) WHETHER THE PROSECUTOR IMPROPERLY MISSTATED THE EVIDENCE DURING HIS CLOSING
ARGUMENT AND THE COURT ERRED IN FAILING TO PROVIDE A CUPATIVE INSTRUCTION TO THE
JURY; 5) WHETHER THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE A PISTOL AND
BULLETS FOUND AT THE SCENE OF THE OFFENSE.

THE TRIAL TESTIMONY REVEALS THAT ON MAY 5, 1979, PAT PIRKLE, A WITNESS IN THE
CASE, VISITED JEANETTE SCHUERMAN. MS. SCHUERMAN WAS A FRIEND OF APPELLANT AND
WAS LIVING IN A RENTAL UNIT ATTACHED TO APPELLANT'S HOME. WHEN MS. PIRKLE

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ARRIVED AT MS. SCHUERMAN'S RESIDENCE, APPELLANT WAS VISITING WITH MS. SCHUERMAN.
SHE LEFT SOON AFTER MS. PIRKLE'S ARRIVAL. SOMETIME AFTER MIDNIGHT, AS MS.
PIRKLE AND MS. SCHUERMAN WERE WATCHING TELEVISION, MS. PIRKLE HEARD MS.
SCHUERMAN'S DOG SUDDENLY BEGIN BARKING IN THE BEDROOM. MS. PIRKLE WENT TO THE
BEDROOM WINDOW AND OBSERVED A FIGURE STANDING OUTSIDE. AS THE FIGURE REVEALED
ITSELF, MS. PIRKLE COULD SEE THAT IT WAS THE APPELLANT AND THAT SHE WAS ARMED
WITH A GUN. APPELLANT DEMANDED TO SPEAK TO MS. SCHUERMAN. MR. PIRKLE TESTIFIED
AT TRIAL THAT SHE REFUSED TO ALLOW MS. SCHUERMAN TO COME TO THE WINDOW AND THAT
SHE CONTINUED TO SPEAK WITH APPELLANT FOR APPROXIMATELY 15 MINUTES. MS. PIRKLE
FURTHER TESTIFIED THAT APPELLANT THREATENED TO USE THE GUN UNLESS MS. SCHUERMAN
CAME TO THE WINDOW. AFTER DENYING APPELLANT'S DEMANDS, MS. PIRKLE TURNED FROM
THE WINDOW AND TOOK APPROXIMATELY TWO STEPS TO THE DOORWAY OF THE ROOM WHEN SHE
HEARD A GUN BEING FIRED.

MS. PIRKLE AND MS. SCHUERMAN CALLED THE POLICE, WHO INVESTIGATED THE SCENE
AND DISCOVERED A BULLET HOLE THROUGH THE WINDOW AND SCREEN NEAR THE PLACE
APPELLANT HAD BEEN STANDING. ACCORDING TO THE INVESTIGATING OFFICER'S TESTIMONY
AT TRIAL, A BULLET APPARENTLY ENTERED THROUGH THE WINDOW IN FRONT OF WHICH
APPELLANT WAS STANDING AND EXITED THROUGH A SECOND WINDOW IN THE BEDROOM. THE
OFFICERS APPREHENDED APPELLANT RIDING A BICYCLE IN FRONT OF HER HOME. THEY ALSO
FOUND A PISTOL WRAPPED IN A TOWEL IN A BOX ON A CLOSET SHELF IN A BEDROOM OF THE
HOUSE WHERE APPELLANT WAS LIVING. FINALLY, APPELLANT TOLD THE OFFICERS WHERE TO

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~~FIND SOME BULLETS WHICH SHE HAD DROPPED AND WHICH WERE IDENTIFIED AS BEING OF THE SAME CALIBER AS THE GUN FOUND IN THE BEDROOM OF THE RESIDENCE.~~

~~INSTRUCTIONS ON THREATENING OR INTIMIDATING AND ENDANGERMENT~~

~~FOR APPELLANT'S FIRST CLAIM OF ERROR, SHE ARGUES THAT THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT THE OFFENSES OF THREATENING OR INTIMIDATING (A.R.S. § 13-1202) AND ENDANGERMENT (A.R.S. § 13-1201) ARE LESSER INCLUDED OFFENSES OF AGGRAVATED ASSAULT, AS CONTENDED BY APPELLANT AT TRIAL. THE TRIAL COURT REFUSED TO GIVE EITHER OF APPELLANT'S REQUESTED INSTRUCTIONS AND GAVE ONLY AN INSTRUCTION ON SIMPLE ASSAULT AS A LESSER INCLUDED OFFENSE OF AGGRAVATED ASSAULT.~~

~~OUR DISCUSSION OF THIS ISSUE AND OUR HOLDING HEREIN IS LIMITED SOLELY TO THE OFFENSE CHARGED IN THIS CASE, NAMELY AGGRAVATED ASSAULT IN VIOLATION OF A.R.S. § 13-1204(A)(2). WE DO NOT ADDRESS THE ISSUE OF WHETHER ENDANGERMENT OR THREATENING OR INTIMIDATING IS A LESSER INCLUDED OFFENSE OF EITHER SIMPLE ASSAULT OR AGGRAVATED ASSAULT AS DEFINED BY ANY OF THE REMAINING PROVISIONS OF A.R.S. § 13-1203 OR A.R.S. § 13-1204.~~

~~A CRIMINAL DEFENDANT IS ENTITLED TO INSTRUCTIONS ON ANY LESSER INCLUDED OFFENSE OF THE OFFENSE CHARGED WHERE THE EVIDENCE SUPPORTS THE GIVING OF SUCH AN~~

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~~INSTRUCTION. STATE V. DUGAN, 125 ARIZ. 194, 608 P.2d 771 (1980). "AN OFFENSE IS LESSER INCLUDED WHEN THE GREATER OFFENSE CANNOT BE COMMITTED WITHOUT NECESSARILY COMMITTING THE LESSER OFFENSE." Id. at 195, 608 P.2d at 772. Thus, IF THE OFFENSE ALLEGED TO BE A LESSER OFFENSE HAS AN ELEMENT IN ADDITION TO AND SEPARATE FROM THE ELEMENTS OF THE OFFENSE WHICH IS ASSERTED TO BE GREATER, IT IS NOT A LESSER INCLUDED OFFENSE.~~

~~THE QUESTION OF WHETHER THE OFFENSES OF THREATENING OR INTIMIDATING AND ENDANGERMENT ARE LESSER INCLUDED OFFENSES OF AGGRAVATED ASSAULT IS ONE OF FIRST IMPRESSION IN ARIZONA. THE NEW STATUTES DEFINING THOSE OFFENSES ARE BASED ON THE MODEL PENAL CODE §§ 211.2 THROUGH 211.3. A NUMBER OF STATES HAVE SIMILAR STATUTES. E.G., OREGON REVISED STATUTES § 163.195; NEW YORK PENAL LAW § 120.20; TEXAS PENAL CODE § 22.05. HOWEVER, THERE ARE FEW CASES FROM OTHER JURISDICTIONS ADDRESSING THE ISSUE. SEE, HOWEVER, PEOPLE V. MILLER, 69 MISC. 2d 722, 330 N.Y.S. 2d 925 (1972); GALLEGOS V. STATE, 548 S.W.2d 50 (TEX. CR. APP. 1977).~~

~~ENDANGERMENT~~

~~"A PERSON COMMITS ENDANGERMENT BY RECKLESSLY ENDANGERING ANOTHER PERSON WITH THE SUBSTANTIAL RISK OF IMMINENT DEATH OR PHYSICAL INJURY." A.R.S. § 13-1201(A). THE COMMENTS OF THE CRIMINAL CODE COMMISSION INDICATE THAT THE OFFENSE SUPPLEMENTS THE LAW OF CRIMINAL ATTEMPT BY ADDING A PROVISION FOR~~

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~~RECKLESS ACTIONS. ARIZONA REVISED CRIMINAL CODE COMMISSION REPORT AT 134 (1975). THE STATUTE IS DESIGNED TO COVER "SITUATIONS WHERE THE ACTOR'S RECKLESSNESS ENDANGERS ANOTHER'S WELL BEING WITHOUT THE ACTOR TECHNICALLY INTENDING OR KNOWING HE IS DOING SO." R. GERBER, CRIMINAL LAW OF ARIZONA AT 163 (1978). ACCORDING TO THE COMMISSION, CONDUCT PUNISHABLE UNDER THE STATUTE WOULD INCLUDE SUCH ACTIONS AS "RECKLESSLY DISCHARGING FIREARMS IN PUBLIC, POINTING FIREARMS AT OTHERS, OBSTRUCTING PUBLIC HIGHWAYS OR ABANDONING LIFE-THREATENING CONTAINERS WHICH ARE ATTRACTIVE TO CHILDREN." ARIZONA REVISED CRIMINAL CODE COMMISSION REPORT AT 134 (1975). IT IS THUS CLEAR, BOTH FROM A READING OF THE STATUTE AND FROM THE COMMISSION'S COMMENTS, THAT ONE OF THE REQUIRED ELEMENTS OF ENDANGERMENT IS THAT THE VICTIM MUST BE PLACED IN ACTUAL SUBSTANTIAL RISK OF IMMINENT DEATH OR PHYSICAL INJURY. THERE IS NO REQUIREMENT THAT THE VICTIM BE AWARE OF THE CONDUCT OF THE ACTOR.~~

~~THE ELEMENTS OF AGGRAVATED ASSAULT WHICH ARE PERTINENT TO THIS CASE ARE SET FORTH IN A.R.S. § 13-1203(A)(2) AND § 13-1204(A)(2). THEY REQUIRE THAT THE ACTOR INTENTIONALLY PLACE "ANOTHER PERSON IN REASONABLE APPREHENSION OF IMMINENT PHYSICAL INJURY" USING A DEADLY WEAPON OR OTHER DANGEROUS INSTRUMENT. A DEADLY WEAPON MAY BE AN UNLOADED GUN. A.R.S. § 13-105(9) AND (12). AGGRAVATED ASSAULT PURSUANT TO A.R.S. § 13-1204(A)(2) MAY THEREFORE BE COMMITTED BY USING AN UNLOADED GUN AND IT IS EASY TO IMAGINE SITUATIONS IN WHICH THE ASSAULT COULD BE COMMITTED WITHOUT PLACING THE VICTIM IN ACTUAL RISK. THUS, IT IS NOT A~~

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~~NECESSARY ELEMENT OF AGGRAVATED ASSAULT THAT THE VICTIM BE IN ACTUAL SUBSTANTIAL RISK OF IMMINENT DEATH OR PHYSICAL INJURY. ALL THAT IS REQUIRED IS THAT THE VICTIM BE IN REASONABLE APPREHENSION OF PHYSICAL INJURY. ENDANGERMENT IS THEREFORE NOT A LESSER INCLUDED OFFENSE OF AGGRAVATED ASSAULT AS DEFINED IN A.R.S. § 13-1204(A)(2), AND APPELLANT WAS NOT ENTITLED TO AN INSTRUCTION ON THE OFFENSE OF ENDANGERMENT AS A LESSER INCLUDED OFFENSE.~~

~~THEREATENING OR INTIMIDATING~~

~~APPELLANT ARGUES ADDITIONALLY THAT SHE WAS ENTITLED TO A JURY INSTRUCTION ON THE OFFENSE OF THREATENING OR INTIMIDATING IN VIOLATION OF A.R.S. § 13-1202(A)(1) AS A LESSER INCLUDED OFFENSE OF AGGRAVATED ASSAULT. A.R.S. § 13-1202(A)(1) PROVIDES:~~

~~A PERSON COMMITS THREATENING OR INTIMIDATING IF SUCH PERSON WITH THE INTENT TO TERRIFY THREATENS OR INTIMIDATES BY WORD OR CONDUCT: (1) TO CAUSE PHYSICAL INJURY TO ANOTHER PERSON. THE CRIMINAL CODE COMMISSION'S COMMENTS INDICATE THAT THE STATUTE WAS DESIGNED TO PROSCRIBE "THREATS THAT CAUSE SERIOUS ALARM FOR PERSONAL SAFETY" ON THE GROUND THAT "[PEOPLE] WHO ARE ATTEMPTING TO AVOID WHAT THEY BELIEVE TO BE IMMEDIATE SERIOUS HARM MAY OFTEN TAKE ACTION SO PRECIPITOUS AS TO HARM THEMSELVES." ARIZONA REVISED CRIMINAL CODE COMMISSION REPORT AT 135 (1975). THE~~

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~~COMMENTS POINT OUT THAT WHILE THE DEFENDANT MAY BE FOUND GUILTY OF A MORE SERIOUS OFFENSE IF ACTUAL HARM DOES RESULT, THE STATUTE AUTHORIZES CONVICTION FOR "THE INCHOATE THREAT".~~

~~THE ELEMENTS OF THEREATENING OR INTIMIDATING ARE: (A) INTENT TO TERRIFY, (B) THREATENING OR INTIMIDATING BY WORD OR CONDUCT, (C) TO CAUSE PHYSICAL INJURY TO ANOTHER. "TERRIFY" IS DEFINED IN WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1966) AS "TO FILL WITH TERROR; FRIGHTEN GREATLY," AND "TERROR" IS DEFINED AS "A STATE OF INTENSE FRIGHT OR APPREHENSION; STARK FEAR." "APPREHENSION" IS DEFINED AS "ANTICIPATION ESPECIALLY OF UNFAVORABLE THINGS; SUSPICION OR FEAR ESPECIALLY OF FUTURE EVIL." APPELLANT ARGUES THAT THE INTENT REQUIRED FOR THREATENING OR INTIMIDATING IS THE SAME AS THAT REQUIRED FOR ASSAULT, ASSERTING THAT THERE IS NO APPRECIABLE DISTINCTION BETWEEN TERROR AND APPREHENSION. APPELLANT'S ARGUMENT MISSES THE POINT BECAUSE THE DISTINCTION BETWEEN THREATENING OR INTIMIDATING AND AGGRAVATED ASSAULT LIES NOT IN THE VICTIM'S MENTAL STATE BUT IN THE DEFENDANT'S SUBJECTIVE CONCERN WITH THE VICTIM'S MENTAL STATE. TO BE FOUND GUILTY OF THREATENING OR INTIMIDATING, THE DEFENDANT MUST INTEND TO FILL THE VICTIM WITH INTENSE FRIGHT; IN OTHER WORDS, THE DEFENDANT MUST SUBJECTIVELY AND SPECIFICALLY INTEND THAT THE VICTIM'S MENTAL STATE BE ONE OF TERROR. BY CONTRAST, TO BE FOUND GUILTY OF ASSAULT UNDER A.R.S. § 13-1204(A)(2) THE DEFENDANT NEED ONLY INTENTIONALLY ACT USING A DEADLY WEAPON OR DANGEROUS INSTRUMENT SO THAT THE VICTIM IS PLACED IN REASONABLE APPREHENSION OF IMMINENT~~

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~~PHYSICAL INJURY. IN OTHER WORDS, THE DEFENDANT MUST INTEND TO DO THE ACT, AND THE VICTIM MUST REACT WITH APPREHENSION, BUT THE DEFENDANT NEED NOT HAVE ANY SUBJECTIVE CONCERN WHATEVER FOR THE VICTIM'S MENTAL STATE. WHILE AN ASSAULT, ESPECIALLY AN AGGRAVATED ASSAULT, MAY TERRIFY A VICTIM, THE OFFENSE DOES NOT REQUIRE THAT THE DEFENDANT INTEND TO EVOKE TERROR IN THE VICTIM. THEREFORE, THREATENING OR INTIMIDATING IN VIOLATION OF A.R.S. § 13-1202(A)(1) IS NOT A LESSER INCLUDED OFFENSE OF AGGRAVATED ASSAULT AS CHARGED HERE IN VIOLATION OF A.R.S. § 13-1204(A)(2). APPELLANT WAS THUS NOT ENTITLED TO AN INSTRUCTION ON THE OFFENSE OF THREATENING OR INTIMIDATING AS A LESSER INCLUDED OFFENSE.~~

~~SPEEDY TRIAL~~

~~APPELLANT NEXT CONTENTS THAT SHE WAS DENIED HER RIGHT TO A SPEEDY TRIAL BY VIRTUE OF VARIOUS CONTINUANCES THAT WERE GRANTED BY THE TRIAL COURT. THE CASE PROCEEDED FROM INITIAL APPEARANCE TO TRIAL AS FOLLOWS: APPELLANT'S INITIAL APPEARANCE OCCURRED ON MAY 6, 1979, AND HER ARRAIGNMENT OCCURRED ON JUNE 6, 1979. APPELLANT WAS NOT IN CUSTODY AND THEREFORE SHE WAS REQUIRED TO BE BROUGHT TO TRIAL WITHIN 120 DAYS FROM HER INITIAL APPEARANCE OR 90 DAYS FROM HER ARRAIGNMENT, WHICHEVER WAS GREATER. STATE V. ROSE, 121 ARIZ. 131, 589 P.2D 5 (1978); RULE 8-2(C), ARIZONA RULES OF CRIMINAL PROCEDURE. IN THIS CASE, THE GREATER PERIOD WAS 90 DAYS FROM THE ARRAIGNMENT, AND THE LAST DAY FOR TRIAL WAS THUS SEPTEMBER 4, 1979. APPELLANT MOVED FOR A CONTINUANCE WHICH WAS GRANTED ON~~

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AUGUST 23, 1979, AND THE NEW LAST DAY FOR TRIAL THUS BECAME OCTOBER 2, 1979. RULE 8.4(A), ARIZONA RULES OF CRIMINAL PROCEDURE. ON SEPTEMBER 18, 1979, THE STATE MOVED FOR A 14-DAY CONTINUANCE IN ORDER TO SUBPOENA THE VICTIMS, WHO WERE RESIDING IN COLORADO AT THE TIME. THE TRIAL COURT GRANTED THE CONTINUANCE AND ORDERED THAT NONE OF THE DAYS WERE TO BE EXCLUDED. THUS THE LAST DAY FOR TRIAL REMAINED OCTOBER 2, 1979. APPELLANT DID NOT OBJECT TO THE CONTINUANCE. FINALLY ON OCTOBER 2, 1979, THE STATE AGAIN MOVED FOR A CONTINUANCE BECAUSE IT HAD BEEN UNABLE TO SECURE THE APPEARANCE OF THE TWO VICTIMS. AT THE HEARING ON THE MOTION TO CONTINUE, THE STATE PRESENTED EVIDENCE THAT IT HAD MADE A GOOD FAITH AND DILIGENT EFFORT TO OBTAIN THE OUT-OF-STATE WITNESSES. THE STATE SHOWED THAT IT HAD PROMPTLY MAILED THE SUBPOENAS TO COLORADO BUT THAT THEY WERE DELAYED IN THE POST OFFICE BECAUSE THEY SHOWED AN INCORRECT ZIP CODE. APPELLANT OBJECTED TO THE CONTINUANCE AND MOVED FOR DISMISSAL BASED ON AN ALLEGED VIOLATION OF HER RIGHT TO A SPEEDY TRIAL. THE TRIAL COURT DETERMINED THAT EXTRAORDINARY CIRCUMSTANCES EXISTED AND GRANTED THE STATE A 16-DAY CONTINUANCE TO OCTOBER 18, 1979. THE MATTER PROCEEDED TO TRIAL ON OCTOBER 18, 1979.

IT IS CLEAR IN ARIZONA THAT THE GRANTING OR DENIAL OF A MOTION FOR CONTINUANCE IS WITHIN THE SOUND DISCRETION OF THE TRIAL COURT AND THAT SUCH A RULING WILL NOT BE REVERSED ON APPEAL UNLESS IT IS SHOWN THAT THE TRIAL COURT HAS ABUSED ITS DISCRETION SO AS TO RESULT IN PREJUDICE TO THE DEFENDANT. STATE V. BLODGETTE, 121 ARIZ. 392, 590 P.2D 931 (1979). CERTAIN TIME PERIODS ARE

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PROPERLY EXCLUDABLE WHEN DETERMINING SPEEDY TRIAL LIMITS. THOSE INCLUDE DELAYS OCCASIONED BY OR ON BEHALF OF THE DEFENDANT PURSUANT TO RULE 8.4(A), AND DELAYS MANDATED BY EXTRAORDINARY CIRCUMSTANCES WHERE SUCH DELAY IS INDISPENSABLE TO THE INTERESTS OF JUSTICE. RULE 8.5(B), ARIZONA RULES OF CRIMINAL PROCEDURE. WE FIND THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN THIS INSTANCE BY FINDING THAT EXTRAORDINARY CIRCUMSTANCES EXISTED TO JUSTIFY THE CONTINUANCE AND THAT THE DELAY WAS INDISPENSABLE TO THE INTERESTS OF JUSTICE. WE FIND THAT THE TIME WAS PROPERLY EXCLUDED, AND THAT THE MATTER PROCEEDED TO TRIAL WITHIN THE TIME LIMITS REQUIRED BY RULE 8.

FINALLY, APPELLANT CLAIMS THAT SHE WAS PREJUDICED BY THE FAILURE OF THE STATE TO PRODUCE BOTH OF THE OUT-OF-STATE WITNESSES AT TRIAL. THE COLORADO WITNESSES WERE THE VICTIMS, PAT PIRKLE AND JEANETTE SCHUERMAN. MS. PIRKLE COMPLIED WITH THE SUBPOENA AND ULTIMATELY TESTIFIED AT TRIAL. HOWEVER, A HEARING WAS HELD IN COLORADO REGARDING THE SUBPOENA OF JEANETTE SCHUERMAN, AND THE COLORADO COURT FOUND THAT COMPLIANCE WITH THE SUBPOENA WOULD HAVE RESULTED IN UNDUE HARDSHIP FOR HER. THUS, SHE DID NOT APPEAR AT TRIAL. HOWEVER, WE FAIL TO SEE HOW APPELLANT WAS PREJUDICED BY THE FAILURE OF MS. SCHUERMAN TO APPEAR AS A WITNESS IN THIS CASE. APPELLANT WAS ORIGINALLY CHARGED WITH TWO COUNTS OF AGGRAVATED ASSAULT, ONE PERTAINING TO EACH VICTIM. AT THE CLOSE OF THE STATE'S CASE, THE TRIAL COURT DISMISSED COUNT ONE OF THE CHARGE WHICH ALLEGED AN ASSAULT ON THE ABSENT VICTIM JEANETTE SCHUERMAN.

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FURTHERMORE, AS THE TRIAL COURT POINTED OUT, APPROXIMATELY A WEEK PRIOR TO TRIAL, TRIAL COUNSEL FOR APPELLANT RECEIVED WORD THAT THE WITNESS SCHUERMAN WOULD NOT TESTIFY IN THE CASE. AT THAT TIME APPELLANT HAD THE OPPORTUNITY TO TAKE THE WITNESS' DEPOSITION IN COLORADO IF SHE WANTED TO PRESERVE HER TESTIMONY. HAVING ACTUAL NOTICE THAT THE WITNESS WOULD NOT APPEAR AT TRIAL, APPELLANT NEVERTHELESS FAILED TO INITIATE THE PROCEDURES NECESSARY TO PRESERVE THE WITNESS' TESTIMONY FOR TRIAL. UNDER THE CIRCUMSTANCES, WE FIND THAT APPELLANT HAS FAILED TO SHOW THAT THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING THE STATE'S MOTION FOR A CONTINUANCE OR THAT SHE WAS PREJUDICED THEREBY.

~~COMMENTS ON SILENCE~~

FOR HER THIRD ISSUE ON APPEAL, APPELLANT CLAIMS THAT THE PROSECUTOR COMMITTED REVERSIBLE ERROR IN HIS CLOSING ARGUMENT BY COMMENTING ON HER FAILURE TO TESTIFY ON HER OWN BEHALF. IN THE STATE'S REBUTTAL ARGUMENT, THE PROSECUTOR MADE THE FOLLOWING STATEMENTS:

MR. JARVI DECEITED THE EXPLANATION OF SOME OF THE FACTS. AND ALTHOUGH THE DEFENSE CAN ELECT TO PRODUCE NO EVIDENCE, THAT, THEY DID. THE FACTS HERE HAVE BEEN PRESENTED AND THEY ARE THE STATE'S EVIDENCE. AND THE EVIDENCE DOES, WHEN TAKEN WITH FAIR INFERENCES, PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT

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~~TORY MORGAN, COMMITTED THE OFFENSE OF AGGRAVATED ASSAULT WITH A DEADLY WEAPON. [EMPHASIS ADDED] IMMEDIATELY FOLLOWING THE STATEMENT, DEFENSE COUNSEL MOVED FOR A MISTRIAL WHICH WAS DENIED.~~

~~APPELLANT ARGUES THAT THE REMARKS WERE MADE FOR THE PURPOSE OF EMPHASIZING HER REFUSAL TO TESTIFY. ADDITIONALLY, SHE ASSERTS THAT SHE WAS THE ONLY PERSON OTHER THAN MS. PIRKLE WHO COULD HAVE TESTIFIED AS TO THE FACTS OF THE OFFENSE.~~

~~A COMMENT BY A PROSECUTOR UPON THE FAILURE OF THE DEFENDANT TO TESTIFY VIOLATES THE DEFENDANT'S FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION. GRIFFIN V. CALIFORNIA, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965). SUCH COMMENTS ALSO VIOLATE ART. 2 § 10 OF THE ARIZONA CONSTITUTION AND A.R.S. § 13-117(B). HOWEVER, NOT ALL SUCH COMMENTS ARE IMPROPER. ONLY COMMENTS WHICH ACTUALLY DIRECT THE JURY'S ATTENTION TO THE FAILURE OF THE DEFENDANT TO TESTIFY ARE IMPERMISSIBLE. STATE V. ARREDONDO, 111 ARIZ. 141, 526 P.2d 163 (1974). "TO BE CONSTITUTIONALLY PROSCRIBED, A COMMENT MUST BE ADVERSE; THAT IS, IT MUST SUPPORT AN UNFAVORABLE INFERENCE AGAINST THE DEFENDANT AND, THEREFORE, OPERATE AS A PENALTY IMPOSED FOR EXERCISING A CONSTITUTIONAL PRIVILEGE." STATE V. MATA, 125 ARIZ. 233, 238, 609 P.2d 48, 53 (1980). SEE ALSO LAKESIDE V. OREGON, 435 U.S. 333, 98 S.Ct. 1091, 55 L.Ed.2d 319 (1978).~~

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~~IN THE INSTANT CASE, AN EXAMINATION OF THE CONTEXT IN WHICH THE REMARK WAS MADE REVEALS THAT IT DID NOT RAISE AN UNFAVORABLE INFERENCE AGAINST THE DEFENDANT. IN HER OWN CLOSING ARGUMENT, APPELLANT HAD REMINDED THE JURORS THAT SHE HAD NOT TAKEN THE WITNESS STAND AND ADMONISHED THEM NOT TO DRAW AN UNFAVORABLE INFERENCE AGAINST HER BECAUSE OF HER FAILURE TO TESTIFY. THE PROSECUTOR'S COMMENTS DID NO MORE THAN RESTATE WHAT DEFENSE COUNSEL HAD ALREADY ARGUED, THAT IS, THAT THE DEFENDANT PRODUCED NO EVIDENCE. IN ADDITION, THE COMMENT DOES NOT FOCUS THE JURY'S ATTENTION ON THE FAILURE OF THE DEFENDANT TO TESTIFY. THE APPELLANT WAS NOT THE ONLY PERSON WHO COULD HAVE EXPLAINED OR CONTRADICTED THE EVIDENCE. JEANETTE SCHUERMAN WAS ALSO PRESENT AT THE RESIDENCE AT THE TIME OF THE OFFENSE, AND THE JURY WAS NOT AWARE THAT SHE WAS UNAVAILABLE TO TESTIFY. STATE V. STILL, 119 ARIZ. 549, 582 P.2d 639 (1978). WE FIND, THEREFORE, THAT THE COMMENT DID NOT SUPPORT AN UNFAVORABLE INFERENCE AGAINST THE APPELLANT FOR HER EXERCISE OF HER CONSTITUTIONAL PRIVILEGE AGAINST SELF-INCRIMINATION.~~

~~PROSECUTOR'S CLOSING ARGUMENT~~

~~APPELLANT NEXT CLAIMS THAT THE PROSECUTOR MADE CRITICAL MISSTATEMENTS OF FACT IN HIS CLOSING ARGUMENT AND THAT THE TRIAL COURT ERRED IN FAILING TO GIVE THE JURY A SUITABLE CAUTIONARY INSTRUCTION. AT TRIAL, KEVIN DAVIS, THE INVESTIGATING OFFICER, TESTIFIED THAT HE FOUND A GUN, WHICH APPEARED TO HAVE~~

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~~BEEN FIRED RECENTLY, IN A BEDROOM CLOSET IN THE RESIDENCE WHERE APPELLANT LIVED. HE ALSO TESTIFIED THAT APPELLANT ASKED HIM IF HE WOULD LIKE TO KNOW WHERE THE BULLETS TO THE GUN WERE. SHE HAD TOLD HIM THAT SHE HAD PLACED THE BULLETS IN HER UNDERWEAR AND THEY HAD SCATTERED AROUND THE YARD SURROUNDING THE RESIDENCE. HOWEVER, THE STATE WAS UNABLE TO PROVE CONCLUSIVELY AT TRIAL THAT THE GUN WHICH WAS FOUND IN THE BEDROOM CLOSET WAS THE GUN USED BY APPELLANT TO COMMIT THE OFFENSE.~~

~~IN CLOSING ARGUMENT, THE PROSECUTOR STATED AS FOLLOWS:~~

~~LATER AT THE POLICE STATION, SHE TOLD OFFICER KEVIN DAVIS THAT SHE HAD PLACED THE CARTRIDGES/SHELLS FOR THE GUN IN HER UNDERWEAR AND APPARENTLY THEY HAD FALLEN OUT AS SHE WAS LEAVING THE SCENE. [EMPHASIS ADDED] COUNSEL FOR APPELLANT OBJECTED TO THE STATEMENT AND MOVED FOR A MISTRIAL. THE TRIAL COURT DENIED THE MOTION, BUT TOLD THE PROSECUTOR TO MAKE IT CLEAR HE WAS NOT QUOTING FROM THE EVIDENCE. WHEN THE PROSECUTOR RESUMED HIS ARGUMENT, HE CAUTIONED THE JURY AS FOLLOWS:~~

~~NOW, I WOULD POINT OUT TO YOU THAT IN INDICATING WHAT THE DEFENDANT SAID TO OFFICER DAVIS THAT I WAS PARAPHRASING MY UNDERSTANDING OR INTENT OF THE STATEMENT AND WAS NOT INTENDING TO QUOTE THE DEFENDANT EXACTLY, AND I AM NOT SURE THAT EVEN THE TESTIMONY INDICATED AN EXACT QUOTE OF HER WORDS.~~

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~~APPELLANT CLAIMS THAT THE CAUTIONARY STATEMENT OF THE PROSECUTOR DID NOTHING TO CURE THE TINT LEFT BY HIS PREVIOUS REMARKS. SHE ALSO CLAIMS THAT THE PROSECUTOR ERRED IN MAKING THE FOLLOWING STATEMENTS DURING HIS REBUTTAL ARGUMENT:~~

~~"AND THEN WE HAVE THE DEFENDANT, TODY MORGAN, WHILE DOWN AT THE POLICE STATION, SAYING: 'YOU WANT TO KNOW WHERE THE BULLETS ARE?' BULLETS TO WHAT? FIRST, WHAT DO BULLETS GO TO? THEY GO TO GUNS."~~

~~"YOU WANT TO KNOW WHERE THE BULLETS ARE? I PUT THEM IN MY UNDERWEAR AND THEY DROPPED OUT AS I WAS LEAVING."~~

~~"THE OFFICER GOES BACK AND HE FINDS .38-CALIBER BULLETS."~~

~~COUNSEL IS PERMITTED CONSIDERABLE LATITUDE IN CLOSING ARGUMENT, INCLUDING THE RIGHT TO DRAW REASONABLE INFERENCES FROM THE EVIDENCE. STATE V. JARAMILLO, 110 ARIZ. 481, 520 P.2d 1105 (1974). IN THE INSTANT CASE, THE IMPLICATION THAT THE BULLETS WHICH WERE FOUND ON THE LAWN BELONGED TO THE GUN WHICH WAS FOUND IN THE CLOSET WAS A REASONABLE INFERENCE TO BE DRAWN FROM THE EVIDENCE, AND WAS THUS PROPER ARGUMENT. ADDITIONALLY, THE JURY WAS INSTRUCTED THAT ARGUMENTS OF COUNSEL WERE NOT EVIDENCE. WE FIND NO ERROR.~~

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~~ADMISSION OF PISTOL AND BULLETS~~

~~FINALLY, APPELLANT ARGUES THAT THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE THE GUN FOUND IN THE CLOSET AND THE BULLETS IN THE YARD. APPELLANT ARGUES FIRST THAT THE STATE FAILED TO LAY A PROPER FOUNDATION PRIOR TO ADMITTING THE GUN. SHE ASSERTS THAT THE STATE FAILED TO PROVE THAT THE GUN WHICH WAS FOUND IN THE CLOSET WAS THE GUN USED BY APPELLANT IN THE COMMISSION OF THE CRIME. SHE ALSO ARGUES THAT THE BULLETS WERE ADMITTED WITHOUT PROPER FOUNDATION LINKING THEM TO THE GUN OR TO THE INCIDENTS.~~

~~WE DISAGREE. THE GUN WHICH WAS SEIZED WAS IN A BEDROOM CLOSET IN THE RESIDENCE WHERE APPELLANT LIVED. OFFICER DAVIS TESTIFIED THAT IT APPEARED TO HAVE BEEN FIRED RECENTLY. THE GUN THUS BECAME AN ADDITIONAL PIECE OF CIRCUMSTANTIAL EVIDENCE USED TO COMPLETE THE STORY OF THE CRIME. ADDITIONALLY, AT TRIAL, APPELLANT OBJECTED TO THE ADMISSION OF THE GUN ON THE GROUND THAT IT WAS IMMATERIAL AND IRRELEVANT, RATHER THAN UPON THE GROUND THAT AN IMPROPER FOUNDATION HAD BEEN PRESENTED. THUS, AS TO THE ADMISSIBILITY OF THE GUN, APPELLANT HAS FAILED TO PRESERVE THE ISSUE FOR PURPOSES OF THIS APPEAL. UNITED STATES V. MARKHAM, 440 F.2d 119 (9TH CIR. 1971).~~

~~THE BULLETS WERE SEIZED AS A RESULT OF APPELLANT'S STATEMENTS TO THE POLICE INDICATING THAT THE BULLETS COULD BE FOUND ON THE LAWN NEAR THE HOUSE. WHEN THE~~

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~~OFFICERS SEARCHED THE PREMISES, THEY FOUND THE BULLETS WHICH WERE ULTIMATELY INTRODUCED INTO EVIDENCE. AT TRIAL, APPELLANT OBJECTED TO THE ADMISSION OF THE BULLETS ON THE GROUND THAT THEY HAD NOT BEEN SUFFICIENTLY IDENTIFIED. EVEN IF SUCH AN OBJECTION COULD BE CONSTRUED AS AN OBJECTION ON THE GROUNDS THAT THE PROSECUTOR FAILED TO ESTABLISH A PROPER FOUNDATION, WE DO NOT BELIEVE THAT THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING THE BULLETS TO BE ADMITTED. WE FIND THAT THE INVESTIGATING OFFICER'S TESTIMONY DID PROVIDE SUFFICIENT FOUNDATION FOR THE ADMISSION OF THE BULLETS. HER ARGUMENT THAT THEY WERE NOT SUFFICIENTLY IDENTIFIED BY THE OFFICER GOES TO THE WEIGHT OF THE EVIDENCE AND NOT TO ITS ADMISSIBILITY. STATE V. BLAZAK, 114 ARIZ. 199, 560 P.2d 54 (1977); STATE V. MAVS, 7 ARIZ. APP. 90, 436 P.2d 482 (1968).~~

~~APPELLANT ALSO ASSERTS THAT THE PISTOL AND BULLETS SHOULD HAVE BEEN SUPPRESSED AS THE "FRUIT OF A POISONOUS TREE." PRIOR TO TRIAL, APPELLANT FILED A MOTION TO SUPPRESS THE ADMISSION OF CERTAIN STATEMENTS MADE BY HER TO THE POLICE OFFICERS. THE MOTION WAS GRANTED. SHE CONTENTS THAT THE PISTOL AND BULLETS WERE SEIZED AS A RESULT OF THE STATEMENTS WHICH HAD BEEN SUPPRESSED. APPELLANT DID NOT MOVE TO SUPPRESS THE PISTOL AND THE BULLETS PRIOR TO TRIAL. MOREOVER, AT THE TIME THEIR ADMISSION WAS SOUGHT AT TRIAL, APPELLANT DID NOT OBJECT ON THE GROUNDS THAT THEY WERE THE FRUIT OF HER PREVIOUSLY SUPPRESSED STATEMENTS. APPELLANT HAS THUS WAIVED THIS ISSUE FOR APPEAL. STATE V. MARAHRENS, 114 ARIZ. 804, 560 P.2d 1211 (1977).~~

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~~FOR THE FOREGOING REASONS, THE JUDGMENT AND SENTENCE ARE AFFIRMED.~~

07 JUL 1981

F O'Connor

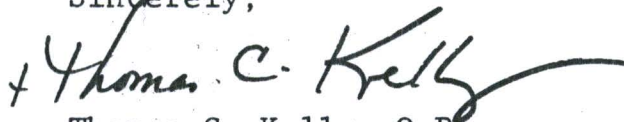
July 6, 1981

Ms. Myra Tankersley
Personal Secretary to
the Attorney General
Room 5111
Office of the Attorney General
Department of Justice
Washington, DC 20530

Dear Ms. Tankersley:

As a follow-up to a conversation he had with
Mr. William Wilson, Cardinal Krol of Philadelphia
has asked me to supply some information relative
to the candidacy of Hon. Sandra O'Connor for the
U.S. Supreme Court. I have been asked to direct
this to you for referral to the Attorney General.
Thank you for your kind assistance in this
connection.

Sincerely,


Thomas C. Kelly, O.P.

Arizona pro-life citizens have brought to our attention the following information concerning Sandra Day O'Connor's actions on abortion related legislation while serving in the State Senate.

1. 1970: April - O'C voted in the Judiciary Committee in favor of a therapeutic abortion bill that was in effect an abortion on demand bill.
 - she likewise voted in favor of the same bill in the Republican Caucus.
2. 1973: O'C is reported to be a prime sponsor of SB 1190 Family Planning Bill that included provision for surgical procedures (undefined) and for the provision of contraceptive materials to minors without parental consent.
3. 1974: April - O'C voted against SCM 1001 - HCM 2002 a Memorialization of Congress for a Human Life Amendment both in the Senate Judiciary Committee and in the Republican Caucus. This vote of O'C is mentioned specifically in an article in the Phoenix Gazette - 5/23/74.
4. 1974: O'C is identified as among the 9 Senators voting against a bill to prohibit tax-funded abortions at the University of Arizona Medical Center except in life of mother situations. Phoenix Gazette 5/7/74 identified vote as 21-9. Sen. Trudy Camping who served in the State Senate at that time claims that O'C voted in the negative.

✓ O'CONNOR

MEMORANDUM

THE WHITE HOUSE
WASHINGTON

6 July 1981



MEMORANDUM FOR ED THOMAS

FROM: MARILEE MELVIN *pm*

Call this morning from Harold O. J. Brown, prominent evangelical theologian from Trinity Seminary, Deerfield, Illinois.

Wanted to relay to Mr. Meese what a disastrous effect the nomination of Sandra O'Connor would have on the enthusiasm of the evangelical community for President Reagan. He said we are talking about a constituency who, by their social conservatism, have never been involved politically until recently.

Dr. Brown wished to communicate that if Mrs. O'Connor was nominated or appointed, it would have a disastrous effect upon this community's trust in the President. Brown has spent the weekend talking to a lot of these people and says he has yet to find one that would not be horrified.

If you wish to speak to him about any of this, he can be reached:

home: 312/948-0697
ofc: 312/945-8800
312/945-2284

He added that we may be getting a call from Jerry Falwell along the same lines today.

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

July 6, 1981

FOR: EDWIN MEESE

FROM: MICHAEL UHLMANN *WU*

RE: Candidacy of Judge O'Connor for the Supreme Court

Over the past three or four days, I have received a number of calls from people in and around the right-to-life movement. Similar calls, I gather, have been made to others at the White House. The burden of the message was that the nomination of Judge O'Connor would trigger a nasty political protest against the President.

Ther core accusations against O'Connor appear to be two: (1) that she led the floor fight in the Arizona legislature against the effort to have that state memorialize Congress to reverse Roe v. Wade; and (2) that she was an active participant in the International Year of the Woman conferences, which were, as you know, the bete noire of conservative pro-family types.

Whether these charges are true or not, I cannot say. But if they are, I have no doubt that we would face a potentially disastrous political firefight. The call to which I attach the greatest weight came from Jim McFadden, whose Lifeletter is the most widely read organ among right-to-lifers. He is a poltical realist with small use for some of the screamers who by self-appointment or otherwise occupy leadership roles in the movement.

He indicated that if O'Connor were nominated, every moderate within the movement would be forced into hard opposition. Right-to-lifers are already nervous (if not paranoid) about the Hatfield appropriations flap, he said, and believe the Administration is foot-dragging on the Human Life bill. Judge O'Connor's nomination would confirm their worst suspicions. "People sometimes shoot themselves in the foot accidentally," he concluded, "but why anyone wants to do it on purpose, I don't know."

O'Connor aside, and turning more generally to the nomination, it is important to bear in the mind the special significance that right-to-lifers attach to Supreme Court nominations. The federal judiciary in general, and the High Court in particular, have in their view been engaged in a systematic effort to prevent the public from working its will on

the subject of abortion. Whatever one may think of that argument, or of the merits of abortion itself, the intensity of right-to-lifers on the issue of judicial power should not be underestimated.

It does not follow that a pro-lifer must be nominated. It does follow, I think that the nominee's record on the issue be examined with special scrutiny and that the nominee regard Roe v. Wade and its progeny as most unwise assertions of judicial power. Whoever is selected, it should not be someone who can be accused of being "soft" both on abortion per se and on the current judicial hegemony over the subject.

JUL 6 1981

THE WHITE HOUSE

WASHINGTON

July 6, 1981

MEMORANDUM TO: Jim Baker
✓ Ed Meese
Mike Deaver
Fred Fielding
Pen James

FROM: Max Friedersdorf *M. F.*

SUBJECT: Supreme Court/Connor and Kennedy/Senator Nickles/Rep. Hyde

Senator Don Nickles (R-Okla.) and Rep. Henry Hyde (R-Ill.) called this morning to protest the possible appointment of the Connor woman from Arizona to the Supreme Court.

Hyde also objected to the Kennedy woman's appointment.

Arguments made against Connor:

- 1) Unacceptable to pro-lifers; six times voted for unlimited abortion; favors E.R.A., and is a Mary Crisp clone.
- 2) Her appointment would cause a firestorm among Reagan supporters; a betrayal of the platform; resentment would be profound, and she was anti-Reagan.

Hyde also charged that Kennedy has issued an opinion in the Akron Ordinance case that is hostile to pro-lifers.

Senator Nickles said that if Connor is nominated, he and other pro-family Republican Senators will not support the choice.

Hyde suggested the name of Howard T. Markey, Chief Judge of the U. S. Court of Customs and Patents Appeals, for consideration.

He also said there is a woman Federal Judge serving in the St. Petersburg, Florida, area (he had no name) who has a good reputation and would be acceptable to conservatives.

THE WHITE HOUSE

WASHINGTON

July 6, 1981

MEMORANDUM TO: Jim Baker
Ed Meese
Mike Deaver
Fred Fielding
Pen James

FROM: Max Friedersdorf *ML-6*

SUBJECT: Supreme Court/Hill Reaction

Add Senator Jesse Helms (R-N.C.) and Senator Steve Symms (R-Idaho) to the list of Senators calling in today in opposition to Sandra O'Connor for Supreme Court nomination. Both objections were based on the abortion issue.

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

6 July 1981

MEMORANDUM FOR ED MEESE

FROM: MARILEE MELVIN
SUBJECT: Sandra O'Connor

Besides the longer communications from the National Right to Life Foundation and Dr. Willkie, and from Dr. Harold O. J. Brown from Trinity Seminary, we have been getting many calls in the past several days from citizens protesting the nomination or appointment of Sandra O'Connor to the Supreme Court.

On Thursday, 2 July 1981 we received 12 calls protesting her appointment. Today we have had 11 calls.

We will keep you posted.



UNITED STATES CATHOLIC CONFERENCE

1312 MASSACHUSETTS AVENUE N.W., WASHINGTON, D.C. 20005 (202) 659-6690

F V O'CONNOR

07 JUL 1981

Office of General Counsel

July 6, 1981

Mr. William French Smith
Attorney General
Rm. 5111
Department of Justice
Washington, DC 20530

Dear Mr. Attorney General:

My purpose in writing is twofold, namely (a) to comment upon one of the persons who have been publicly identified as under consideration by the Administration to fill the vacancy on the United States Supreme Court created by the resignation of Mr. Justice Stewart, and (b) to commend for serious consideration a person whom publicity has not attended.

It appears that Hon. Dallin H. Oaks is under serious consideration. On behalf of the Conference, I am authorized to say that the appointment of Judge Oaks would be considered a good choice. Among his many qualifications, he is a man of scholarship whose demonstrated social, constitutional and moral values should serve this nation well.

I am also authorized to request favorable consideration of Hon. Howard T. Markey, Chief Judge of the United States Court of Customs and Patent Appeals. We consider Chief Judge Markey as eminently qualified to assume and discharge the responsibilities of an Associate Justice of the Supreme Court of the United States. Enclosed please find a brief biographical statement concerning the Chief Judge.

With appreciation for your kind attention to this letter, I am,

Sincerely,

WILFRED R. CARON
General Counsel

WRC:dae
Enclosure

Howard T. Markey

Chief Judge, United States Court of Customs and Patent Appeals (appointed June 22, 1972, by President Nixon)

Born 1920 in Chicago;
Roman Catholic;
Bachelor's degree from University of Arizona;
J.D. cum laude, Loyola Univ., 1949;
Master of Patent Law, John Marshall L.S., 1950;
Admitted to Bar 1950;
Married, four children;
Army Air Corps, 5 years, WW II and 21 months in
Korean War; highly decorated; one of
the earliest jet plane test pilots.

Chief Judge Markey's appointment to the judiciary followed twenty-two years as an active practitioner in Chicago.

A large percentage of Judge Markey's published opinions were written in connection with his duties as Chief Judge of the Court of Customs and Patent Appeals. However, he has also sat by designation on every Circuit Court of Appeals in the Federal system in over a thousand cases, and in that capacity has also written some 300 opinions. Chief Judge Markey's opinions uniformly evince an intellect which is vigorous, analytical and comprehensive, and a writing style which befits a jurist of the highest stature.

In 1979 Chief Justice Warren Burger appointed Chief Judge Markey as Chairman of the Ethics Advisory Committee on the Codes

of Conduct of the Judicial Conference of the United States. A recipient of numerous awards and honorary degrees, Chief Judge Markey is also a member of the faculty of the Federal Judicial Center, and the board of advisers of Loyola University School of Law. Chief Judge Markey has published a large number of articles, with a preponderance in the area of patent law. Other materials by the Chief Judge, including speeches, reveal an individual with strong, well-defined, jurisprudential and moral values. These, combined with his proven ability as a lawyer and judge, give solid basis for reposing confidence in him as a member of the Nation's highest tribunal.

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

6 July 1981

MEMORANDUM FOR ED MEESE

FROM: MARILEE MELVIN

Another phone call from Dr. John Willke, National Right to Life President.

They are getting ready to "go public" with a press release which, he says, may embarrass the President.

Would like to get definite reassurance from you that Sandra O'Connor will not be nominated to the Supreme Court.

Said they have heard it from all their sources that her nomination is imminent, she has been chosen and it is all settled.

Has evidence that O'Connor made eight pro-abortion votes while she was Senator.

In the absence of an official denial, he is taking this rumor as evidence.

Willke would like to see you/talk to you about this tonight or tomorrow morning. Phone: 681-4396.

07 JUL 1981



Suite 341, National Press Bldg. — 529 14th Street, N.W. —
Washington, D. C. 20045 — (202) 638-4396

July 7, 1981

TO: President Reagan ATTN: Mr. Edwin Meese III
RE: Sandra O'Connor

- Press release enclosed
- Summary of data
- Documentation of data was delivered to Mr. L. Nofzinger by federal express yesterday.

J. C. Willke, M. D.
President

A press conference will be held in Room EF 100 U. S. Capitol at 3:30 p.m. announcing opposition to Judge O'Connor's appointment and confirmation.



J. C. WILLKE, M.D.
PRESIDENT

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SANDRA O'CONNOR
ABORTION RECORD

- 1970 Arizona Senate, a bill to legalize abortion.
Bill passed the Senate Judiciary Committee. Sandra O'Connor, a member of the committee, voted pro-abortion.
Bill defeated in Senate Republican Caucus with Senator Sandra O'Connor, a member of the caucus, voting pro-abortion.
- 1973 Sen. Sandra O'Connor was prime sponsor of S-1190, a family planning bill which would have provided family planning information to minors without parental knowledge or consent. Included under "family planning" were contraceptives and "surgical procedures."
- 1974 HR 2012, a memorialization resolution calling upon Congress to pass a Human Life Amendment has passed the Arizona House by a wide margin. Sen. Sandra O'Connor voted against the resolution, which passed by a 4-2 vote, in the Senate Judiciary Committee.
Sen. Sandra O'Connor voted against it again in the Senate Majority (Republican) Caucus, and thus helped to kill the bill (vote was 9-9).
- 1974 A bill to forbid abortions at the University of Arizona at Tucson passed 21-9 in the Arizona Senate with Senator O'Connor voting pro-abortion.
While a member of the Tucson Hospital Board, Sandra O'Connor voted for Blue Cross funds being used to pay for elective abortions.
- 1977 Sandra O'Connor was a keynote speaker at the pro-abortion International Women's Year state meeting in Arizona.



National RIGHT TO LIFE committee, inc.

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PRESS RELEASE

FOR IMMEDIATE RELEASE
July 6, 1981

CONTACT: J.C. WILLKE, M.D.
(202) 638-4396

WASHINGTON, D.C.— The president of the National Right to Life Committee today announced strong opposition to the proposed appointment of Sandra D. O'Connor to the U.S. Supreme Court.

Dr. J.C. Willke stated, "Sandra O'Connor's public record indicates a complete lack of respect for the right to life of unborn human beings. As an Arizona state senator, she repeatedly worked for pro-abortion legislation and against pro-life initiatives. The appointment of Sandra O'Connor or any other abortion advocate to the Supreme Court would be totally inconsistent with the Republican Platform and with President Reagan's often-stated recognition of the right to life of unborn babies. Such an appointment would shock the pro-life public nationwide. There are other potential nominees— women among them— who share the President's philosophy regarding the proper role of the federal judiciary, and who are also pro-life.

"In the event she is the nominee, the entire pro-life movement will oppose her confirmation," Dr. Willke stated.

As an Arizona state senator in 1970, Sandra O'Connor voted for a bill to legalize abortion, both in the Senate Judiciary Committee and in the Republican Caucus.

In 1973, she sponsored a bill to promote family planning, in which "family planning" was defined to include "surgical procedures" (abortion).

In 1974, the Arizona Senate voted 21-9 to forbid abortions at the University of Arizona (except to save the life of the mother), with Sen.

O'Connor voting pro-abortion. Also in 1974, Sen. O'Connor voted against a memorial resolution requesting Congress to enact a Human Life Amendment.

As a member of the Tucson Blue Cross board, Sandra O'Connor voted for insurance payments for elective abortions.

It is our sincere hope and full expectation that the Administration will follow the Republican Platform's specific guideline on this issue.