IN THE SUPREME COURT
STATE OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA, JUAN M. MARTINEZ, SBN #009510 Respondent.	No. SB-17-0081-AP Office of the Presiding Disciplinary Judge No. PDJ-2017-9044 State Bar File No. 15-3363

BRIEF OF *AMICUS CURIAE* ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF STATE BAR OF ARIZONA'S APPEAL

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INTRODUCTION

Juan Martinez's conduct and comments are on the record and have been noted unfavorably by reviewing courts for several years. Such comments in and of themselves are unprofessional and warrant discipline. The panel of the Presiding Disciplinary Judge and two other members ("the Panel"), rather than recognizing the indefensibility of such statements, recast them as unfortunate remarks in the "heat of battle." Because Martinez's words are uncontroverted and plain, and his experience sufficiently substantial, it was unnecessary and improper for the Panel to re-characterize his words and courtroom conduct and divine his intent. The Panel is correct that context matters. *See* Ariz. R. Sup. Ct. 42, Preamble ("The Rules of Professional Conduct are rules of reason."). In Martinez's case, however, his statements are so outrageous (in one case, a court called them "reprehensible") that context should relate only to determining what penalty should be imposed.

Amicus curiae Arizona Attorneys for Criminal Justice ("AACJ") recognizes that attorneys often make improvident remarks during the "heat of battle" and does not suggest that every offhand comment deserves a sanction. Martinez's case, however, is the exception that proves the rule. Some of the complained-of comments are part of a clear pattern of misconduct, while others are so reprehensible that even uttering them in the courtroom demonstrates deficits in

character that requires a sanction. The clear and undeniable record was ample evidence not just to support, but to demand a sanction.

INTERESTS OF *AMICUS CURIAE*

AACJ, the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 to give a voice to the rights of the criminally accused and to those attorneys who defend them. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

AACJ, through its then-President Kathleen Brody, is the complainant in this matter. Although AACJ is generally concerned about prosecutorial misconduct, it is particularly concerned with the litigation in this case. AACJ brought this matter to the attention of the State Bar after considerable research into Martinez's previous cases. Rather than focus solely on the case of *State v. Jodi Arias*, which generated multiple other bar charges, AACJ outlined a pattern of misconduct extending beyond the courtroom and into clemency proceedings where he personally attacked a retired judge. Defense attorneys and even judges are reticent to file bar charges against powerful prosecutors in the Maricopa County Attorney's

Office. Although the State Bar chose to pursue discipline only for those acts that appear clearly in the record and had already been cited by appellate decisions as misconduct, and chose to rely almost exclusively on transcripts, even that limited record speaks volumes.

DISCUSSION

The Panel abused its discretion in this case for two reasons. First, it made multiple errors of law, such as denying that prosecutors are held to a higher standard than other lawyers and refusing to apply an objective test to Martinez's state of mind in committing the well-documented misconduct. *See Tobin v. Rea*, 231 Ariz. 189, 194 ¶ 14 (2013) (error of law is abuse of discretion). Second, several important factual findings are clearly erroneous. *See* Ariz. R. Sup. Ct. 59(j).

What is most notable about the Supplemental Report is the tone. The Panel repeatedly castigated Bar Counsel in its findings for relying on transcripts and appellate decisions rather than testimony, but when a witness tried to offer testimony about something that occurred in the courtroom, the PDJ sustained Martinez's objections that "the transcript speaks for itself." Transcript at 26, 78. The Panel also attacked Bar Counsel for failing to elicit evidence from the experts concerning the application of the ABA Standards to this case, yet it sustained Martinez's objection when Bar Counsel attempted to elicit such testimony from Martinez's expert because "[c]ertainly the Panel is aware of the aspects of the

standards and their application to cases, so I don't think we need expertise on that point in any event." Transcript at 226.

The failings of Bar Counsel are not the issue here; this is not a mock trial competition. By focusing so heavily on Bar Counsel's inability to conduct proper witness examinations and other flawed strategic decisions, the Panel lost sight of the real issue in this case: Martinez's pattern of misconduct.

1. Contrary to the Panel's opinion, a prosecutor in a criminal prosecution is indeed held to a higher ethical standard than another lawyer whose client is not the State of Arizona in a criminal case.

There is no question that prosecutors, as representatives of the State, have special obligations that transcend those of an ordinary lawyer representing a client. "All prosecutors take an oath to ensure that justice is done in each case and owe concomitant special duties to the public and to the justice system." *American Bar Association Annotated Standards for Imposing Lawyer Sanctions* (ABA 2015), at 213 (the "Standards"). "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons." ER 3.8, cmt. 1.

As this Court observed in *In re Peasley*, "Recognizing a Government lawyer's role as a shepherd of justice, we must not forget that the authority of the

Government lawyer does not arise from any *right* of the Government, but from the power entrusted to the Government." *In re Peasley*, 208 Ariz. 27, 35 ¶ 34 (2004) (citing *In re Doe*, 801 F. Supp. 478, 480 (D.N.M. 1992)) (emphasis original). Thus, "[w]hen a Government lawyer, with enormous resources at his or her disposal, abuses this power, and ignores ethical standards, he or she not only undermines the public trust, but inflicts damage beyond calculation to our system of justice. This alone compels the responsible and ethical exercise of this power." *Id.* A "prosecutor's interest in a criminal prosecution 'is not that it shall win a case, but that justice shall be done.'" *Id*. (quoting *Pool v. Superior Court*, 139 Ariz. 98, 103 (1984)).

In addition, courts generally recognize that the ethical rules impose high ethical standards on prosecutors. *Id*.; *see also* Standards 5.0 and the attendant annotations; ABA Criminal Justice Standards 3-1.2(c); *Connick v. Thompson*, 563 U.S. 51, 65-66 (2011) ("prosecutors who violate their ethical obligations are subject to professional discipline since prosecutors have a special duty to seek justice, not merely to convict.") (cleaned up); *Berger v. United States*, 295 U.S. 78, 88 (1935) (prosecutors have special obligations as representatives "not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice

shall be done"); *U.S. v. Lopez-Avila*, 678 F.3d 955, 956 (9th Cir. 2012) ("Prosecutors, as servants of the law, are subject to constraints and responsibilities that do not apply to other lawyers ….").

At a very basic level, a prosecutor's duty, no less than a regular lawyer, is to ensure a client's objectives, directives, and requirements are attained. "A lawyer, as a member of the legal profession, is a representative of clients …. As advocate, a lawyer asserts the client's position." Ariz. R. Sup. Ct. 42, Preamble [1, 2]. Analogously, a lawyer's duty to her organizational clients, which include the state, the government, and governmental agencies, is to represent the interests of the organization. ER 1.13 and comments thereto.

In the case of a criminal prosecution, the State's interests—necessarily the interests of the prosecutor's client—are to ensure that the processes of trial and sentencing are fair, reliable, and free from taint, bias, and partiality. The interests, and actually the duties of a prosecutor's client in a criminal case, are no mystery; they expressly reside in the state and federal constitutions:

- The powers of the government are derived from the people and shall be exercised to protect and maintain individual rights under Article 2, § 2;
- A defendant shall receive due process of law under Article 2, § 4 and the 5th and 14th Amendments;
- A defendant shall receive justice in all cases, administered openly, and without unnecessary delay under, Article 2, § 11;

- A defendant shall receive a fair trial by jury of their peers, free from bias and partiality under Article 2, § 23 and the 6th Amendment.

These constitutional rights, and the attendant duties, are not ephemeral, transient, or discretionary; they are mandatory and absolute. Many ethical rules define a lawyer's duties in terms of the interests of his client. In a criminal prosecution, however, this Court explained first in *Pool* and then again in *Peasley* that the prosecutor's interest is to see that justice is done.

No other lawyer has this kind of responsibility, i.e., ensuring due process and a fair trial for the opposing party. The "client" has the ultimate authority on how a case may be handled. *See* ER 1.2. Here, the client is the State, which ostensibly acts "through its duly authorized constituents." ER 1.13. But, regardless of an authorized constituent's directive, the interests of the State would not lawfully be served by depriving a defendant of due process of law or a fair trial. The State's objective and the State's duty, acting through the prosecutor, is to do justice that comports with a defendant's state and federal constitutional rights, not just to win a case.

2. Proof of deprivation of a fair trial is not required to prove that a prosecutor engaged in ethical misconduct.

Unremarkably, under Arizona's Rules of Professional Responsibility and the Standards, the *potential* for injury suffices to warrant professional discipline. *See, e.g.*, Standard 5.22 ("Suspension is generally appropriate when a lawyer in an

official or governmental position knowingly fails to follow proper procedures or rules, and causes injury or *potential* injury to a party or to the integrity of the judicial process.") (emphasis added); *see also Peasley*, 208 Ariz. at 32 ¶ 19, 35 ¶ 33 ("Under the [ABA] Standards, consideration is given to the following factors: (1) the duty violated; (2) the lawyer's mental state; (3) the actual or *potential* injury caused by the misconduct; and (4) the existence of aggravating and mitigating factors.") (emphasis added). In *Peasley*, for example, the hearing officer found, and this Court agreed, that the potential for injury was sufficient to impose discipline.

Martinez's position that a finding of "misconduct" under the first prong of the prosecutorial misconduct test does not equate to a finding of ethical misconduct is overbroad. For prosecutorial misconduct to be the basis for reversing convictions and ordering a new trial, a defendant must prove that (1) the prosecutor's actions amounted to misconduct, and (2) there was prejudice in that there is a "reasonable likelihood … that the misconduct could have affected the jury's verdict, thereby denying defendant a fair trial." *State v. Hulsey*, 243 Ariz. 367, 388 ¶ 89 (2018).

But that result does not preclude an analysis of, and finding that, prosecutorial misconduct (even without "prejudice") can result in ethical misconduct. "Here although prosecutor Juan Martinez engaged in several instances of misconduct or near misconduct, it was not so prolonged or pronounced that it

affected the fairness of the trial." *Id*. (emphasis added). This conclusion adds nothing to whether the several instances of misconduct or near misconduct warranted bar discipline.

As noted in the Answering Brief, the remedy in court where there has been prosecutorial misconduct, but no prejudice, is "affirmance, followed by bar disciplinary proceedings against the offending lawyer, *if such proceedings are warranted*." Answering Brief at 19 (citing *State v. Valdez*, 160 Ariz. 9, 14 (1989)) (emphasis in Answering Brief).

Martinez treats the possible lack of a referral to the State Bar as precluding bar discipline. The claim is meritless. First, there is no statute of limitations on a lawyer's ethical misconduct, particularly where the misconduct has continued, unabated and publicly remarked on, over a period of years. As this Court repeated last year, "We do, … once again remind prosecutors, and particularly Mr. Martinez (whose misbehavior has been repeatedly noted in prior cases), that they are to act as ministers of justice and exercise professionalism even in the heat of trial." *Hulsey*, 243 Ariz. at 394 ¶ 123.

The Panel said that because Martinez did not testify at the hearing, it "could not measure his motives, credibility, or state of mind." Supplemental Report at 9-10. This is legally erroneous. In *Pool*, 139 Ariz. at 105-08, this Court specifically held that a prosecutor's motives should be measured objectively and that a court

should review the record for what reasonable inferences of intent should be drawn. It quoted the United States Supreme Court:

> a standard that examines the intent of the prosecutor, though certainly not entirely free from practical difficulties, is a manageable standard to apply. It merely calls for the court to make a finding of fact. Inferring the existence or nonexistence of intent from objective facts and circumstances is a familiar process in our criminal justice system.

Id. at 105 (quoting *Oregon v. Kennedy*, 456 U.S. 667, 675 (1982)). This Court then expressly instructed lower courts to engage in this inquiry:

> The trial judge is to measure what the prosecutor "intends" and "knows" by objective factors, which include the situation in which the prosecutor found himself, the evidence of actual knowledge and intent and any other factors which may give rise to an appropriate inference or conclusion. He may also consider the prosecutor's own explanations of his "knowledge" and "intent" to the extent that such explanation can be given credence in light of the minimum requirements expected of all lawyers.

Id. at 108 n.9. This is an objective test, not a subjective one.

Because the Panel overtly rejected the *Pool* standard in favor of its own subjective-intent standard, it erred as a matter of law.

3. The Panel made findings of fact that were manifestly unreasonable because they contradicted the undisputed documents in the record.

The Panel gave inordinate attention in its findings of fact and conclusions of law to attacking the competence of counsel for the State Bar and the integrity of the State Bar's expert witness Paul Charlton. Rather than catalogue all of the Panel's errors, AACJ highlights the most glaring and "clearly erroneous" findings.

A. *Morris* and *Gallardo*

In closing argument in *State v. Morris*, Martinez referred to the putrid smell of the victim's jacket and noted that this evidence was opened for the jury's "smelling pleasure." 215 Ariz. 324, 338 ¶ 62 (2007). He then invited specific female members of the jury to put themselves in the place of the victims—because the defendant only took women—and asked which one of the jurors "want[ed] to volunteer to come sit here and have the defendant sit on your chest" and grab her hair and pull it around her neck. *Id.* at 337 ¶ 58 & n.6.

Three years later, in *State v. Gallardo*, Martinez invited the jurors to sit in the shoes of the father who could no longer call his son. 225 Ariz. 560, 569 ¶¶ 41-42 (2010). These arguments appeal to the fears of the jury in a manner that this Court has already held violates ER 3.4. *In re Zawada*, 208 Ariz. 232, 236-37 ¶ 13 & n.2 (2004). The Panel erred by ignoring that this Court had considered those statements in context and determined they constituted misconduct in and of themselves.

B. *Beemon*

In rebuttal argument in *State v. Beemon*, Martinez invoked "Hitler," "the big lie," and "the German flag" in characterizing defense counsel's trial tactics. On appeal, the court of appeals referred to this "recurring theme" of comparing defense counsel and his argument to something from "Adolf Hitler" and "Nazi

Germany." Exhibit 4, at pp.19-21 (Bates 000063-000065). The court determined that reversal was not warranted because, "[a]s reprehensible as the prosecutor's analogy was, we believe any reasonable juror would have recognized the inappropriateness of this line of argument and discounted it." *Id*.

Inexplicably, the Panel ruled that the court of appeals was "inaccurate" because Martinez never used Hitler's first name or the word "Nazi." Supplemental Report at 35-40. It is a matter of historical fact that Hitler's first name was Adolf and there was no Germany over which Hitler ruled other than Nazi Germany. The Panel also challenged the court of appeals' characterization of Martinez's "recurring theme," which the Panel insists was "the big lie" and not Hitler or Germany. Again, the Panel ignores that, in context, "the big lie" was that told by Hitler and his Nazi Party officials.

Last, the Panel's attempt to excuse Martinez's conduct as suitable representation of his "client" is just wrong. Resorting to calling an opponent Hitler has never been acceptable even in Internet discussion threads; it is for this reason that Godwin's Law was created to cause people to pause and think twice before invoking Hitler. For an attorney to make this reference so glibly in the courtroom in a murder trial is sanctionable misconduct. The Panel clearly erred in failing to recognize this.

C. *Lynch II*

Five years after *Gallardo*, in *State v. Lynch (Lynch II)*, 238 Ariz. 84 (2015), Martinez committed a wide variety of misconduct that this Court determined was not reversible in large part because the trial court repeatedly sustained objections and instructed the jury to disregard the offensive remarks. Among his misconduct was:

- Repeatedly making argumentative remarks during opening statement, with multiple objections sustained. *Id*. at 92-93 ¶ 10.
- Improperly aggressive witness questioning, much of which drew objections that were sustained. *Id*. at 93 ¶ 12.
- Improperly attacking defense experts, for which many objections were sustained. *Id*. at 95 ¶ 22.
- Intentionally misstating the evidence, for which objections were sustained. *Id*. at 96 ¶ 26.
- Several misstatements of law. *Id*. at 98-99 ¶¶ 37, 41-43.

Finally, despite having been warned years earlier in *Morris*, and more recently in *Gallardo*, Martinez again invited jurors to put themselves in the position of the victim. This time, he encouraged them to envision being grabbed from behind and having their throat cut "from ear to ear." *Id*. at 100 ¶¶ 47-49.

This Court then reviewed the trial for cumulative misconduct and noted that "the prosecutor disturbingly made a number of inappropriate comments, prompting valid objections by Lynch that the trial court sustained." *Id*. at 100-01 ¶ 52.

Because the trial court maintained order over the courtroom, Martinez's misconduct did not prejudice the defendant. That, however, does not change the fact that Martinez committed such a degree of misconduct that this Court saw fit to call it "disturbing."

Although Bar Counsel could have included more complete transcripts of the *Lynch II* proceedings, Martinez did not deny that the *Lynch II* opinion accurately characterized Martinez's conduct. Thus, the Panel abused its discretion in finding that there was no evidence that Martinez committed misconduct by clear and convincing evidence. Supplemental Report at 57.

D. *Arias*

In *State v. Arias*, Martinez stated, as an argument by analogy, that if he were married to defense counsel Jennifer Willmott, he would "f-ing want to kill myself" (and said the expletive on the record, according to Ms. Willmott's testimony). Transcript at 78. Ms. Willmott explained that it was an insulting and unprofessional remark, and not a "compliment or a bad joke," as Martinez later claimed.

It was inappropriate, unnecessary, and inaccurate for the Panel to justify Martinez's conduct by determining that Ms. Willmott "likewise intended to have the victim disrespected in the eyes of the jury …" Supplemental Report at 63. In other words, the Panel appeared to believe that there was a quid pro quo. Even

assuming for the sake of argument that Ms. Willmott's effort to admit this evidence was groundless, no lawyer in this state should be allowed to resort to such a personal attack on opposing counsel at a bench conference. This Court explained long ago why the Panel's rationale is clearly erroneous as a matter of law:

> Defense counsel was quite an accuser in this case. The trial court once wrote, "Defendant's motion practice continues to make scurrilous attacks upon State's counsel.... Counsel's motion practice does not merit this much judicial consideration but for its outrageous nature."
>
> Although not all of defense counsel's accusations were unfounded, to fairly discuss how often the court and/or the prosecutor had reason to believe that defense counsel was himself guilty of impropriety would be a long story that will not be told in this opinion. Defense counsel misconduct can be the focus of other proceedings, but it warrants only a footnote in this opinion, which is focused on whether prosecutorial misconduct deprived Defendant of a fair trial. It suffices to say that the State does not argue, and we do not find, that the prosecutorial misconduct in this case can be excused on any sort of "invited error" theory.

State v. Hughes, 193 Ariz. 72, 77 n.2 (1998). Because the Panel failed to apply the common-sense adage that "two wrongs don't make a right," the Panel erred in finding Martinez's conduct excusable as a "heat of battle" response to a legitimate evidentiary question. As with the *Beemon* case, this example crystallizes Martinez's character.

E. Paul Charlton's testimony

The Panel saved its most withering and inexplicable attack for the State Bar's expert, Paul Charlton. At the outset, it qualified what was to come by stating

that the judge and attorney on the panel hold Mr. Charlton in high regard. But the fourteen-page section of "findings" related to this witness were nothing if not *ad hominem*.

Perhaps the most obtuse statement in the entire document is the assertion that Mr. Charlton "testified, with no explanation, that he was fired" from his job as the United States Attorney for the District of Arizona, and then stressing that "this was left unexplained." Supplemental Report at 18. It is hard to believe that neither the judge nor the attorney panelists were aware of the circumstances of Mr. Charlton's firing in 2006, since it was one of the most prominent legal stories in late 2006 and early 2007. As countless news accounts showed, Mr. Charlton was one of six U.S. Attorneys fired immediately after the 2006 election for political reasons—in Mr. Charlton's case, it was for taking a principled stand against prosecutorial overreach. *See, e.g.*, Amy Goldstein, *Fired Prosecutor Says Gonzalez Pushed Death Penalty*, Washington Post, June 28, 2007 ("Paul K. Charlton, one of nine U.S. attorneys fired last year, told members of Congress yesterday that Attorney General Alberto R. Gonzales has been overzealous in ordering federal prosecutors to seek the death penalty, including in an Arizona murder case in which no body had been recovered."). If the Panel truly was mystified and wanted to know why Mr. Charlton was fired, it was entitled to ask questions of witnesses

in disciplinary proceedings—and it routinely does. If this was truly a matter of concern, then the failure of any of the panelists to ask questions was remiss.

Furthermore, the fact that Mr. Charlton holds prosecutors to the highest standards meant to the Panel that "[i]t is transparent … that Mr. Charlton's opinion means he believes that any lawyer that is not a prosecutor need not adhere as 'closely as is humanly possible' to all the ethical rules." This finding is plainly incredible, and is contrary to all law on the question. It has been well settled, black-letter law since at least 1935 (when *Berger* was decided) that a prosecutor in a criminal prosecution is held to a higher ethical standard than an ordinary lawyer, and that prosecutors' special duties and heightened ethical obligations are reflected and incorporated in codes of professional responsibility across the country. That prosecutors in criminal cases have heighted duties does not suggest that other lawyers may have a pass on their own ethical violations.

Finally, the Panel considers Mr. Charlton biased and dishonest about his testimony that "he 'hadn't prejudged the case,'" because "while teaching 'Prosecutorial Decision Making and Ethics' at the Sandra Day O'Connor College of Law … Mr. Charlton instructed his law students in each semester by referencing Mr. Martinez, 'as something that a prosecutor should not do.' From that he acknowledged he had 'a preconceived image of Mr. Martinez.'" Supplemental Report at 19, 20.

This finding of bias is legally wrong for a number of reasons. First, more than any other field, law is derived from precedent, and future lawyers are best taught how to behave ethically by learning from the examples that this Court has given through its published opinions; and for prosecutors, the prospect of "naming names" in judicial opinions is generally considered to have deterrent effect because it has an overt effect on one's professional reputation.[1]

Second, it is not uncommon for a professor to be called before a tribunal as an expert witness and inform the tribunal of the subject matter they teach; this happens with experts in all fields. One would not consider a professor of astrophysics to be "biased" against the Flat-Earth Society because the syllabus contains Kepler's laws of planetary motion. The witness is supposed to bring his or her body of knowledge and experience to the tribunal. Likewise, as an adjunct

[1] A good example of this is seen in the oral argument before the Ninth Circuit Court of Appeals in *Baca v. Adams*, No. 13-56132 (9th Cir.), available at https://www.youtube.com/watch?v=2sCUrhgXjH4. The Court, after confronting a deputy California Attorney General with widespread misconduct, including of his colleagues, suggested, "it looks really bad, it will look terrible in an opinion when we write it up and name names; will your name be on there?" *See id*. at 34:00-34:15.

In *State v. Gallardo*, dealing with Martinez's misconduct, the state made a similar argument: "[I]f … an appellate court had found that I had acted inappropriately but that it didn't rise to the level of reversal, and named me in their opinion, and said that they didn't think that I had behaved appropriately, that would have had a tremendous impact on me and it would have had a tremendous impact on everybody in the prosecuting agency I work for." *State v. Gallardo* Oral Argument, available at http://supremestateaz.granicus.com/MediaPlayer.php?view_id=2&clip_id=1216 30:26-30:46.

professor of law, Mr. Charlton is responsible for teaching the future lawyers of Arizona what this Court's opinions say about prosecutorial misconduct. When he told Bar Counsel that he had not "prejudged" the case, he obviously meant that his ultimate opinion would depend on review of materials he had never seen, such as some of the transcripts that were admitted into evidence. This is what any expert in a particular field who is asked to evaluate evidence does.

The Panel then dismissed Mr. Charlton's competence by alleging that "he did not know that on death penalty cases the Supreme Court looks not only at the arguments of the defense counsel, but also conducts an independent review for the entire trial for fundamental error." Supplemental Report at 22. The reason Mr. Charlton did not know this is because it is not true. The statute requiring appellate courts to search the record for fundamental error, A.R.S. § 13-4035, was repealed in 1995. *See State v. Brown*, 191 Ariz. 102, 103 n.1 (App. 1997). To the extent there was independent review in capital cases, the *Morris* opinion is in evidence and shows it was related to "the jury's findings of aggravating and mitigating circumstances and the propriety of the death sentence" and did not apply "after August 1, 2002." *Morris*, 215 Ariz. at 340 ¶ 72.

The Panel used the term "swore" to describe Mr. Charlton's testimony no less than seven times. Supplemental Report at 19, 22, 23, 26, 39, 46. No other witness received this treatment; all other witnesses were described as having

"testified." *Id*. at 10, 40, 63 (defense expert Thomas Zlaket); *id*. at 55, 57, 58 (Lawrence Blieden). The Panel ascribed malicious intent to a witness who merely attempted to assist the tribunal with understanding the standards for prosecutors. The Panel's findings related to Mr. Charlton are unsupported by the evidence and clearly erroneous.

F. Conclusion

It is true that the conclusions of courts reviewing Martinez's conduct are illustrative but not dispositive. They are, however, far more informative than the brittle re-characterizations offered by the Panel to justify Martinez's references to Hitler, the malodorous stench of a putrid jacket offered to the jury for their smelling pleasure, Martinez's repeated invitations to jurors to place themselves in the shoes of someone whose throat is being cut (even after multiple warnings), and that Martinez would f-ing kill himself if married to Ms. Arias's lawyer.

Although the Panel continuously referred to Bar Counsel's "obfuscation" in presenting its case, the Panel's decision was no less aggressive, dismissive, and, at times, inappropriate in the way it characterized the proceeding below. Because the Panel's factual findings are contrary to the undisputed record, this Court should reject all of those findings.

4. Not only was the remedy sought—reprimand—fully justified in this case, but this Court has previously deemed suspension appropriate under similar circumstances.

A. At the least, Martinez must be reprimanded and placed on probation.

The most applicable standard here is Standard 5.2, Failure to Maintain the Public Trust: "Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving public officials who engage in conduct that is prejudicial to the administration of justice …"

Standard 3.0 provides, "[i]n imposing a sanction after a finding of lawyer misconduct, a court shall consider the following factors: (a) the duty violated; (b) the lawyer's mental state; (c) the potential or actual injury caused by the lawyer's misconduct; and (d) the existence of aggravating or mitigating factors." Standard 5.23 states, "[r]eprimand is generally appropriate when a lawyer in an official or governmental position negligently fails to follow proper procedures or rules, and causes injury or potential injury to a party or to the integrity of the legal process."[2]

Here, "the State Bar relied on the stipulated admission of transcripts and related exhibits regarding five appellate cases along with [Respondent's] Answer

[2] It is the Court's province to determine the appropriate level of discipline. Because the State Bar sought a reprimand, it is proper to refer to Standard 5.23. In so doing, however, *amicus* in no way suggests Martinez's conduct was negligent rather than knowing or intentional—far from it.

in the underlying discipline matter admitting the substance of Martinez's statements. Reply Brief at 2. It is on the basis of that evidence that the Panel decision was incorrect. There was ample evidence that Martinez repeatedly violated his duties as a professional and his special duties as a prosecutor, and certainly ample evidence to warrant a reprimand. *See Hulsey*, 243 Ariz. at 394 ¶¶ 122-124 ("When assessing cumulative error, this Court 'consider[s] whether persistent and pervasive misconduct occurred and whether the cumulative effect of the incidents shows that the prosecutor intentionally engaged in improper conduct and did so with indifference, if not specific intent, to, prejudice the defendant.'") (quoting *Lynch II*, 238 Ariz. at 100, ¶ 51)).

Assume that Martinez, rather than choosing not to testify, were to have asserted that he has no prior discipline and had substantial experience in the practice of law, that his motives were pure, and that his desire to obtain a conviction or a sentence of death did not abrogate and subsume his duty to do justice. Be that as it may, per the Standards, "good motives do not excuse prosecutorial misconduct." Standards, at 217 (citing *In re Pautler*, 47 P.3d 1175 (Colo. 2002)); *see also Peasley*, 208 Ariz. at 36-37 ¶¶ 36-44 (substantial experience allows a prosecutor to be assigned cases of greater magnitude and consequence, potentially exacerbating the effect of any misconduct, and the desire "to obtain[] a conviction at any cost" rather than to act as a minister of justice,

equates to a dishonest or selfish motive). At a minimum, reprimand was appropriate.

B. This Court has previously determined that suspension is appropriate when a prosecutor repeatedly and flagrantly disregards these special duties and shows no remorse or insight into the misconduct.

In *Zawada*, this Court held that prosecutor Thomas Zawada, who committed egregious misconduct in two cases separated in time by more than a decade, deserved a suspension of six months and a day. 208 Ariz. at 241 ¶ 38. Zawada's first case of misconduct, *Pool*, was so egregious that this Court saw fit to extend the double jeopardy protections of the Arizona Constitution beyond those of the Fifth Amendment. *Id*. at 238 ¶ 20 & n.3. Then, in 1994, Zawada prosecuted a defendant charged with first-degree murder and engaged in misconduct leading this Court not only to reverse the convictions but also to uphold the trial court's decision to bar retrial. *Id*. at 234 ¶ 3 (citing *State v. Hughes*, 193 Ariz. 72 (1998), and *State v. Jorgenson*, 198 Ariz. 390 (2000)).

This Court granted *sua sponte* review of the Disciplinary Commission's decision to censure Zawada and decided that no less a term of suspension than six months and a day was warranted. It found that Zawada was completely unrepentant to the extent that the risk of repeating his misconduct was "unacceptable" to the point that he should be required "to follow the formal application and reinstatement procedure under the rule." *Zawada*, 208 Ariz. at 240 ¶¶ 31-32.

Martinez certainly learned two lessons from *Zawada*: he appeared before the Panel with retained counsel and he did not personally and overtly attack this Court for wrongly criticizing him in opinions. *See id*. at 239 ¶ 25.

But Martinez did not learn anything from the prior cases in which this Court found he had committed misconduct. Even though this Court twice found he had acted improperly by asking the jury to place themselves in the shoes of the victim in *Morris* and *Gallardo*, he engaged in the exact same conduct in *Lynch*. That does not reflect an argument made in the heat of battle, it reflects an improper tactic he knows he can get away with. He also never learned that he wasn't supposed to attack opposing counsel. In *Beemon* the Court of Appeals found it improper when he compared defense counsel to Hitler. In *Arias*, his attack just became more vulgar and personal.

And at this hearing, Martinez refused to testify and refused to acknowledge in any way that he had repeatedly crossed a bright line of misconduct or that he would endeavor to improve his courtroom demeanor. Thus, there is no way this Court could divine any remorse on his part. Instead, based on a clear pattern of behavior, it is evident that Martinez will not learn from anything less of a sanction than suspension.

CONCLUSION

For these reasons, Juan Martinez should be disciplined.

RESPECTFULLY SUBMITTED this 3rd day of April 2019.

By: /s/ Mikel Steinfeld
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