KOPLOW
LAW FIRM

Friday, November 4, 2022

SENT VIA EMAIL & U.S. MAIL

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Re: TIFFANY BRADY, KEN VICK, RACHEL MITCHELL, *ET AL.*
COMPLAINT OF ETHICAL MISCONDUCT
PROSECUTION OF NUBIA RODRIGUEZ | CR2020-001819

Dear Ms. Vessella,

Nubia Rodriguez committed no crime. It was obvious. However, this did not prevent Maricopa County Prosecutor Tiffany Brady from charging Ms. Rodriguez with homicide. This did not prevent supervising attorneys Ken Vick and Rachel Mitchell from enabling Ms. Brady's prosecution.

After all three prosecutors were repeatedly presented with indisputable evidence that the allegations of negligent homicide were unfounded – they continued their prosecution. After all three prosecutors were confronted with the material misrepresentations this case was based on, the clearly exculpatory evidence Ms. Brady and Phoenix Police[1] suppressed – they still continued their prosecution of Ms. Rodriguez.[2]

[1]A complaint will also be filed addressing Phoenix Police's misconduct with the relevant local authorities. Counsel also intends to submit the relevant information to their Department of Justice for the current investigation of the Phoenix Police Department announced in 2021. https://www.justice.gov/opa/pr/justice-department-announces-investigation-city-phoenix-and-phoenix-police-department (last checked 11.03.22).

[2]A reoccurring issue in this case was the prosecution's refusal to address material flaws and misrepresentations in the foundation of their claims.

[redacted]

At the beginning of this case, these prosecutors were made aware of the tragic consequences of their actions. They were informed Ms. Rodriguez was a therapeutic foster mother. They were made aware that Ms. Rodriguez was in the process of adopting a special needs foster child living in her home nicknamed "Butterfly." Specifically, Ms. Brady was made aware that the indictment she procured resulted in the removal of Butterfly from Ms. Rodriguez's home by DCS.

Now, at the end of this case, two separate Maricopa County Superior Court judges have found there was **not probable cause** of a crime. However, to become free of this homicide charge, Ms. Rodriguez had to unnecessarily suffer through almost two years of a wrongful prosecution. Even after a Superior Court judge remanded the indictment to the grand jury, because it was founded on misconduct and suppressed evidence that was obviously exculpatory, MCAO still pushed forward with their prosecution. In doing so they simply repeated their false claims about Ms. Rodriguez.

On September 22, 2022, Maricopa County Superior Court Judge Joseph Kreamer found exactly what defense counsel told these prosecutors years prior. He found, what was obvious to everyone…who was willing to listen. Judge Kreamer found there was **no probable cause of a crime**.[3]

Judge Kreamer's ruling came *after another* Superior Court Judge ruled the prior grand jury presentation in this matter (by Ms. Brady) contained **material misrepresentations** and **failed to present** clearly exculpatory evidence. Ms. Brady's failure to correct the false statements by the testifying witness resulted in Superior Court Judge Ryan-Touhill remanding the matter for a new finding of probable cause.[4]

Undersigned counsels represented Ms. Rodriguez in her criminal matter. Now that the criminal prosecution has been dismissed, we submit, that the conduct of Ms. Brady, Mr. Vick and Ms. Mitchell, as detailed in this complaint, demonstrates they

[3] Exhibit 16, Order by Judge Kreamer, No Probable Cause Finding, 09.22.22.

[4]After Judge Ryan-Touhill remanded the matter for a new finding of probable cause the prosecution took a highly unusual procedural step. Instead of going back to the grand jury they chose to proceed by conducting a Preliminary Hearing on the same charge of negligent homicide. Judge Kreamer presided over the Preliminary Hearing which lasted three days.

[redacted]

all[5] flagrantly violated several of the Arizona Rules of Professional Responsibility on **multiple occasions**.[6]

They were all given several **opportunities to mitigate** their conduct. They were all shown objective evidence of Ms. Rodriguez's innocence by the defense on multiple occasions throughout the years of this prosecution. However, instead of doing what was mandated their ethical obligations, each time their response was only to strengthen their commitment to the prosecution of Ms. Rodriguez…regardless of the evidence.

We submit that in their prosecution of Ms. Rodriguez, the ethical duties violated, include, but are not limited to:

1. **ER 1.1 | Competence**
   ER 1.1 provides a lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

2. **ER 3.1 | Meritorious Claims and Contentions**
   ER 3.1 provides in relevant part a lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a good faith basis in law and fact for doing so that is not frivolous.

3. **ER 3.3(a)(1) | Knowingly Making a False Statement**
   ER 3.3(a)(1) provides a lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal.

4. **ER 3.3(a)(3) | Knowingly Offer Evidence Known to Be False**
   ER 3.3(a)(3) provides a lawyer shall not knowingly offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

[5] Due to the death of Allister Adel her actions are not included in this letter.
[6] *See* Section IV. PRIMARY INSTANCES OF MISCONDUCT.

[redacted]

5. **ER 3.4(a) | Obstruction of Access to Materials with Evidentiary Value**
   ER 3.4(a) provides a lawyer shall not unlawfully obstruct another party's access to evidence or conceal a document or other material having potential evidentiary value.

6. **ER 3.4(b) | Assist a Witness to Testify Falsely**
   ER 3.4(b) provides a lawyer shall not assist a witness to testify falsely.

7. **ER 3.4(c) | Violation of a Rule of a Tribunal**
   ER 3.4(c) provides a lawyer shall not knowingly disobey an obligation under the rules of a tribunal.

8. **ER 3.8(a) | Knowingly Prosecuting Without Probable Cause**
   ER 3.8(a) provides a prosecutor in a criminal case shall refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.

9. **ER 3.8(d) | Prosecutor Shall Disclose Evidence Which Negates Guilt**
   ER 3.8(d) provides a prosecutor in a criminal case shall make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense.

10. **ER 3.8(f) | Prosecutor Shall Refrain from Extrajudicial Comments Which Heighten Condemnation**
    ER 3.8(f) provides a prosecutor in a criminal case shall refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused.

11. **ER 5.1(b) | Duties as a Supervisor**
    ER 5.1(b) provides that a lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

12. **ER 8.4(c) | Professional Misconduct | Dishonesty and Misrepresentation**
    ER 8.4(c) provides it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation

13. **ER 8.4(d) | Conduct Prejudicial to the Administration of Justice**
E.R. 8.4(d) provides that it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice.

14. **Knowing Behavior | *In re Zawada*, 208 Ariz. 232, 237, ¶ 15 (2004)**
Knowing behavior is established by invoking, among other things, objective factors that 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." *Pool*, 139 Ariz. at 108 n. 9, 677 P.2d at 271 n. 9. Applying this standard, there can be no doubt that Zawada, **an experienced prosecutor**, was aware of his direct disobedience of a court rule. *See In re Zawada*, 208 Ariz. 232, 237, ¶ 15, 92 P.3d 862, 867 (2004).

A Brief Preamble

It is important to briefly explain the need for the length and detail of this complaint.

The underlying criminal matter was designated complex by the court. There was a tremendous volume of discovery. A significant portion of that discovery involved technical information requiring specialized knowledge. However, these are not the primary reasons for the amount of content provided.

The main reason is the extraordinary breadth and scope of the misconduct by prosecutors and police occurring in this matter. The only other comparable precedent counsel could find was the matter of *In re Aubuchon*[7] (also involving the Maricopa County Attorney's Office).[8]

The sheer number of false representations and untruthful statements by prosecutors and police required an extraordinary amount of time and effort to untangle. Misinformation does not come with a warning sign. Context was critical to revealing

[7] *In re Aubuchon*, 233 Ariz. 62, 72, ¶ 49, 309 P.3d 886, 896 (2013), as amended (Oct. 25, 2013) ("In sum, Aubuchon violated ERs 3.8(a) and 8.4(d) by filing the criminal complaint against Judge Donahoe without probable cause…")

[8] Counsel submit, in their opinion, the record demonstrates an even greater level of prosecutorial culpability here than in *Aubuchon*.

[redacted]

many of the misrepresentations and why they so severely prejudiced Ms. Rodriguez.[9]

I. SUMMARY OF CRIMINAL ALLEGATIONS & FACTS

On the morning of March 21, 2019, a man illegally[10] darted into traffic outside of a crosswalk. After running past one lane, he then ran into the adjacent lane where Ms. Rodriguez's vehicle was traveling. That is where the impact occurred. As a result of the collision the man died.

Phoenix Police conducted an investigation. The results of their investigation provided numerous findings of fact. Ms. Rodriguez agreed with several of Phoenix Police's (PPD) own findings. Accordingly, as the Phoenix Police Department determined, it was **undisputed** that:

- Ms. Rodriguez had **no alcohol** in her system.
- Ms. Rodriguez had **no drugs** in her system.
- Ms. Rodriguez was **not texting** (or distracted by her phone).
- Ms. Rodriguez was traveling **under** the posted **speed limit** at the time of impact.

The man who ran into the road, that failed to look before entering Ms. Rodriguez's lane – was a **Phoenix Police Officer**. Phoenix Police Officer Paul Rutherford (Rutherford) tragically died soon after this accident.

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[9] Counsel limited this complaint to the most egregious instances of alleged ethical misconduct. Counsel also limited (and or redacted) the complaint's supporting documentation / information cited to the publicly available portions of the record and items meeting the definition of a public record.

[10] *See* A.R.S. § 28-793(C) provides: "[b]etween adjacent intersections at which traffic control signals are in operation, **pedestrians** shall not cross at any place except in a **marked crosswalk**." Moreover, Judge Ryan-Touhill found Brady and Davidson presented evidence that gave a false impression of an exigency, but that impression was not supported by the evidence. *See also* Exhibit #1, p. 4, 7, Order of Judge Ryan-Touhill, dated 08.10.22.

[redacted]

An Unforeseen Event

Prior to the collision, Rutherford (and his partner Officer Miller) were investigating a non-injury traffic accident on 75th Drive, on the *south side*, of Indian School Road. Then something **unforeseen** and **unconnected to** Rutherford's current traffic investigation occurred.[11] Something no one in Ms. Rodriguez's position could possibly foresee.

There was a radio call about a completely unrelated incident.[12] It was not a traffic issue. It was **not occurring** on Indian School Road. Rather, PPD received a report of a man with a weapon causing a disturbance at a restaurant. This occurred near the *north side* of Indian School Road in the same vicinity (in a Filiberto's Restaurant).

Rutherford and Miller **did not** take the call. Miller looked to the north as the call was coming out. He initially didn't see any activity. Rutherford and Miller heard over their radios that **other units** had already answered the call. So, both officers stayed at the accident scene to finish their investigation.[13]

Soon after, as their traffic investigation was concluding, Miller went to check on something at the other incident. Subsequently, Rutherford decided to check on Miller who had already crossed Indian School Road.[14]

Rutherford's Decision to Cross Outside the Crosswalk

After Rutherford told a witness he was going to check on the situation across the street[15], he then *walked* over to his police vehicle. It was located in the south curb lane of Indian School Road. At this time, and contrary to the claims of Brady and

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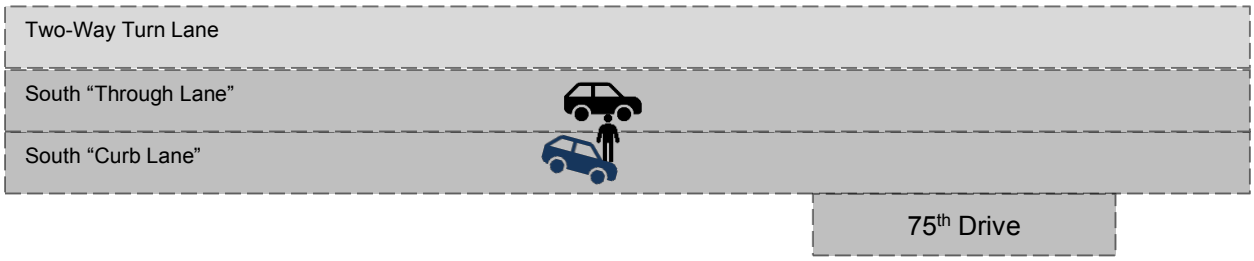
[11] Exhibit #1, p. 4 - 5, Order of Judge Ryan-Touhill, dated 08.10.22.
[12] *Id.*
[13] *Id*. at p. 4 - 5, 7.
[14] *Id*. at 4
[15] In Judge Ryan-Touhill's order remanding the indictment it was held:

> In providing evidence to the Grand Jury, the State elicited testimony from Detective Davidson, a Phoenix Police Department detective. **The Court concludes** this testimony, in part, gave the Grand Jury the impression that Officer Rutherford responded to a police emergency when he crossed the street. **This impression is not supported by the evidence**. [bold added].

[redacted]

Davidson, videos[16] shows traffic is still traveling eastbound in the adjacent lanes on Indian School Road.

Rutherford's vehicle had its red and blue lights on. However, it was daylight, which **reduced their visibility**.[17] After Rutherford secures his vehicle, video[18] shows he turns to face north. The first thing in his line of sight is a car, directly in front of him, in the **"through lane"** traveling east. It is in the lane adjacent to Rutherford who is in the **"curb lane."**

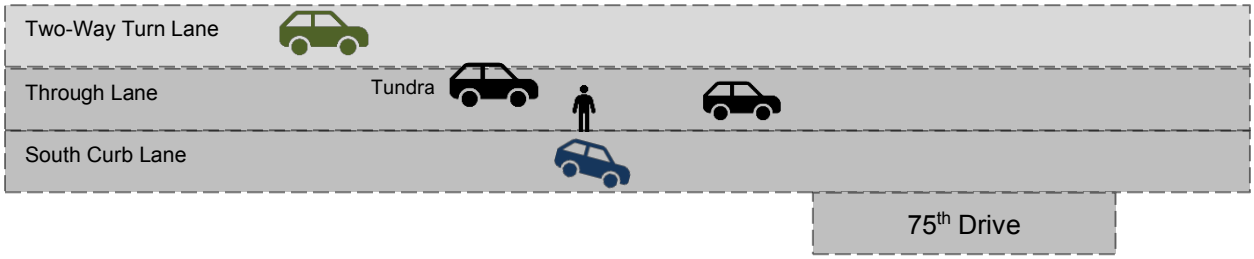


After the vehicle passes, the officer runs[19] into the *through lane*. As he runs into the *through lane*, he raises his hand to stop a Toyota Tundra that approached him.[20]

[16] Exhibit #13, Body Camera Video of Rutherford; and Exhibit #2, Security Video.
[17] MCAO conceded to defense counsel they never determined how far the visibility of the lights extended in daylight (and when their sightline was obstructed by other vehicles as in this case)..
[18] Exhibit #13, Body Camera Video of Rutherford.
[19] Exhibit #9, p. 23, Dager Report ("The speed of Officer Rutherford as he was **running northbound** was **4 to 6** miles per hour…")
[20] *Id*.

[redacted]

Ms. Rodriguez[21] was in the lane that was north, and immediately adjacent to, the lane the Tundra was traveling. That is, she was in the "**two-way turn lane**." However, she was further back than the Tundra (see illustration below). As she immediately told police at the scene, she intended to turn left, to get to the Filiberto's restaurant located to the north.

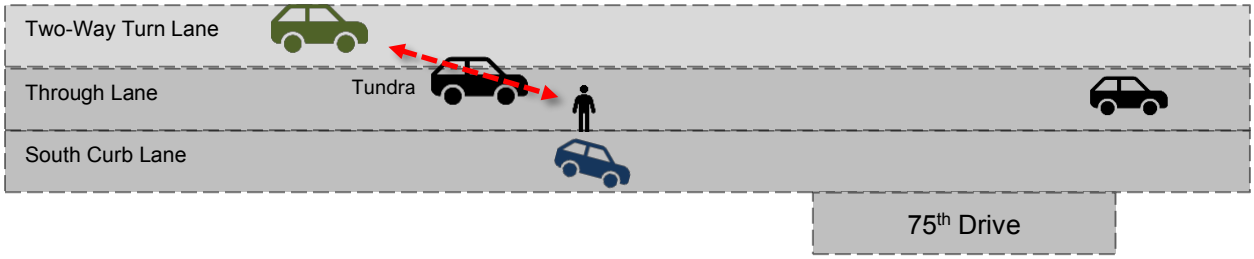


According to Ms. Rodriguez's statement to police at the scene, she was in that lane intending to turn left. She was planning to get breakfast at the fast-food restaurant (Filiberto's) located in the shopping center directly to her north.[22]

Coincidently, and unbeknownst to Ms. Rodriguez, this was the same restaurant where the other incident was occurring. Also unbeknownst to Ms. Rodriguez, it was now Rutherford's destination as well.[23]

Rutherford Enters Her Lane Without Looking

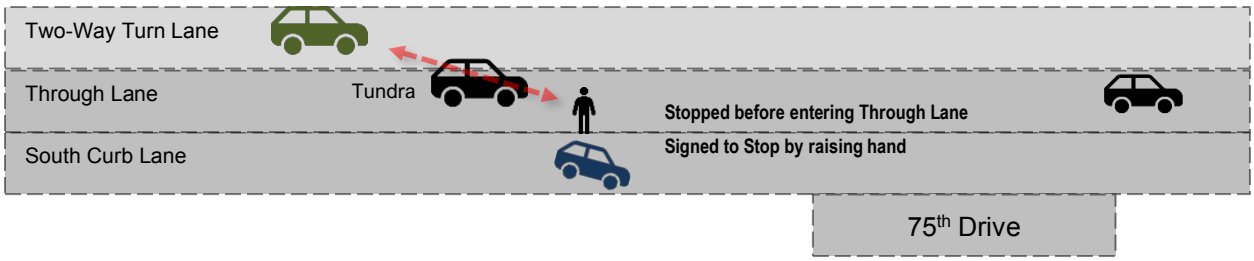
As PPD's crash analysis concluded, the Tundra (located in the lane next to, and just south of, Ms. Rodriguez's lane) blocked the officer's view of Ms. Rodriguez's vehicle. It also **blocked Ms. Rodriguez's view** of Rutherford.[24]



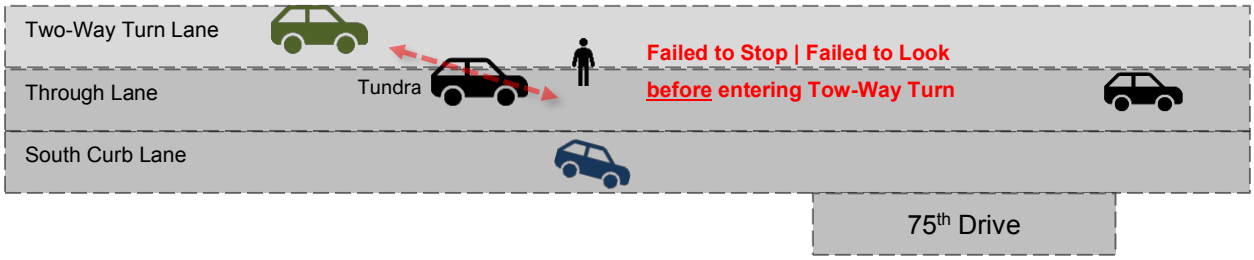
[21] Rodriguez's vehicle is depicted as the green car in the illustration.
[22] Exhibit #1, p. 2 - 5, Order of Judge Ryan-Touhill, dated 08.10.22.
[23] *Id.*; See also Exhibit #4, Crash Analysis of PPD Expert Gibbs, Dated 08.18.19
[24] Exhibit #4, p. 29, Crash Analysis of PPD Expert Gibbs, Dated 08.18.19.

[redacted]

Prior to entering the *through lane* with the Tundra, Rutherford **looked to the left**, ensuring he had enough time to **raise his hand** and stop traffic. This ensured he had enough time to also raised his hand to signal the approaching Toyota Tundra.



However, ***prior to*** entering Ms. Rodriguez's lane (the two-way turn lane) Rutherford **did not** take this same precaution. As stated in PPD's own Crash Analysis[25], the officer darts out into Ms. Rodriguez's lane – **without stopping** – and **without looking** into her lane. Then, almost immediately, the collision occurs.



As conceded in PPD Expert Gibbs' written Crash Analysis, the collision could have **been avoided** if Rutherford had by stopping and looking before entering Rodriguez's lane.[26] **These facts were suppressed from the grand jury by Brady.**[27]

Rutherford ran into the two-way turn lane where Ms. Rodriguez was driving – **solely due** to the unrelated incident – on the north side of the road. The prior non-injury traffic accident provided no reason for Rutherford to be anywhere near the lane where the collision occurred with Ms. Rodriguez's vehicle.

[25] *Id*. at p. 37 ("**It needs to be considered** that Ofc. Rutherford could have also avoided the collision **if he** had **stopped and looked** west down the two-way left turn lane prior to entering it.")
[26] *Id*.
[27] Exhibit #1, p. 6, Order of Judge Ryan-Touhill, dated 08.10.22.

[redacted]

In our view, despite these undisputed facts, PPD and the Maricopa County Attorney's Office (MCAO) would not accept that it was Rutherford's own mistake that caused this tragedy.

Security Video of the Incident

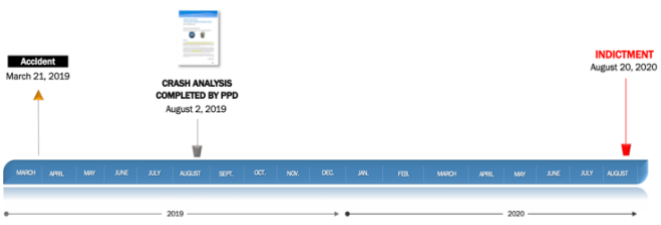
By pure coincidence, the final moments of this tragedy were captured on a security video[28] of a nearby business. Without that video defense counsel believes Ms. Rodriguez would likely be a felon by now. Phoenix Police obtained the video soon after the accident. **The video was never shown to the grand jury.**

The events described above were captured on the video. Gibbs (PPD's own expert) based his opinion about Rutherford's failure to stop and look from this very video. It is, combined with Rutherford's body camera video,[29] the best objective evidence providing a complete view of Rutherford's behavior. It was clearly exculpatory evidence, known to Brady, who made a knowing decision not to show it to the grand jury.

Instead of showing this video to the grand jury the prosecution had their only witness Detective Davidson (Davidson) narrate how the accident occurred. In and of itself there is nothing inherently wrong or unethical about presenting evidence to a grand jury in this manner. However, it was the fictional claims that Brady and Davidson provided to the grand jury that were contradicted by the videos, that resulted in violations of law and her ethical duties.

Timing Relevant Events

The timeline of events is critical context. The accident occurred on **March 21, 2019**. For all practical purposes PPD's investigation was completed on **August 2, 2019** when Gibbs issued his report (almost 6 months after the accident).



[28] Exhibit #2, Security Video.
[29] Exhibit #6, Rutherford Body Camera Video.

[redacted]

However, the indictment would not occur until almost a year and half after the accident.[30] Thus, Brady and Davidson had almost a year and a half to review all evidence in this matter. This included the security camera video, the body camera videos, and all the police reports. This was a high-profile case that included the death of a police officer. PPD had addressed the case in the media.

In addition, the defense was informed that *before* the grand jury presentation, this case was staffed at the highest levels within MCAO. It would have been a violation of Ms. Brady's Duty of Competence to not watch the videos in her possession before initiating this prosecution.

Any reasonable person, who had watched the security camera video, would have known that Davidson was testifying untruthfully to the grand jury regarding the facts of how the accident occurred. Any reasonable attorney would have comported with their ethical obligations and corrected the record. Brady did not.

II. THE ALLEGED STATUTORY CRIME

The sole crime which MCAO chose to present to a grand jury in this matter was negligent homicide.

A. RELEVANT STATUTES

Under Arizona law: "[a] person commits negligent homicide if with **criminal negligence** the person **causes** the **death of another person**…" A.R.S. § 13-1102. [bold added].

A.R.S. § 13-105(d) Criminal negligence. The statute provides:

> 'Criminal negligence' means, with respect to a result or to a circumstance described by a statute defining an offense, that a person **fails to perceive** a **substantial and unjustifiable risk** that the result will occur or that the circumstance exists. The **risk must** be of such nature and degree that the **failure to perceive it** constitutes **a gross**

[30] To be clear, the issue raised here is not *per se* how long it took from the time of the accident until it was presented to a grand jury. There are many valid reasons why a felony matter may take a significant period of time to be charged. Rather, the point is, there was more than adequate time for prosecutors and police to review all the evidence to accurately present it to a grand jury.

> **deviation from** the **standard of care** that a reasonable person would observe in the situation. A.R.S. § 13-105

Negligent homicide is seldom initially charged as a vehicular crime. As the Comments to Criminal Arizona Revised Jury Instructions note, criminal negligence is rarely charged:

> USE NOTE: This instruction should be used only in those statutes whose mental state involves the **rarely-criminalized** standard of negligence, *e.g.,* A.R.S. § 13-1102, negligent homicide." *See* RAJI, 1.0510(d), Criminal Negligence.

These statutes are most often[31] used as a lesser included offense or in a plea agreement to find a reduced charge in pursuit of a resolution.

B. RELEVANT LEGAL PRECEDENT

The Arizona Supreme Court has interpreted the negligent homicide statute and determined that a decedent's conduct is a material consideration. *See State v. Shumway*, 137 Ariz. 585, 588–89 (1983).

In *State v. Shumway*, 137 Ariz. 585, 588–89 (1983) the Court held:

> …In the instant case, the **decedent's conduct** may be relevant **because** her failure to yield the right of way **could relieve the defendant** of criminal responsibility. For example, the defendant might prove that he expected the victim to yield and, therefore, did not slow down as he approached the intersection.
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> ****
>
> The jury might therefore conclude that the defendant's failure to slow down was **not criminal negligence**, *i.e.,* "a gross deviation from the standard of care that a responsible person would observe in the situation." A.R.S. § 13–105(5)(d).[32]

[31] Defense counsel requested MCAO provide a list of other instances where they had charged negligent homicide as an initial offense. They were only able to provide three (3) other matters.
[32] *State v. Shumway*, 137 Ariz. 585, 588, 672 P.2d 929, 932 (1983).

The Court further stated:

> While it is true that in a criminal prosecution for negligent homicide the contributory negligence of the deceased is not a defense, *State v. Nerison*, 28 Wash.App. 659, 661, n. 1, 625 P.2d 735, 737, n. 1 (1981), the trier of fact **may still consider** the **decedent's conduct** when determining whether the defendant's act was **criminally negligent**.[33]

III. MCAO'S FALSE THEORY OF PROSECUTION

It is important to consider that the undisputed facts in this matter, combined with the legal requirements of the negligent homicide statute(s), limited the number of potential scenarios that could constitute negligent homicide. Put another way, **removing** factors such as (1) impairment, (2) distracted driving or (3) traveling over the posted speed limit at impact, leaves very few imaginable circumstances where a person's behavior would be considered a gross deviation from the required standard of care. So, how did Brady get a grand jury to issue an indictment?

Brady permitted: (1) legal instructions by the sole testifying officer that she had to know were untrue, (2) solicited factual claims she had to know were false, and (3) suppressed clearly exculpatory evidence. The record shows this combination of prohibited behaviors conveniently threaded the needle to produce an indictment for negligent homicide.

It is also important to note that Judge Ryan-Touhill granted defense counsel's motion to remand **without an evidentiary hearing** or without even addressing several of the instances of misconduct raised. As the court's minute entry order provides,[34] the instances it relied on were so egregious, that the court did not reach many of the issues raised by defense counsel in that motion.[35]

At the same time, keep in mind that this was a high-profile case that defense counsel was informed was staffed at the highest levels within the Maricopa County Attorney's office before it was brought to the grand jury. Brady had almost one year and a half to prepare for this presentation. With so many people following this case

[33] *Id*.
[34] Exhibit #1, Order of Judge Ryan-Touhill, dated 08.10.22.
[35] In all candor, Judge Ryan-Touhill did not agree with *all* defense counsel's arguments in their motions.

any reasonable person would conclude Brady had adequately prepared with her witness (Davidson) for this presentation.

A. FALSE LEGAL INSTRUCTION TO GRAND JURY[36]

There is no good faith[37] reason to explain why an experienced prosecutor would allow a witness to: (1) provide legal instructions to a grand jury; (2) that were blatantly incorrect; and (3) fundamentally altered the relevant law in a manner **designed to** produce an indictment.

At the grand jury, Brady called only one witness to testify: Detective Davidson (Davidson). During both Brady's initial presentation and the subsequent questioning from grand jurors she **permitted him**[38] to provide **numerous** and **in-depth legal instructions**. This legal instruction was objectively contrary from the actual requirements of Arizona law.

What occurred in this grand jury presentation was not a one-off mistake or inadvertent oversight. It had to be **a pattern of intentional conduct** of both Brady and Davidson. Not even a novice prosecutor would permit a testifying witness to completely usurp their role as the provider of legal instruction. Nor would they stand by and permit obviously incorrect legal instruction to go uncorrected.

Counsel believes a review of the publicly available testimony occurring in this grand jury presentation shows that Brady not only (as the Assistant Bureau Chief of the Vehicular Crime Section) had to know Davidson was violating Rodriguez's due process rights – but also that she acquiesced and assisted him in the violations.

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[36] Counsel limited the information cited to and materials provided in this complaint to information made publicly available and not protected by statute. Counsel will seek to have other information and materials believed to relevant to this complaint made available. In that instance, these materials will be provided to the State Bar.
[37] *See Talbot v. Schroeder*, 13 Ariz. App. 230, 231, 475 P.2d 520, 521 (1970) (Arizona courts have long held that an attorney is bound to discharge his/her duties with strict fidelity and to observe the highest and utmost good faith).
[38] Exhibit #1, p. 7-8, Order of Judge Ryan-Touhill, dated 08.10.22 ("The witness' statements give legal conclusions and should have been corrected by the State.").

[redacted]

1. Brady Permits Davidson to Provide Legal Instruction

A fundamental requirement of competence for a prosecutor responsible for handling matters in a grand jury is knowing the requirements of A.R.S. § 21-408.[39] Subsection A plainly states that the prosecutor attends the grand jury to examine witnesses, to give the jury legal advice, and to prepare indictments. A.R.S. § 21-408(A). The legislature only provided statutory authority to one party, in a grand jury presentation, to provide legal instructions – the prosecutor.

However, despite the plain language of A.R.S. § 21-408(A) which is well known and followed by prosecutors in Arizona, Brady permitted Davidson to assume the roles of prosecutor and a judge. Davidson spent a significant portion of his testimony providing erroneous legal instructions and making prohibited legal conclusions without any corrections or admonitions from Brady.[40] The primary erroneous legal instructions and prohibited legal conclusions are addressed below.

2. Brady Permits Davidson To Falsely Instruct the Grand Jury Regarding Entering the Road Outside of a Crosswalk.

As quoted in Judge Ryan Touhill's order remanding this matter, a grand juror asked: "[i]s it illegal to step into an oncoming traffic lane?"[41] Without any intervention from Brady, Davidson eventually answers "no." This answer was **contrary to law**. It is inconceivable that Brady did not know it was erroneous at the time and as the court found she failed to correct it.[42]

Rutherford entered Indian School Road outside of any designated crosswalk. A law specifically prohibits Rutherford's actions. A.R.S. § 28-793(C) provides:

> "[b]etween adjacent intersections at which traffic control signals are in operation, **pedestrians** shall not cross at any place except in a **marked**

[39] Exhibit #14, A.R.S. § 21-408.
[40] Exhibit #1, p. 7-8, Order of Judge Ryan-Touhill, dated 08.10.22.
[41] *Id*. at 7. This is not to say police are never exempt from traffic laws. The legislature has created specific statutory traffic law exemptions for police. For example, *See* A.R.S. § 28-624 (*i.e*., hot pursuit, emergencies, etc.). However, as the court also concluded none applied here. Rutherford possessed no knowledge of any specific exigent circumstance requiring him to enter the roadway outside the crosswalk. He was also aware that other officers had already responded to the call. His behavior recorded on video prior to entering the road did not demonstrate that he was attempting to respond to an emergency.
[42] *Id.*

[redacted]

> **crosswalk**." [bold and underling added]. Rutherford's actions did not comply with the plain language of the statute.[43]

As the Court found, Brady was required to prevent, and / or correct, Davidson's legal advice to the grand jury. However, Brady permitted him to act as a legal adviser to grand jury. Davidson erroneously instructed the grand jury of Rutherford's legal duty to not enter the road – outside the crosswalk – in a manner that led to an erroneous indictment of Ms. Rodriguez. Brady failed to correct Davidson's misconduct at the time it occurred, and also when the defense brought it to her attention on subsequent occasions, as required.[44]

In addition, well after the indictment, but before the Preliminary Hearing, defense counsel informed Brady and her supervisors Vick and Mitchell that the indictment was secured by materially false statements and misconduct. The defense notified all of them of their duty to notify the court - all failed to comply with this duty.[45]

3. Brady Permits Davidson To Falsely Instruct the Grand Jury That Rutherford Had the Right of Way.

Brady also permitted Davidson to provide an erroneous legal instruction about **who had** the **right of way**.[46] Once in the roadway, A.R.S. § 28-793(A) mandates that "a pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection **shall yield** the right-of-way **to all vehicles** on the roadway." However, Davidson gave legal instruction to the contrary.

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[43] When looking at Arizona's overall statutory traffic law scheme there is no evidence of a legislative intent to exclude certain classes of pedestrians. *See generally, State v. Salcido*, 238 Ariz. 461, 465, ¶ 13, 362 P.3d 508, 512 (App. 2015) (providing a relevant analysis in the context of determining if police vehicles fit the definition of "other traffic" pursuant to § 28–754).

[44] Exhibit # 7, *Basurto* Notice to MCAO; ER 3.3(a)(3), *United States v. Basurto*, 497 F.2d 781 (9th Cir. 1974); *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959); *State v. Moody*, 208 Ariz. 424, 440, ¶ 32, 94 P.3d 1119, 1135 (2004).

[45] *Id*. *See also* Exhibit 8, Email of Ken Vick, Dated 05.02.22, where Vick asserts:

> I have spent a significant amount of time reviewing your accusations and the evidence in this case. In addition, I have sought the advice of other attorneys due to the serious nature of your accusations and your opinion of my ethical obligations. **I disagree** that the prosecutor in this matter **acted inappropriately or unethically** in her presentation before the grand jury. [bold and underline added].

[46] Exhibit #1, p. 7, Order of Judge Ryan-Touhill, dated 08.10.22.

[redacted]

As Judge Ryan-Touhill also quoted in her order, a grand juror asked: "[d]oesn't he—doesn't the car have the right-of-way over the officer?"[47] Instead of Brady referring to the relevant statute(s), she permitted Davidson to improperly answer this legal question. Davidson then erroneously instructed the grand jury.[48]

a. The Color of Authority Argument

Brady permitted Davidson to incorrectly instruct the grand jury that **Ms. Rodriguez <u>did not</u>** have **the right of way**.[49] As noted in Judge Ryan-Touhill's order, Davidson went on to claim that Rutherford was "…actually acting under the **color of his authority**" so that gave him the right of way.[50] This answer was not only incorrect[51] but also absurd.

The Court found (as defense counsel previously informed[52] Brady Vick and Mitchell) that Davidson's legal instruction was incorrect.[53] Keep in mind that – **Brady's written response** to the defense's motion – contained no case law or statue supporting Davidson's claim. Judge Ryan-Touhill found:

> The State failed to present any evidence to the Grand Jury that an officer "acting under the color of his authority" automatically has the right-of-way in crossing traffic. The Court could find no case on point to support the witness' testimony and the **State has failed to present any authority** supporting their witness' testimony. Moreover, this Court has found no law that distinguishes law enforcement from "regular" pedestrians.[54]

The fact Brady was unable to provide any legal authority to support Davidson's absurd legal opinions, also supports, the propositions: (1) that she and Davidson

[47] Exhibit #1, p. 7, Order of Judge Ryan-Touhill, dated 08.10.22.
[48] *Id.*
[49] *Id.*
[50] *Id.* [bold underline added]
[51] Even the concept of Davidson's legal instruction should have been obviously absurd to Brady when he announced it to the grand jury. Color of authority simply means with the appearance of authority. There is an entire area of law dedicated to litigating actions by police, done pursuant to their color of authority, that are still unlawful. This is the core premise of every Section 1983 lawsuit against police.
[52] Exhibit # 7, *Basurto* Notice to MCAO.
[53] Exhibit #1, p. 7, Order of Judge Ryan-Touhill, dated 08.10.22.
[54] *Id.*

[redacted]

knew their legal instructions to the grand jury were incorrect **at the time**; and (2) that she and Davidson knew the indictment was **procured through the use** of materially false testimony – requiring notification to the court (as requested by defense counsel in writing).[55]

4. Brady Permits Davidson to Conclude Ms. Rodriguez "Breached" Her Duty of Care.

Brady permitted Davidson to instruct the grand jury that Ms. Rodriguez was driving illegally. That is, as Judge Ryan Touhill documented, Brady also permitted Davidson to testify that Phoenix Police's investigation found Ms. Rodriguez "breached" her duty of care.[56]

This testimony presented several forms of misconduct. Brady permitted Davidson to usurp the grand jury's role. It is well established that whether there is probable cause to believe a person violated a law is not for a testifying witness to decide.[57] Moreover, it is also well established that personal opinions as to a person's guilt or innocence are also prohibited.[58]

With these kinds of prohibitions in mind, consider the answer Brady permitted Davidson to provide to this grand juror question: "**is it illegal to drive** in the left-hand turn lane to pass cars and then go up and turn left," Davidson responded, "**the way the statute is written – the answer is <u>yes</u>**."[59] [bold and underline added].

Brady, an experienced prosecutor, **had to know** Davidson's answer usurped the grand jury's role. She had to know the issue of whether a person violated a law is not for a testifying witness to decide.[60] Brady had to know that personal opinions as to a person's guilt or innocence were also prohibited.[61]

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[55] Exhibit # 7, *Basurto* Notice to MCAO; *See also* ER 3.3(a)(3).
[56] Exhibit #1, p. 7-8, Order of Judge Ryan-Touhill, dated 08.10.22.
[57] *See generally* Crimmins v. Superior Court, In & For Maricopa County, 137 Ariz. 39, 44, 668 P.2d 882, 887 (1983); and see Maretick v. Garrett, 204 Ariz. 194, 197 (2003).
[58] *See State v. Bojorquez*, 111 Ariz. 549, 554, 535 P.2d 6, 11 (1975) (citing *State v. King*, 110 Ariz. 36, 514 P.2d 1032 (1973).
[59] Exhibit #1, p. 7, Order of Judge Ryan-Touhill, dated 08.10.22.
[60] *See* generally *Crimmins v. Superior Court, In & For Maricopa County*, 137 Ariz. 39, 44, 668 P.2d 882, 887 (1983); and see *Maretick v. Garrett*, 204 Ariz. 194, 197 (2003).
[61] *See State v. Bojorquez*, 111 Ariz. 549, 554, 535 P.2d 6, 11 (1975) (citing *State v. King*, 110 Ariz. 36, 514 P.2d 1032 (1973); *State v. Abney*, 103 Ariz. 294, 440 P.2d 914 (1968).

[redacted]

Davidson's testimony that Ms. Rodriguez "breached" her duty of care was also prohibited vouching[62]. This testimony was akin to not only providing an opinion that Ms. Rodriguez was guilty, but also that the **Phoenix Police Department believed** that Ms. Rodriguez is guilty.

In her 05.09.22 Response to the Motion to Remand, Brady provided what she stated was a justification for permitting this testimony. Brady wrote:

> **It was not for Det. Davidson or DCA Brady to intervene and tell the grand juror that it was not relevant**. Indeed, it is easy to see how it could be relevant. If the police had not found that she breached her duty, there would be no case.[63]

This response is astounding. It is either astoundingly ignorant or astoundingly made in bad faith. In either event, Judge Ryan-Touhill found, Brady had a duty to correct Davidson's obvious misconduct and failed to comply with this duty.[64]

B. SUPPRESSED EVIDENCE

Several key exculpatory findings by PPD's own expert were suppressed by Brady. Sgt. Gibbs (Gibbs) of the Phoenix Police Department (at the time his rank was Detective), was assigned to perform a crash analysis. He would also become Ms. Brady's primary expert in this matter.

During the grand jury presentation Davidson testified to several of Gibbs' conclusions in support of obtaining an indictment. However, not all of Gibbs' essential findings were provided to the grand jury.

In Gibbs' written report, completed almost **a year prior** to the grand jury presentation, he made two material findings:[65]

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[62] *See United States v. De Rosa*, 783 F.2d 1401, 1405 (9th Cir. 1986) (a prosecutor may invalidate an otherwise valid indictment by making prejudicial remarks, failing to control a witness' irrelevant and inflammatory remarks or vouching for a witness' credibility).
[63] Exhibit #11, p. 9, State's Response to Motion to Dismiss, Dated May 9, 2022.
[64] Exhibit #1, p. 7-9, Order of Judge Ryan-Touhill, dated 08.10.22 ("The witness' statements give legal conclusions and should have been corrected by the State.").
[65] Both of these findings by the prosecution's own expert were suppressed from the grand jury.

1. It "**needs**" to be considered that the officer "could have also **avoided** the collision" if "he had **stopped** and **looked** west down the two-way left turn lane prior to entering it."[66]

2. Ms. Rodriguez's and Rutherford's **view of each other was obstructed**. Gibbs also found: "[t]he assumption was made that the Ford driver could not see through the Tundra and that Ofc. Rutherford was only visible over the hood of the Tundra once the A-pillar area was no longer a visual obstruction."[67]

How could these findings not be clearly, and obviously, exculpatory?

The first finding by PPD expert Gibbs is tantamount to saying the accident could have been avoided if Rutherford used *due care*. Moreover, Gibbs stated it "**needs**" to be considered – not it ***should*** or ***might*** be considered.

The second finding points towards the conclusion that, it was **not foreseeable** for anyone in Ms. Rodriguez's position, to anticipate Rutherford would be entering her lane. That is, for reasons beyond Rodriguez's control, it was not possible for her to see Rutherford as he ran into the road (outside of a crosswalk).

However, **Brady's written response** to defense counsel's motion to remand (which raised the issue of the suppression of these specific claims) she denied withholding clearly exculpatory evidence. In retrospect, Brady's claim that "The State Did Not Withhold Clearly Exculpatory Evidence" is striking when viewing at the totality of circumstances. Brady plainly cherry-picked Gibbs' opinions that supported her theory of the case, and that she suppressed from the grand jury his other opinions that were clearly exculpatory in nature and contrary to Brady's theory of the case.

Instead of admitting to the violation, as required,[68] Brady ***doubled down*** on her misconduct. Rather than mitigate this violation Brady claimed the defense somehow took Gibbs' conclusion out of context. At the same time, Vick and Mitchell appear to have embraced Brady's position based on assertions to have reviewed this matter and found no wrongdoing.[69]

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[66] Exhibit #4, p. 37, Gibbs Crash Analysis.
[67] Exhibit #4, p. 29, Gibbs Crash Analysis.
[68] See ER 3.3(a)(1) and ER 3.3(a)(3).
[69] Exhibit #17, Response by MCAO to ABC15 News (Re: Remand Ruling), Dated 08.16.22.

[redacted]

Ultimately, however, Judge Ryan-Touhill agreed with defense counsels' position. Her order remanding the indictment found:

> Det. Gibbs, also from the Phoenix Police Department, investigated and reconstructed the accident. Det. Gibbs did not testify at the grand jury proceeding but Det. Davidson referenced Det. Gibbs' report. Det. Gibbs concluded, "It needs to be considered that [Officer] **Rutherford could have also avoided the collision** if he had stopped and looked west down the two-way left turn lane prior to entering it." Motion to Remand at 7 (emphasis added).
>
> ****
>
> **But nowhere** in his testimony does Det. Davidson acknowledge that Officer **Rutherford failed** to again to look west into traffic before stepping into the two-way left turn lane. **This is critical**. Det. Gibbs' statement regarding Officer Rutherford's contribution to the incident is clearly exculpatory and the State should have presented it to the Grand Jury.[70] [bold and underline added].

The denials by Brady, Vick and Mitchell, that clearly exculpatory evidence was suppressed, are not credible and **lack a good faith basis**. Any reasonable prosecutor would have considered this conclusion by own expert (which he stated "needs" to be considered) obviously exculpatory.

C. FALSE FACTUAL CLAIMS

MCAO primarily based this prosecution on Ms. Rodriguez's **pre-impact** driving behavior and pre-impact speeds. Despite **evidence to the contrary**, prosecutors espoused a *theory* that Ms. Rodriguez:

- "made a decision to use the two way left turn lane as a high speed lane of travel to avoid the traffic backup that was caused by the wreck blocking the two lanes in her direction of travel."[71]

[70] Exhibit #1, p. 6, Order of Judge Ryan-Touhill, dated 08.10.22.
[71] Exhibit #20, Email of Ken Vick, 03.10.22. In addition, the clearly exculpatory security video was shown by defense counsel to Vick at an in-person meeting demonstrating only one lane was blocked.

[redacted]

- They further asserted "[n]ot only did she decide to use that median as a regular lane, she did not even do that cautiously."[72]

As demonstrated below, these claims lacked a good faith basis and were contrary to the evidence in MCAO's possession.

Methods of Obtaining Evidence

To properly evaluate the validity of the pre-impact driving behavior alleged by MCAO and PPD, it is important to understand how unusual their actions were in pursuit of this prosecution. So, how did MCAO and PPD establish this alleged **pre-impact driving behavior** (*i.e.,* the basis of their case)?

Traditional accident reconstruction was not capable of providing much data of Ms. Rodriguez's driving behavior *prior to impact*. The further back (in terms of time and distance) from the point of impact the less data is available. However, in most criminal cases, this data is sufficient for a prosecution decision. In many criminal cases the speed at impact is combined with some kind of other evidence (*i.e.,* impairment and/or distracted driving evidence); or the speed at impact is so great that, in and of itself, it is a sufficient basis of a criminal charge.

Lacking evidence of impairment, districted driving and having an impact speed under the posted speed limit did not stop the pursuit of a prosecution. Rather, law enforcement sought other means to find evidence of a crime.

No Event Data Recorder Available

Crash Data Retrieval software is a not a novel methodology for crash analysis. It is a generally accepted method of using specialized equipment to retrieve a vehicle's Event Data Recorder (EDR) information. This information is commonly called *crash data* extracted[73] from a *black box*. Unfortunately, no such data was available here.[74]

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[72] *Id.*

[73] The process uses software to translate the EDR data file to a readable format for review and analysis.

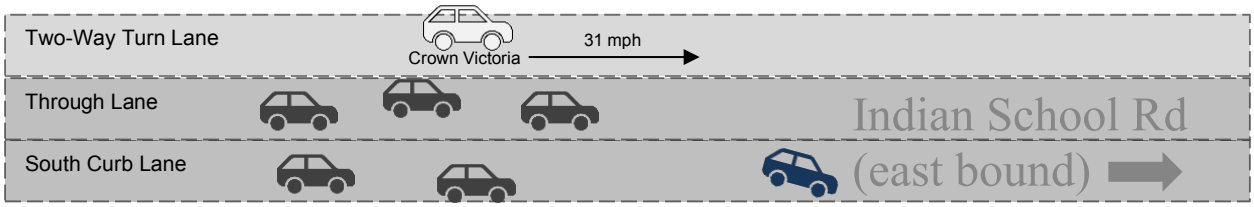
[74] A triggering event is required to activate the recording by an EDR. The collision must create a large enough rate of deceleration to trigger a recording. Here, the impact **did not** have enough change in velocity to trigger the event data recorder in Ms. Rodriguez's vehicle.

[redacted]

Video Evidence

The video analysis by PPD, for purposes of speed determinations, **did not** show Ms. Rodriguez measurably traveling above the posted speed limit.[75] However, PPD also analyzed the speed of one other vehicle using video frame rate analysis. The vehicle was a **Crown Victoria**.

PPD obtained a video that recorded the **Crown Victoria**, not long before recording Ms. Rodriguez, also traveling in the **same** two-way turn lane. The recording takes place at a location close to the where the collision with Rutherford would soon occur. PPD calculated this **Crown Victoria** traveling at just over **30 mph vehicle**.[76] Recall that PPD determined that Ms. Rodriguez's speed could have been as low as **36 mph** at the time of impact.[77]



Despite possessing[78] the information about the Crown Victoria's speed and lane, Brady asserted through this prosecution that Ms. Rodriguez was going to 5 to 10 **times the flow of traffic**. Of course, this argument fails if the speed of the Crown Victoria is considered.[79]

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[75] The case was dismissed before defense counsel could even challenge it accuracy. However, for purposes of the ethical issues here, we will rely on the conclusions about speed from the videos as accurate.

[76] Exhibit # 9, p. 19, Dager Report ("The Crown Victoria was also traveling in the two-way left turn lane passing the stop and go traffic;" and "the Crown Victoria covered the distance in 25 frames or 0.83 seconds which gives me a speed of **31.55 mph**")

[77] *Id*., at page 23 ("I reconstructed the collision, using known reconstruction techniques, and it was determined the speed of the Ford was **36** to 40 miles per hour at the first sign of roadway evidence.)

[78] Exhibit # 9, p. 19, Dager Report ("The Crown Victoria was also traveling in the two-way left turn lane passing the stop and go traffic;" and "the Crown Victoria covered the distance in 25 frames or 0.83 seconds which gives me a speed of 31.55 mph")

[79] *Id;* The arguments were also reiterated and debated at the preliminary hearing after the indictment was remanded.

[redacted]

BERLA DATA

To support their theory that Ms. Rodriguez had engaged in a pattern of reckless driving that resulted in the death of Rutherford, PPD needed more evidence than traditional crash analysis methods provided. To claim, as explained above, that Ms. Rodriguez at one point was traveling at a speed which was 10 times the flow of traffic (meaning she would be going 50 mph) – PPD also needed more evidence that traditional crash analysis methods provided. Accordingly, PPD turned to a **novel** data extraction **software.**

Berla iVe software was the **only tool** they had which put Ms. Rodriguez's speed over the posted speed limit. Without the use of the Berla software, law enforcement had no meaningful evidence to support their reckless pre-impact driving theory. The location and speed allegations created using the Berla software were not just material to this prosecution – **they were essential**. Brady relied on Berla data speeds at both the grand jury and also at the preliminary hearing.

The fact that Brady prosecuted this case relying on a novel scientific methodology is **not a basis** of this complaint. Rather, this complaint is based on a record that shows Brady had to be aware the claims being made, using Berla Data, were not supportable but she presented them as established fact.

What is Berla Data?

Berla software extracts data from a vehicle's "infotainment" system. Many modern vehicles have "infotainment" systems (*e.g.,* Apple Car Play). An "infotainment" system is a combination of vehicle systems that are used to deliver entertainment and information to the driver and the passengers through audio / video interfaces, and control elements (*i.e.,* touch screen displays, button panel, etc.). Berla software extracts data from a compatible vehicle's "infotainment" system.

The Types of Data Available

The kinds of data Berla software is able to extract depends on what the vehicle's "infotainment" system collects and stores. Different brands of vehicles and models will collect and store different kinds of data.

Many more recent vehicles collect GPS location data. However, it is well established that there are significant limitations to the accuracy of these kinds of GPS systems.[80]

Garbage In Garbage Out

In vehicles that have an infotainment system, that collects GPS data, Berla software is capable of utilizing it to produce a calculation of speed. However, as stated above, the calculation is not intended to represent a vehicle's actual speed.

The Berla system determines speed based on comparing prior GPS position – to current GPS position. Accordingly, the accuracy of the position which the system determines directly impacts its speed calculation. The more accurate the location determination the more accurate the speed determination. **The converse is also true,** the less accurate the position data, the less accurate the speed data.[81]

Berla software merely extracts data and uses it to make calculations. It **does not improve the quality**[82] of the data. Thus, the software will calculate and assign a speed to a specific GPS location, but results are only as accurate as the existing GPS system that was installed by the vehicle's manufacture – which is completely unknown.

1. **Berla Warned PPD of its Limitations**

Berla does **not conceal** the fact that speed determinations using their software can't be verified (this is because determining a vehicle's exact speed is not the primary purpose of their software).

Berla actually warned PPD, prior to the grand jury presentation, that the accuracy of the speed determinations using Berala software were not verifiable. Soon after the accident, PPD Detective Dennison (Dennison), soon after the accident, was tasked with extracting data from Ms. Rodriguez's vehicle using the BERLA software.

Dennison was certified in the use of Berla data. After extracting the data Dennison identified a significant problem in the data. In response, he called BERLA for

[80] Exhibit 15, Paragraphs 4, 8, 9, Declaration of Expert Robert Anderson (Author of SEA Paper).
[81] Exhibit 15, Paragraphs 6 - 9, Declaration of Expert Robert Anderson (Author of SEA Paper).
[82] Exhibit 15, Paragraphs 5, Declaration of Expert Robert Anderson (Author of SEA Paper).

assistance. In his written report, Dennison documents what he learned from his communications with BERLA. Dennison wrote:

> GREG ALSO INDICATED THE SOURCE OF THE **LOCATION DATA** AND **SPEEDS REFLECTED** IN THE BERLA EXTRACTION WERE A RESULT OF GLOBAL POSITIONING DATA (GPS) AND HE WAS **UNABLE TO QUANTIFY THE ACCURACY**.[83] [caps in original][bold added]

Given that Brady had, and presumably read the Dennison's report that was later disclosed to the defense, she had to know the limitations of the BERLA data. However, Brady and Davidson still proffered this evidence as if were established fact and without qualification.

Similarly, defense counsel also had a privately retained accident reconstructionist contact the Berla about the use of their software for speed calculations. Berla informed him that the speed calculation from the software should not be relied upon.

2. BERLA Data Presented as Fact

Despite knowing these above limitations, Brady permitted Davidson to testify the BERLA iVe software revealed Ms. Rodriguez's speeds at specific GPS locations, at specific times. Accordingly, Davidson (and then later Gibbs at the preliminary hearing) asserted that this data showed a *pattern* of reckless conduct and evidenced that she was using the two-way turn lane for a purpose other than Ms. Rodriguez stated to police at the scene.

MCAO and PPD used Berla data to support their claim the Berla data showed Ms. Rodriguez's driving grossly deviated from what a reasonable and prudent driver would do approaching the area where the collision would occur.

3. Specific Berla Data Claims

The specific Berla data claims were primarily documented in Gibbs Crash analysis and reiterated in Davidson's certified Form 4 probable cause[84] statement.

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[83] Exhibit #12, Dennison's Supplemental Report.
[84] Exhibit #18, Probable Cause Statement, Davidson's Form 4, Dated 08.30.19 [caps in original][bold added]

[redacted]

Davidson's Form 4 made the following Berla Data claims:

- ACCORDING TO THE DATA COLLECTED FROM THE BERLA COMPUTER INTEGRATED IN TO THE FORD EXPEDITION'S INFOTAINMENT SYSTEM, AS MS. CASTILLO [now Rodriguez][85] TRAVELED EAST, SHE CHANGED FROM THE CURB LANE TO THE TWO-WAY LEFT TURN LANE, BETWEEN 78TH AVENUE AND 77TH DRIVE, APPROXIMATELY 300 FEET WEST OF 77TH AVENUE.

- MS. CASTILLO REMAINED IN THE TWO-WAY LEFT TURN LANE FOR APPROXIMATELY 1,100 FEET AS SHE PASSED SEVERAL OPPORTUNITIES TO MAKE A LEFT TURN.

- SHE COLLIDED WITH OFC. RUTHERFORD AT THE THIRD PRIVATE DRIVE TO THE FEDERICO'S **SHE ACCELERATED UP TO SPEEDS OF 50 MILES PER HOUR JUST PRIOR** TO COLLIDING WITH OFC. RUTHERFORD (ACCORDING TO THE BERLA COMPUTER, MS. CASTILLO'S SPEED WAS GREATEST AS SHE DREW CLOSER TO THE COLLISION SCENE BEING INVESTIGATED BY THE OFFICERS).

- MS. CASTILLO MAINTAINED THAT SPEED FOR APPROXIMATELY ONE SECOND BEFORE APPLYING THE BRAKES AND COLLIDING WITH OFC. RUTHERFORD.

Brady and Davidson relied on such Berla claims through the entire prosecution of Ms. Rodriguez.

4. The Scientific Authority Relied on by PPD

The primary expert witness Brady relied on for Berla Data evidence was Gibbs. Perhaps the most important single piece of evidence for the prosecution was Gibbs' conclusion:

[85] Ms. Rodriguez went through a divorce after the accident and changed her name back from Castillo to Rodriguez.

[redacted]

> Studies have shown the Berla data to be accurate to the vehicle's actual speed (Vandiver) indicating the Ford was traveling **near 50 mph** in the two-way left turn prior to the collision. [bold added][86]

The full citation provided for that study was found on page 38 of Gibbs Crash Analysis. That citation was: Vandiver, W., **Anderson, R**. "Accuracy of Speed Data Acquired from Ford Sync Generation 2 and Generation 3 Modules Utilizing the Berla iVe System." **SAE Technical Paper** 2018-01-1442. 2018. [bold added].

Undersigned counsel, independently obtained a copy of this scientific authority, used by PPD to support for their BERLA Data claims. After our review of the publication, it did not appear to stand for the proposition that Gibbs stated in his report. Accordingly, counsels sought out a qualified expert to address this contradiction.

5. Defense Counsel Contacts the Expert Cited by Gibbs

The co-author the study Gibbs cites "**Anderson, R**." was short for Robert Anderson. Counsels sought out and retained Mr. Anderson to review the Berla Data and the claims PPD had made regarding it to indict Ms. Rodriguez.

Mr. Anderson's written expert opinions[87] included:

a. The data obtained through the Berla iVe system was used improperly and beyond its limitations in this case.

b. The data also contained flaws which were material to the crash analysis.

c. Berla iVe did not have sufficiently reliable GPS data (nor enough data) to make a trustworthy speed calculation, for any given point in time.

d. This limitation is well known and generally accepted in the relevant Accident Reconstruction Community.

[86] Exhibit #4, p. 36, Detective Gibbs Crash Analysis.
[87] Exhibit #15, Declaration of Expert Robert Anderson (author of SEA Paper).

[redacted]

e. Gibbs' crash analysis materially mistakes and misapplies the findings of his published paper. His findings in that study, which Gibbs cited, did not support his claims in the reconstruction of Ms. Rodriguez's case.

In sum, the person who authored the only scientific authority which PPD relied on for their most important claim – reviewed the data in this case – and concluded Gibbs' crash analysis materially misstated and misapplied the findings of his published SAE paper.[88] The same expert also found:

> Based upon my research and expertise, the **assertions made cannot be supported** by any peer reviewed published scientific authority.
>
> ****
>
> It is **not generally accepted** in the relevant scientific community to use the data obtained with Berla iVe to support the assertions in Detective Gibbs' analysis since **it cannot be used** to determine a **specific speed**, at a **specific location**, at a **specific time**.[89]

On **March 30, 2022**, defense counsel disclosed[90] this **written declaration** from Robert Anderson that contain these and several other criticisms of Gibbs use of Berla data to Brady.

6. Admission by PPD to Brady

Unknown to defense counsel, after the disclosure of Anderson's Declaration, PPD subsequently admitted that they could not contest his conclusions.

Prior to the preliminary hearing, which resulted in the complaint being dismissed by Judge Kreamer, defense counsel made a **public records request** to the Maricopa County Attorney's Office. Counsel attempted to get the requested documents before the preliminary hearing but was unable. Rather, they were turned over by MCAO soon after Judge Kreamer issued his ruling.

Contained in the documents turned over was an **April 4, 2022** email exchange between Davidson and Brady. In an email to Brady, Davidson states:

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[88] Exhibit #15, paragraph 14, Declaration of Expert Robert Anderson (Author of SEA Paper).
[89] *Id*. at paragraph 15.
[90] Exhibit #19, Email to Brady, Disclosing Anderson's Declaration, Date 03.30.22.

[redacted]

> **"Neither** CC or Thayne said they **could dispute** the author of the SAE paper. They suggest hire an engineer from BERLA to testify." [bold and underline added]
>
> Mike Davidson #7038
> Phoenix Police Department

Upon information and belief "CC" and "Thayne" are PPD employees. The author of the SAE paper is defense expert Robert Anderson. Consequently, this was a concession by PPD that they **could not** contest the opinions in Mr. Anderson's Declaration (disclosed to Brady days prior to this email).

Brady **never disclosed** this email, or the admission contained in it. This admission, that the most important piece of evidence relied on by the prosecution, was a misapplication of Anderson's published paper was "favorable" evidence required to be disclosed.[91]

IV. PRIMARY INSTANCES OF MISCONDUCT

Below are the primary instances of **when** the misconduct detailed in this complaint occurred throughout the litigation.

1. The Grand Jury Presentation[92]

Meritorious Claims and Contentions | Responsibility of Prosecutor | Knowingly Making a False Statement | Preserving Integrity of Adjudicative Process | Ex Parte Proceedings | Candor to Tribunal

As illustrated above, Brady's grand jury presentation combined the knowing use of materially false testimony, the suppression of obviously exculpatory evidence and substantive legal misrepresentations. It is implausible that these actions occurred by coincidence. On the contrary, the available record shows **knowing misconduct** by the presenting witness and the **appearance of collusion** by Brady with that witness.

In summary, the primary misconduct (much of which was cited by Judge Ryan-Touhill in her remand order) at the grand jury presentation was:

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[91] *Brady v. Maryland*, 373 U.S. 83 (1963); Rule 15.1, Arizona Rules of Criminal Procedure.
[92] This complaint is currently limited to information regarding the grand jury that is already contained in the public record, and was revealed by the Court's Remand Order.

False Legal Instruction

a. Brady Permitting Davidson to Provide Legal Instruction.

b. Brady Permitting Davidson to Erroneously Instruct the Grand Jury Regarding Entering the Road Outside the Crosswalk.

c. Brady Permitting Davidson to Erroneously Instruct the Grand Jury That Rutherford Had the Right of Way.

d. Brady Permitting Davidson to Conclude Rodriguez Violated an Unspecified Traffic Law and Breached Her Duty of Care.

Misrepresentations of Fact

e. Berla Data Presented as Fact

Brady permitted Davidson to testify to Berla speed determinations, at specific GPS locations, at specific times as if these speeds were established fact. However, Brady and Davidson both possessed Det. Dennison's report stating Berla had specifically warned PPD against making such representations.

Thus, any reasonable person would have to conclude that both Brady and Davidson had to know they were presenting false representations to the grand jury; and the record provides the appearance MCAO and PPD colluded[93] together to make such representations.

In addition, it was discovered during cross-examination of **Gibbs** at the subsequent preliminary hearing (occurring years after the indictment was issued by the grand jury) that he **was never provided** Dennison's report **containing the warnings** from Berla before writing his crash analysis. Gibbs testified that the first time he became aware of Dennison's report was when preparing for the preliminary hearing.

[93] *See* Section V. THE APPEARANCE OF COLLUSION.

[redacted]

This raises several questions:

- Why did Davidson (as the case agent) not make sure PPD's own Berla Data Expert (Gibbs) knew about something so important as the information in Dennison's report?

- Why did Brady not question the absence of any mention of Dennison's report – in Gibbs' written Crash Analysis?

Suppression of Clearly Exculpatory Evidence

f. Suppressing their own expert's finding that it "**needs" to be considered** that the officer "could have also avoided the collision" if "he had stopped and looked west down the two-way left turn lane prior to entering it."[94]

g. Suppressing their own expert's finding: Ms. Rodriguez's and Rutherford's view of each other was obstructed.[95]

h. Suppressing Berla's warning to PPD Detective Dennison (documented in his report) that the accuracy of speed determinations from the software could not be verified.[96]

2. Settlement Conference #1

Failure to Take Remedial Measures | Duties as A Supervisor | Responsibility of Prosecutor

Prior to the settlement conference, defense counsel filed a Settlement Conference Memorandum detailing many of the issues outlined in the complaint. Defense counsel provided the Memorandum to Brady prior to the conference.

Defense counsel asked Brady in front of the settlement conference judge whether she had staffed this case with the acting county attorney at the time - Allister Adel.

[94] Exhibit #4, p. 36, Detective Gibbs Crash Analysis
[95] Exhibit #4, p. 29, Detective Gibbs Crash Analysis
[96] Exhibit #12, Dennison Supplemental Report

[redacted]

Brady provided a cryptic response, but eventually, confirmed that that case was staffed with her then Division Chief – Rachel Mitchell.

Brady stated that Mitchel reviewed this matter with her. She also stated that Mitchell had approved the plea offer. The plea required Ms. Rodriguez **plead guilty to a felony** and serve at least a **one-year term of jail** - despite the known exculpatory evidence.

Defense counsel also directly asked Brady to address our claims that this indictment was based on materially false representations. Brady refused to address our questions and communicated that she was only there to discuss whether Ms. Rodriguez was interested in a plea offer or not. Brady asserted that a settlement conference was not the place to address legal issues raised by the defense.

3. Presentation to MCAO by Defense Counsel

Failure to Take Remedial Measures | Duties as a Supervisor[97] | Responsibility of Prosecutor

Defense counsel requested a staffing with MCAO's Chief Deputy Ken Vick to address the issues raised. Mr. Vick agreed to an in-person meeting.

On 03.02.22, at MCAO, defense counsel provided a **detailed PowerPoint Presentation** of many of the issues raised in this complaint. Included in attendance were Vick and Brady. According to Vick, Mitchell was supposed to be present. The parties waited for her to attend and eventually proceeded without Mitchell (who upon information and belief was acting as Brady's Division Chief at the time).

The presentation illustrated numerous instances of erroneous legal instruction Brady permitted Davidson to provide to the grand jury. It also highlighted the materially false representations that Brady permitted Davidson to provide the grand jury; and also showed the clearly exculpatory evidence suppressed.

[97] In the *Matter of Alexander*, the Arizona Supreme Court addressed the ethical obligations of criminal prosecutors and their supervisors required by ER 5.2. *See Matter of Alexander*, 232 Ariz. 1, 300 P.3d 536 (2013). In *Alexander*, a matter involving prosecutors working in the Maricopa County Attorney's Office, the court held under ER 5.2(a), "A lawyer remains bound by the Rules of Professional Conduct even when working at another lawyer's direction." *Alexander*, 232 Ariz. at 6, 300 P.3d at 541.

Counsel also brought a former Mesa Police Accident Reconstructionist to the meeting. He had previously been an expert for the Maricopa County Attorneys' Office. He had even been an expert witness for Ms. Brady in prior cases. He occasionally assisted with the presentation and made himself available for questions.

After the presentation Vick provided a written response. On 03.10.22, Vick sent an email to defense counsel stating, *inter alia*:

a. "I am **not going to express any opinion** as to **whether the case should be remanded** to the grand jury. I understand the concerns that you explained in your presentation, but I have not dug into the details of that beyond what you highlighted."

b. "I will **leave to the prosecution team** the task of deciding how to best litigate those issues."

c. Mr. Vick acknowledged the limitations of Berla data ("Despite the limitations of that data…")[98]

4. Admission by PPD to Brady | 04.04.22 Email

Failure to Disclose Exculpatory Evidence | Responsibility of Prosecutor | Candor to Tribunal | Obstruction of Access to Materials with Evidentiary Value

Unknown to defense counsel at the time, there was an **April 4, 2022** email exchange, between Davidson and Brady. The subject of the email was an Expert Declaration by Robert Anderson recently disclosed by defense counsel to Brady.

This prosecution relied heavily on PPD's allegations regarding Ms. Rodriguez's speed. The fastest speed PPD alleged was based on Gibbs' use of Berla data. Gibbs claimed that the Berla data proved that Ms. Rodriguez reached a speed of 50 mph prior to the accident in the two-way turn lane.

[98] Exhibit 20, Email of Ken Vick | Dated 03.10.22

[redacted]

However, the use of Berla Data to calculate a vehicle's speed at a specific location was a novel use of this technology under the circumstances. To support his claims Gibbs cited only one public scientific authority. It was a **SAE Technical Paper**.[99]

As referenced earlier, that citation was: Vandiver, W., **Anderson, R**. "Accuracy of Speed Data Acquired from Ford Sync Generation 2 and Generation 3 Modules Utilizing the Berla iVe System." **SAE Technical Paper** 2018-01-1442. 2018. [bold added].[100] The co-author (Anderson) of this publication eventually was **retained as an expert by defense counsel** to review Gibbs' claims.

The results of Anderson's review and analysis were put into a declaration and disclosed to Brady on **March 30, 2022**. In summary, Anderson concluded Gibbs materially misstated the results of his published paper. Anderson also concluded in his declaration that:

> It is **not generally accepted** in the relevant scientific community to use the data obtained with Berla iVe to support the assertions in Detective Gibbs' analysis since **it cannot be used** to determine a **specific speed**, at a **specific location**, at a **specific time**.[101]

Approximately five days later, in an April 4, 2022 email[102] to Brady, Davidson states:

> **"Neither** CC or Thayne said they **could dispute** the <u>author of the SAE</u> paper. They suggest hire an engineer from BERLA to testify." [bold and underline added]
>
> Mike Davidson #7038
> Phoenix Police Department

As discuss earlier, this email admits that no one at PPD could dispute defense expert Anderson's (as reference in the email as the author of the SAE paper) conclusions. Accordingly, no one at PPD could dispute Anderson's conclusion regarding Gibbs misuse and misrepresentations of Berla Data.

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[99] SAE is a global association of more than 128,000 engineers and related technical experts in the aerospace, automotive and commercial vehicle industries. *See* https://www.sae.org.
[100] Exhibit #4, p. 39, Detective Gibbs Crash Analysis.
[101] Exhibit #15, paragraph 15, Declaration of Expert Robert Anderson (Author of SEA Paper).
[102] Exhibit #21, Email from Gibbs to Brady, Dated 04.04.22

This email was never disclosed by MCAO. It was independently discovered by defense counsel through a public records request. The timing of MCAO's response to that public records requests raises serious questions.

Counsel's public records request was made well prior to the preliminary hearing which Judge Kreamer presided. Well prior to the preliminary hearing, MCAO's custodian of records also acknowledged, that they had found approximately 150 responses to the request. However, the April 4, 2022 email was not provided by MCAO until after Judge Kreamer dismissed the case.

The relevant timeline of events below is instructive:

08.16.22 Counsel received an email from MCAO Custodian of Records stating "[t]he email searches have completed and the approx. 150 results are under review/processing."[103]

09.16.22 Counsel contacts MCAO public records requesting a response as to why the records under "review" had not been provided.

Counsel received a response later that day stating:

> We are working to complete your request. With the recent addition of more staff members on our public records team, we anticipate completing this request with any non-privileged, **responsive records within 8 business days**. If we are unable to complete the request at that time, I will be in contact.[104]

09.20.22
09.21.22
09.22.22 Preliminary Hearing conducted by Judge Kreamer resulting in the case being dismissed on 09.22.22.

09.26.22 MCAO provided the requested documents to counsel. Contained within MCAO's response were:

[103] Exhibit #22, Email from MCAO Custodian of Records, Dated 08.16.22
[104] Exhibit #23, Email from MCAO Custodian of Records, Dated 09.16.22.

[redacted]

1. **The April 4, 2022 Email from Davidson to Brady**: discussed above conceding to defense expert Anderson's conclusions.[105]

2. **A Text Message Exchange Between Davidson to Brady:** where Davidson makes derogatory remarks toward counsel.[106]

5. *Barsurto* Notice to Ken Vick

Failure to Take Remedial Measures | Responsibility of Prosecutor | Duties as a Supervisor | Responsibility of Prosecutor | Preserving Integrity of Adjudicative Process

On multiple occasions, defense counsel notified the prosecution that this matter was based on false and misleading representations. On **April 5, 2022**, defense counsel emailed MCAO a formal written notice, pursuant to the holding of *United States v. Basurto*, detailing specific instances supporting the assertion this case was based on the knowing use of materially false representations.[107] The notice also notified MCAO of their duty to notify the court.

In the Notice, addressed and sent to Vick, defense counsel stated in pertinent part:

> False testimony has been presented to the grand jury in this matter. It is difficult to discern how the testifying officer, and the presenting prosecutor, did not know the testimony was false when it was presented.
>
> I have asked you to step in and remedy this misconduct. However, your recent email states that you have chosen to delegate this issue to Ms. Brady. The same presenting prosecutor alleged to have allowed this misconduct to occur. I respectfully request you reconsider this decision. Based upon the record, I submit your intervention is now required.[108]

[105] Exhibit #21, Email from Gibbs to Brady, Dated 04.04.22.
[106] Exhibit #24, Text Exchange Between Gibbs and Brady, Dated 05.20.22.
[107] Exhibit #7, *Basurto* Notice to MCAO, Dated 04.05.22
[108] Exhibit #7, p. 1, *Basurto* Notice to MCAO, Dated 04.05.22

[redacted]

The letter also alleged the defense's belief that Brady's actions demonstrated a pattern of refusing to address the facts of the case.

The notice also specifically informed Vick of defense expert Anderson's declaration recently sent to Brady:

> Last week, I disclosed an expert affidavit – from the co-author of the study Gibbs cites. In short, he states Gibbs' assertions are incorrect. Gibbs' analysis misuses and misstates the study's findings. BERLA data cannot be used in the way it was here by the Phoenix Police Department.[109]

At the time defense counsel sent this Notice to Vick we were unaware, that a day prior (on April 4, 2022) PPD had notified Brady that it could not contest Anderson's conclusions.

6. Brady's Written Responses to Defense Motions

Failure to Take Remedial Measures | Lack of Candor | Responsibility of Prosecutor | Knowingly Making a False Statement | Preserving Integrity of Adjudicative Process

Brady filed her written responses to defense counsels' Motions on **05.09.22**. At that time, she possessed (but had not disclosed) Davidson's 04.04.22 email where PPD concedes the Berla issues to defense expert Anderson.

In Brady's Response, she addressed expert Anderson's declaration. On page 15 of her Response, she writes:

> In any event, the grand jury is not the place to have a **competing battle of the experts**, which is more appropriate for trial. *See Trebus*, 189 Ariz. at 625, 944 P.2d at 1239 ("[T]he grand jury is not the place to try the case."). If the evidence or testimony of the defendant's expert would not have been introduced at the grand jury, there would be no reason to remand the case to the grand jury for a new determination of probable cause.[110]

[109] Exhibit #7, p. 2, *Basurto* Notice to MCAO, Dated 04.05.22
[110] Exhibit #10, p. 16, State's Response, Dated May 9, 2022.

[redacted]

However, Brady knew from Davidson's email that there was never going to be a battle of the experts. PPD had already privately conceded the *battle was over*. They admitted that they could not dispute Anderson's conclusions. This did not stop Davidson and Brady from continuing to assert their false representations and wrongful prosecution.

7. Lack of Probable Cause to Prosecute Notice

Meritorious Claims | Responsibility of Prosecutors | Failure to Mitigate | Knowingly Making a False Statement | Preserving Integrity of Adjudicative Process

On 08.12.22, after Judge Touhill issued her order remanding the indictment to grand jury defense counsel sent a request to MCAO to stop any further attempts of prosecuting her.

> Based on the court's August 10, 2022 Order, we respectfully request the Maricopa County Attorney's Office cease and desist, from any further attempts to prosecute Ms. Rodriguez. The legal debate on the fundamental premises you based this prosecution is now over. The court has unequivocally agreed with our position on core theories of your case. As a result, you no longer have the required probable cause to ethically prosecute Ms. Rodriguez.[111]

The email was sent to Brady (Vick and Mitchell were copied). The request also provided the legal standards that defense counsel asserted prohibited any further attempts to prosecute Ms. Rodriguez.

8. MCAO Response to ABC15 News

Failure to Supervise | Failure to Mitigate | Preserving Integrity of Adjudicative Process |

On 08.16.22, MCAO responded to a request for comment by ABC15 news regarding Judge Ryan Touhill's order remanding the indictment:

> Because this case is still being litigated, we will not comment on the facts of the case. As with all of our cases, the merits of this case will be litigated in the court system. We can comment, however, on the ethical

[111]Exhibit #25, Request to Cease Prosecution Letter, Sent 08.12.22.

[redacted]

> conduct of our attorneys. **This office has closely reviewed the conduct of our attorneys** who have participated in the prosecution of this case and **we have not found any ethical misconduct** and **we do not have any ethical concerns** with the way the case has been handled. While the court found errors in the presentation of the case to the grand jury, not every error amounts to misconduct or an ethical violation and we do not believe any of the issues the court identified give rise to any ethical concerns. [bold added]
>
> Jennifer Liewer
> Communications Director[112]

This statement, and its assertion of ethical purity, stands in direct contradiction with the reality of MCAO's actions (in unison with PDD).

9. Filing of Criminal Complaint After Remand

Failure to Mitigate | Meritorious Claims | Responsibility of Prosecutors | Candor to Tribunal | Knowingly Making a False Statement | Preserving Integrity of Adjudicative Process

Brady relied on representations of fact that, she was made aware were untrue, to support the criminal complaint she filed (after the remand order).

After the remand ruling MCAO had a choice. Pursuant to the Rules of Criminal Procedure, they could go to a new grand jury and present their case again.[113] However, they would have to comply with the limitations set forth in Judge Ryan-Touhill's Order. Their other option was to reinitiate the prosecution by proceeding with a preliminary hearing.[114]

To initiate a preliminary hearing MCAO had to file a new complaint which had to be sworn to by Brady.[115] The Rules of Criminal Procedure also require a prosecutor to support a criminal complaint with "essential facts" constituting a public

[112] Exhibit #17, Response by MCAO to ABC15 News (Re: Remand Ruling).
[113] Ariz. R. Crim. P. 12.9(c) (If the court grants a motion for a new finding of probable cause, the State may proceed with the prosecution of the case by filing a complaint under Rule 2 or by resubmitting the matter to the same or another grand jury)
[114] *Id*.
[115] See Ariz. R. Crim. P. 2.3

[redacted]

offense.[116] Defense counsel was present in court when this occurred and requested that Brady specify those essential facts.

Eventually, Brady chose to adopt the **probable cause statement**[117] contained in PPD's Form 4. It was filled out by Davidson close to the time when the prosecution was initiated. The facts contained in the Form 4, included the allegations regarding the Berla data.[118]

Brady swore to the complaint, and ultimately relied on the above "essential facts" to support the Criminal Complaint against Ms. Rodriguez. Brady made this attestation to the court, well after she was made aware (by Dennison's Report, Anderson's Declaration and Davidson's April 4, 2022 email) that Berla data could not be used for these speed and location claims as done in the Form 4.

10. Preliminary Hearing

Failure to Mitigate | Meritorious Claims | Responsibility of Prosecutors | Knowingly Making a False Statement | Preserving Integrity of Adjudicative Process

The decision to reinitiate a case by a preliminary hearing, after a court had granted a motion to remand, is highly unusual. The decision to initiate a negligent homicide charge through a preliminary hearing is unheard of in Maricopa County.

At this time counsel is in the process of obtaining transcripts of the preliminary hearing (which lasted three days). Accordingly, counsel will supplement this complaint regarding this preliminary hearing once those transcripts have been obtained.

That being said, MCAO was warned by defense counsel that they lacked probable cause to proceed with the preliminary hearing. Counsel notified prosecuting Ms. Rodriguez with merely the information in their possession would violate their ethical duties required by Ethical Rule 3.8. In defense counsel's 08.16.22 letter to MCAO it was stated:

[116] See Ariz. R. Crim. P. 2.3
[117] Exhibit 18, Probable Cause Statement, Davidson's Form 4, Dated 08.30.19
[118] *Id*.

[redacted]

> In Arizona, Ethical Rule 3.8. of the Arizona Rules of Professional Responsibility plainly state a prosecutor in a criminal case shall: "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause." *See* AZ ST S CT RULE 42 RPC ER 3.8 and 4.8(d) (prohibiting an attorney from engaging in conduct that is prejudicial to the administration of justice.*) See also*, *In re Aubuchon*, 233 Ariz. 62, 72, ¶ 49, 309 P.3d 886, 896 (2013), as amended (Oct. 25, 2013) which involved the Maricopa County Attorneys' Office ("In sum, **Aubuchon violated ERs 3.8(a) and 8.4(d) by filing the criminal complaint** against Judge Donahoe without probable cause…" [bold added]).[119]

The record shows MCAO and PPD ignored these warnings. They proceeded with the preliminary hearing despite lacking the necessary evidence of a crime. However, as warned by defense counsel, the court found no probable cause existed.

V. APPEARANCE OF COLLULSION

There are simply too many coincidences in the record for any reasonable person not to question whether MCAO and PPD colluded to bring a case they had to know was not supported by probable cause. To be clear, undersigned counsel believes more investigation is needed to make a definitive conclusion.

However, with that being said, the following timeline and information is provided to the State Bar for their consideration with the other information contained in this complaint.

-2019-

03.21.19 Date of Accident

03.21.19 Dennison Receives Warning from Berla Regarding Use of Speed Determinations

Dennison' PPD report is dated 03.21.19 *but it appears* this call to Berla may have occurred soon after the day of the accident.[120]

08.18.19 PPD Expert Gibbs | Completes Crash Analysis

[119] Exhibit #25, p. 2, Request to Cease Prosecution Letter, Sent 08.12.22.
[120] Exhibit #12, Dennison Supplemental Report

[redacted]

- The analysis relies heavily on **Berla Data** to determine pre-impact speeds. Gibbs' report cites **one authoritative source** for his reliance on the data obtained using Berla iVe to determine Rodriguez's vehicle's speed: Vandiver, W., **Anderson, R**. "Accuracy of Speed Data Acquired from Ford Sync Generation 2…"

- The report also states: "It **needs to be considered** that Ofc. **Rutherford could have also avoided the collision** if he had **stopped** and **looked** west down the two-way left turn lane prior to entering it."

- The report **does not** reference in any manner Berla's warning to Dennison about the use of speed calculations.

10.03.19 **Allister Adel Appointed and Sworn as Head of MCAO**[121]

-2020-

02.20.20 **MCAO Employee Pilant Interview (recorded)**

Pilant had a *prior* interaction with Rutherford where she observed and had concerns with how he entered a roadway. She also stated a prosecutor informed her that Ms. Rodriguez's case was **not going to be charged as a felony**.[122] Davidson conducted the interview.

07.13.20 **Press Release by PLEA**
(Phoenix Law Enforcement Association)
A spokesperson for PLEA, **Lorna Romero**, issued a press release titled "*Phoenix Law Enforcement Association Calls on Local Leaders to Denounce 'Defund Police' Movement*."[123]

[121] *See* https://www.maricopacountyattorney.org/360/Allister-Adel-makes-history (last checked 11.03.22)
[122] Exhibit #26, Pilant Interview, conducted by Davidson, Dated 02.20.20
[123] Exhibit #27, Press Release by PLEA, Dated 07.31.20

[redacted]

On the second page of the document, it states:

> Council members who have publicly supported our officers and encourage Mayor Gallego and the other members of the council to denounce the Defund Police movement." Recently, **Chris Rutherford**, **son of** fallen Phoenix Police Officer **Paul Rutherford**, launched an online petition urging local leaders to support law enforcement. The petition now has more than 2,500 signatures. [bold added]

***Lorna Romero** (at the same time) was also a spokesperson, for then, Acting Maricopa County Allister Adel's Campaign.[124]

08.03.20 **Allister Adel Wins Republic Primary**[125]

08.20.20 **INDICTMENT (NUBIA RODRIGUEZ)**

MCAO went to the grand jury almost a year and half after the accident. Upon information and belief, **no new evidence** was produced by PPD's investigation *after* Gibb's report dated 08.19.19. Upon information and belief **no new evidence** was produced by PPD's investigation *after* MCAO employee stated that a MCAO prosecutor informed her that this case was not going to be charged as a felony

09.19.20 **Arraignment of Rodriguez**

November 2020 **Adel Wins Maricopa County Attorney Election**

As stated above, these events raise obvious questions. Defense counsel requests that the State Bar of Arizona address them as related to the ethical duties of the prosecutors named in this complaint.

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[124] Exhibit #28, Arizona Republic Article, 08.05.22

[125] According to public news reports PLEA (*Phoenix Law Enforcement Association)* supported Adel's initial appoint as Maricopa County Attorney and subsequently endorsed her in the primary election. *See* https://www.azcentral.com/story/news/local/phoenix/2020/10/15/maricopa-county-attorney-allister-adel-prosecutors-office-election-julie-gunnigle/3519443001/ (last checked 11.03.22).

[redacted]

CONCLUSION[126]

Why are we here?

Brady, Vick and Mitchell have given counsel no other choice – but to file this complaint. We believe their blatant disregard for due process, and their repeated refusals to remedy their violations, almost appear to invite this complaint.

We submit this was a **"post-fact"** prosecution. There was really only one piece of evidence that these prosecutors needed to know Ms. Rodriguez was innocent: the security video of the accident. A video that shows Rutherford darting into the road and in a place, as Judge Kraemer stated, he was not supposed to be coming from. We believe no reasonable human being could conclude this video showed anything other than a tragedy – but not a crime. However, we submit these prosecutors made **"post-truth"** claims to the contrary.

We are here because…these prosecutors refused to acknowledge the truth. Instead we believe the record shows they only recognized a result they desired. We expect these prosecutors…to respond to this complaint in the same manner as their prosecution of Ms. Rodriguez. They will deny objective facts and attack defense counsel.

However, as members of the legal community, we cannot allow their actions to stand without accountability. Unless the legal community holds these prosecutors to account such "post-fact" prosecutions will continue.

Sincerely,

/s/*Lawrence Koplow*	/s/*Armando Nava*
Lawrence Koplow	Armando Nava
Attorney for Defendant	Attorney for Defendant

cc: Tiffany Brady | Ken Vick | Rachael Mitchell

[126] Counsel limited the materials cited in this complaint to information publicly available and not protected by statute. Counsel will seek to have other information and material believed to be relevant to this complaint made available. In that instance, these materials will be provided to the State Bar.

[redacted]