

No. 22-104

In The
Supreme Court of the United States

Mark Stuart ,
Petitioner,

v.

State of Arizona , Scottsdale City Prosecutor, et
al.,

Respondents

On Petition For a Writ of Certiorari
To the Maricopa County Superior Court, and
Scottsdale City Court.

PETITION FOR A WRIT OF CERTIORARI

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In *Wright v. Georgia*, 373 U.S. 284, 292 (1963), and a string of cases thereafter, this Court explained that “Obviously, however, one cannot be punished for failing to obey the command of an officer if that command is itself violative of the Constitution.” This case presents the question of whether the holding in *Wright* applies when the admitted purpose of the police orders is to suppress the peaceful and lawful exercise of free speech in a public meeting.

QUESTIONS PRESENTED

- (1) Whether the State can seek to punish and prosecute an individual for refusing to obey an unconstitutional order from a public official and a police officer, or for peacefully and lawfully exercising constitutional and statutory rights?
- (2) Whether the State violates a defendant’s Sixth Amendment Speedy Trial rights by deliberately taking actions seeking to hinder the defense and deprive a defendant of his right to a fair trial, which severely prejudiced the defense and caused more than thirty months of delays in a non-violent misdemeanor prosecution?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner, who was a Defendant- Appellant below, is Mark Stuart, a citizen of Scottsdale, Arizona. ("Stuart")

Respondents are the State of Arizona acting through the Scottsdale city prosecutor's office, and the Hon. Sarbanes of Phoenix city court (sitting by special appointment), and the Hon. Douglas Gerlach of the Maricopa County Superior Court.

State v. Stuart , case number M-0751-SC-2017003568 ,Scottsdale city court, Judge Sampanes presiding, judgment entered Feb. 10, 2020.

State v. Stuart (appeal to Maricopa County superior court), case number LC2020-00239-001 , Judge Gerlach presiding, judgment entered on Nov. 17, 2020

The Arizona Court of Appeals , Division One, and the Arizona Supreme Court , declined to review this case.

No. 1-CA-SA-21-0143, judgment Sept. 09, 2021.
CR-21-0317-PR, judgment entered Jan. 24,2022.

Because no Petitioner is a non-governmental corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Mark Stuart respectfully petitions for a writ of certiorari to review the judgment of the Maricopa County Superior Court and the judgment of the Scottsdale city court.

OPINIONS BELOW

The Arizona Supreme Court ruling declining to review these issues is in App. A : 1A The Arizona Court of Appeals ruling declining to review these issues is in App. A: 2A The Maricopa County Superior Court ruling, upholding Stuart's conviction is in App. A: 3A – 48A ... The Scottsdale city court ruling, declining to vacate the conviction for refusal to obey police is in App. A: 49A-50A

JURISDICTION

The Arizona Supreme Court's order declining review was issued on January 24, 2022. On April 4, 2022, the Honorable Elena Kagan extended the time to file a petition for writ of certiorari until and including June 23, 2022. This Court has statutory jurisdiction under 28 U.S.C. § 1257(a).

**RELEVANT CONSTITUTIONAL PROVISIONS,
AND CITY ORDINANCES**

The First Amendment states:

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Fourteenth Amendment, § 1, states in pertinent part:

.... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Sixth Amendment states in relevant part,

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.....

Scottsdale Revised Code 19-13 states,

No person shall refuse to obey a peace officer engaged in the discharge of his duty, or any other person authorized to aid in quelling any riot, rout or affray.

INTRODUCTION

Petitioner Mark Stuart has been an outspoken critic of Scottsdale Mayor Jim Lane ("Mayor ") and Scottsdale city attorney Bruce Washburn ("Washburn"), since 2010. In December 2016, Stuart organized a local ballot initiative—Save Our

Preserve-- to prohibit construction in the Scottsdale Preserve without voter approval. ("SOP Initiative") The SOP Initiative effectively stopped a lucrative building project , promoted and favored by both the Mayor and Washburn. In January 2017, Stuart sought an SB 1487 investigation of the city attorney's office with the state attorney general and members of the legislature, because the City was advocating against the SOP Initiative using public monies in violation of state law. At open public comment on January 24, 2017, Stuart announced the SB 1487 requests, explained that the City could lose as much as \$50 million in state tax funds if the investigation was successful , and asked the City to stop advocating against the SOP Initiative using public monies. App. 127a-128a Shortly thereafter, the Mayor and City Attorney devised and implemented a plan to stop Stuart from speaking at open public comment, which culminated with Stuart's arrest and prosecution for refusal to obey police on Feb. 7, 2017. The arrest was recorded on video at <https://scottsdale.granicus.com/player/clip/7853?ViewId=106&Redirect=True> 22:45 to 26:11¹

Stuart was prosecuted for refusing to obey the police and mayor's orders to leave the podium without speaking for three minutes, and for refusing to sit on a bench outside the building after he was arrested for refusing to leave the podium without speaking. App. 144a

STATEMENT OF THE CASE

¹Stuart was also charged with trespassing , but was acquitted of this charge.

A. Factual Background

This case arises directly from a ballot initiative sponsored and promoted by petitioner and dozens of Scottsdale citizens, that sought to prohibit construction in the Scottsdale Preserve without voter approval. (“SOP Initiative”) App. 127a. 135a The SOP Initiative effectively ended a city contract to build a tourist attraction in the Scottsdale Preserve, that was funded prior to the inception of the SOP Initiative.

Scottsdale city council meetings have an open call to the public and citizen petitioning time at every meeting. (“Open Public Comment”) Anyone can speak at open public comment for three minutes on any topic related in any manner to the city of Scottsdale. There are no content based rules or guidelines on permissible topics. App. 135a, 137a -143a All who request to speak are allowed to speak , time permitting. Open Public Comment is video recorded and broadcast live to the public . Open Public Comment is also the time reserved for presenting citizen petitions to the city council. The Scottsdale city charter, Article II section 15 allows any citizen of Scottsdale to appear before the city council with a written petition. App. 67a. 125a

About Jan. 26, 2017, the Scottsdale city attorney Bruce Washburn sent Stuart a letter in response to his comments at open public comment in the meeting of Jan. 24, 2017. App. 119a Washburn told Stuart that speaking about the SOP Initiative at open public comment was prohibited. Stuart responded to Washburn, and indicated that Washburn was violating his First Amendment rights, and that Stuart

would sue Washburn and the City if they prevented Stuart from speaking at open public comment, about the SOP Initiative, or anything else. App. 120a Scottsdale police began monitoring Stuart's attendance at public meetings about Jan. 26, 2017.

On Feb. 7, 2017 Stuart appeared at the city council meeting with a written petition, signed up to speak at Open Public Comment, and was called to speak by the Mayor. (the "Meeting") App. 121 a - 126a Stuart emailed copies of his petition to the Mayor and Washburn, prior to the meeting. Washburn emailed Stuart that speaking about the SOP Initiative was prohibited. Stuart told Washburn again, that he would sue him if he prevented him from speaking.

Prior to the meeting, Scottsdale police told Stuart that he would have to leave the podium without speaking if he was ordered not to speak by the Mayor. App. 129a Stuart explained to the police that they were violating his First Amendment rights by threatening him, and that he would sue them if they prevented him from speaking. App. 71a;

Stuart's petition contained an update to the public and city council about the progress of the SOP Initiative, and quotations of this Court's decisions about free speech in public forums in the context of a ballot initiative. App. 121a-126a Stuart intended to inform the city council about the City's unconstitutional speech practices and ask the Council to stop these practices. App. 67a Stuart intended to ask the Council to send the SOP Initiative directly to the voters for approval. App. 127a-128a Stuart was prevented from giving his petition to the council. The Mayor called Stuart to speak. When Stuart tried to give his petition, the Mayor told him he was prohibited from speaking about it at open public

comment. Stuart asked to be allowed to speak for three minutes and to give his entire petition to the council. The Mayor denied this request and ordered Stuart to leave the podium without speaking. Stuart stated that he would leave after he spoke for three minutes. The Mayor then ordered police to remove Stuart from the podium. The police ordered Stuart to leave the podium. Stuart explained that he would leave after speaking for three minutes. The police then arrested Stuart and forced him to leave the podium and escorted him outside the building.

Once outside, Stuart asked to speak to a lawyer and to be allowed to go home. About nine police officers surrounded Stuart outside. The police then handcuffed Stuart because he allegedly refused to sit on a bench. Stuart was taken to jail. When Stuart sought medical attention for shoulder and neck pain, high blood pressure headaches, dizziness and nausea, he was taken to the emergency room, about two hours later. App. 129a 130a Stuart was cited for trespassing and failure to obey police as he was leaving for the emergency room. The Mayor and City attorney Washburn consulted with and advised the police how Stuart was to be charged, prior to citing Stuart.

B. The Proceedings in Scottsdale City Court

1. Proceedings Prior to Trial

Stuart was charged with trespassing and refusal to obey police (“ROP”) on Feb. 7, 2017. Trial commenced on Jan. 27, 2020, thirty-five months later. Judge Sampanes, a non-conflicted judge from Phoenix

city court , was assigned to this case on Sept. 16, 2019. Trial commenced less than five months later.

In 2017, the State initially set trial before a judge whose contract was being reviewed for renewal by the Mayor and Washburn. Stuart successfully disqualified this judge for a conflict of interest under the Fourteenth Amendment. Stuart convinced the entire Scottsdale city court to disqualify itself because of the judges' employment relationships with the Mayor, Washburn and the city council. The case was then transferred to the local justice of the peace courts. The state refused to allow the case to be heard by Judge Conti, in Dreamy Draw Justice Court in Sept. of 2017. Other judges recused themselves for conflicts of interest, so the case was transferred downtown. Downtown, the judge disqualified himself for having knowledge of facts in dispute. The case was then transferred thirty-eight miles from Scottsdale to the White Tanks Justice Court. Between July 2017 and Dec. 2019, Stuart filed several motions to disqualify the Scottsdale prosecutor for a conflict of interest and for violations of his speedy trial rights. These motions were denied In Sept. 2019, the case was transferred back to Scottsdale city court, because the justice courts lacked jurisdiction over the Scottsdale code offense, and because a trial could only occur in the McDowell Mountain Justice Precinct in Scottsdale under state law. App. 133a-135aThe State immediately tried to set trial with a judge that had already been disqualified for a conflict of interest, without serving Stuart or giving him notice of any kind of its intent to set a trial date. That judge vacated his order setting the trial and asked the Arizona Supreme Court to appoint a judge to preside in Scottsdale. Judge Sampanes was appointed by the

Phoenix city court to preside over the trial in Scottsdale city court on Sept. 16, 2019.

2. The Proceedings in Scottsdale city court.

In November and December 2019, Stuart filed pre-trial motions to dismiss for disclosure violations, violations of his speedy trial rights , and for vindictive prosecution. Stuart also filed his third motion to disqualify the prosecutor for having a conflict of interest. App. 76a Stuart demonstrated with uncontested evidence that his defense was prejudiced by the long delays of trial, and that he had suffered physical and mental injuries requiring hospitalization, depletion of financial resources, and the inability to hire an attorney. All of these motions were denied. App. 133a-136a

Trial commenced on Jan. 27, 2020. The State argued that Stuart was trespassing because he attempted to speak about the SOP Initiative and other matters, despite being told by city attorney Washburn that speech on this topic was not allowed at open public comment. The State argued that Stuart had no lawful right based on the First Amendment to refuse any order from a police officer. App. 144a-145a The State sought to convict Stuart of ROP ,for refusing to leave the podium without speaking when ordered to leave by Officer Cleary, Officer Glenn and the Mayor. The State also sought to convict Stuart of ROP for allegedly refusing to obey the officers order to sit on a bench after he was arrested. The State argued that it had no obligation to prove that the officers' orders to Stuart were lawful, in order to pursue a conviction for

ROP. App. 146a The State never sought to prove that the Mayor's and officers' prohibitions on Stuart's speech satisfied strict scrutiny, or any lesser standard. The State never sought to prove that any written rules existed for open public comment, or even well documented traditional practices, and that Stuart's written petition did not meet these undocumented requirements. App. 136a- 144a The State argued, and Officer Cleary testified, that the Mayor had sole and unlimited discretion to decide who could speak and what they could speak about at open public comment. The Mayor testified that Stuart's petition to the city council was within the unwritten rules of open public comment, and that he relied entirely on Washburn's letter to Stuart to prevent Stuart from speaking. App. 142a, 68a The officers testified that they did not know whether the Mayor's order to remove Stuart from the podium without speaking was lawful. The officers testified that they relied entirely on Washburn's letter to Stuart and communications from the city attorney's office to justify arresting Stuart. App. 69a-70a

Stuart's defense was based entirely on the First Amendment and the Fourteenth Amendment. Stuart argued that he had a guaranteed right to speak at open public comment, because he was following the rules and that state open meeting law and the city charter's citizen petitioning clause guaranteed his right to speak. Stuart proved using the Mayor's testimony, that open public comment was a designated public forum , and that since the state could not carry its burden under strict scrutiny, or any other legal standard, the prior restraints on his speech and the content based restrictions on his speech were unconstitutional and could not create the

basis for a valid conviction. App. 137a - 138a, 132a The State asked the trial court to convict Stuart of trespassing, because his proposed speech was not authorized by the Mayor and City Attorney. The trial court implicitly found that Stuart's proposed speech was within boundaries of open public comment by acquitting him on the trespassing charge. App. 172a-176a

Stuart argued that he could not be convicted of trespassing because he had a lawful right to speak at open public comment on his chosen topic. Stuart also argued and proved using the officers' testimony that the orders to leave the podium without speaking were unlawful, because Stuart was well within the unwritten guidelines of open public comment. Stuart presented video evidence to the trial court that it was common practice for people to speak about Scottsdale election issues at open public comment. App. 139a - 143a As of Feb. 7, 2017, no election had been called on the SOP Initiative. Stuart testified that he gave the SOP Initiative update at five or six meetings after Feb. 7, 2017 and was not prevented from speaking or arrested for speaking. These subsequent SOP updates included soliciting volunteers, and asking the Mayor to sign the petition and become a volunteer. App. 131a -132a

The trial court acquitted Stuart of trespassing, but convicted Stuart of ROP for refusing to sit on a bench outside after Stuart had been arrested for trespassing and ROP inside the city council chambers. App. 40a

3. Post Trial Proceedings

Stuart filed a post trial motion to vacate the ROP conviction, because the officers and Mayor's orders to leave the podium without speaking were unconstitutional . Therefore, he had no lawful obligation to obey these orders. Since the order to sit on the bench was a continuation of the unlawful orders to leave the podium without speaking, the order to sit on the bench was also unconstitutional and unlawful. The trial court denied Stuart's motion to vacate. App. 49a

C. The Appeal to Superior Court

Stuart appealed the ROP conviction to the Superior Court. Stuart argued for reversal based on a violation of his speedy trial rights, vindictive prosecution in violation of the Fourteenth Amendment, a prosecutorial conflict of interest in violation of his Fourteenth Amendment rights, and vagueness and overbreadth of SRC 19-13. App. 55a-57a

The Superior Court did not require the State to file a response to Stuart's appeal brief. App. 45a The Superior Court judge acted as a co-prosecutor, extensively researching the issues to supplement the State's lack of response. App. 47a; 14a - 44a The Superior Court did not engage in de novo review of the alleged constitutional violations. Instead the Superior Court assumed that the record supported the lower court's decision. App. 10a The Superior Court assumed that the record below supported its conclusions, and resolved ambiguities in the evidence, and total lack of evidence against Stuart. App. 9a, note 5; 26a, 128a Stuart offered to submit an entire transcript to the Superior Court, to prove that the

portions not included on appeal were not relevant. The Superior Court denied Stuart's request. App. 14a , note 8 The Superior Court shifted the burden to prove that Scottsdale's restrictions on Stuart's speech were unconstitutional to Stuart. The Superior Court assumed, without requiring the State to prove it , that open public comment is a limited public forum, and that the restrictions on Stuart's speech were reasonable and viewpoint neutral. App. 19a-20a The State made no arguments supported with evidence about the type of forum that is open public comment. The Superior Court ignored the fact that Scottsdale did not try to carry its burden to prove the constitutionality of the police orders to Stuart to leave the podium without speaking in Scottsdale city court. Lastly, the Superior Court decided that even if the police and the mayor had violated Stuart's free speech rights, it would not change the result. App. 27a - 29a The Superior Court, Judge Gerlach, affirmed the ROP conviction. The Court of Appeals and the Arizona Supreme Court denied discretionary review.²

REASONS TO GRANT REVIEW

I. These are Important Legal Issues of National Importance in Need of Guidance from this Court

This Court should clarify its precedents and establish a categorical rule that unconstitutional arrests cannot lead to any type of derivative

² The Arizona Supreme Court denied review of Stuart's overbreadth and vagueness challenges to SRC 19-13 on June 3, 2022.

punishment. Otherwise, police and prosecutors will be able to indirectly attack and undermine the First Amendment, and punish people for peacefully and lawfully engaging in free speech.

At oral argument in *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, (2018) this Court acknowledged the problems with police abuse of power and retaliation by police and public officials for engaging in protected speech. Justice Kagan , transcript 31. Justice Roberts, transcript 34-35, 55 . Justice Alito 21. Justice Sotomayor indicated that the Lozman situation is not so uncommon at oral argument in *Nieves v. Bartlett*. transcript 31.

Anecdotal evidence indicates that retaliation by police for engaging in protected speech is a growing problem around the country. Garcia v. Scottsdale, 2:21-cv-00914-SPL-JZB; Puente et. al v. city of Phoneix, 2:18-cv-02778-JJT; "Lawsuits mount against Phoenix, county for outrageous criminal cases against protesters." (<https://www.azmirror.com/2021/07/20/lawsuits-mount-against-phoenix-county-for-outrageous-criminal-cases-against-protesters/>) " Class action lawsuit filed against City of Phoenix, police chief for mass arrests"

Justice Department Announces Investigation of the City of Phoenix and the Phoenix Police Department Aug. 5, 2021. "The investigation will also seek to determine whether PhxPD engages in retaliatory activity against people for conduct protected by the First Amendment."

If a police officer or public official can violate your free speech rights by arresting you to prevent you from peacefully and lawfully speaking on issues of public concern, then the First Amendment is directly

under attack by the police. If First Amendment defenses do not apply to the entire sequence of events after the unlawful arrest, then police can indirectly punish you for peacefully and lawfully exercising your free speech rights. Police can then obtain convictions for your behavior derivative to the unlawful, unconstitutional arrest, even when there is no lawful basis to arrest you in the first place.

In this case Stuart was arrested for "attempted illegal speech" at open public comment in a Scottsdale city council meeting. Stuart beat the illegal speech charge by proving that the police and the Mayor had no lawful authority to prevent him from speaking. Both the trial court and the appeals court ruled that Stuart had an obligation to obey the police, even if his arrest is unconstitutional. App. 27a

This Court has ruled many times, that a person cannot be punished for refusing to obey an unconstitutional order from a police officer. "Obviously, however, one cannot be punished for failing to obey the command of an officer if that command is itself violative of the Constitution." *Wright v. Georgia*, 373 U.S. 284, 292 (1963) "it is axiomatic that "one cannot be punished for failing to obey the command of an officer if that command is itself violative of the Constitution.'" *Drews v. Maryland*, 381 U.S. 421, 428 ,note 6 (1965) "Obviously, however, one cannot be punished for failing to obey the command of an officer if that command is itself violative of the Constitution." *Brown*, 383 U.S. 149, note 9 Police officers " may not exercise the awesome power at their disposal to punish individuals for conduct that is not merely lawful, but protected by the First Amendment." *Duran v. City of Douglas*, 904 F. 2d 1372,1378 (9th

Circ. 1990) “[F]or an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.'” *U.S. v. Goodwin*, 457 U.S. 368, 372, note 4 (1982) An individual “certainly may not be punished for exercising a protected statutory or constitutional right.”

"The principal that a citizen can defy an unconstitutional act is deep in our system *Thomas v. Collins*, 323 U.S. 516, 532-537. *Wainwright v. City of New Orleans*, 392 U.S. 598, 614 (1968)(Douglas dissent) Justice Douglas explained the importance of protecting the right to defy, otherwise we would be acting like police in dictatorships.

The appeals court ruled that all of this legal precedent was irrelevant, because those cases were about orders enforcing racial discrimination, retaliation, or prosecutorial vindictiveness. App. 28a, note 14. This Court did not limit its holding in this manner, or limit its holdings at all. This Court stated clearly that a person cannot be punished for refusing to obey an unconstitutional order from a police officer, no exceptions.

Prosecutors need limits provided by the constitution. If prosecutors have limits, then charges will be automatically dismissed. Police will stop arresting and citing people for lawful and peaceful exercise of free speech, because prosecutors won't pursue them. This is what this Court meant when it stated that one cannot be punished for refusing to obey an order that is violative of the constitution.

This Court should grant certiorari and create a bright line rule, that people cannot be punished, even derivatively, for peacefully and lawfully exercising Free Speech rights. This case is the perfect vehicle.

II. There is a Conflict Between the Ninth Circuit and the Arizona Supreme Court on questions 1 and 2

1. Punishing People for Peacefully and Lawfully Engaging in Free Speech is Prohibited in the Ninth Circuit

Where police officers “ha [ve] no lawful basis for stopping” an individual, we held, they “ha[ve] no lawful basis to pursue and arrest [that individual] for not acceding to the investigatory stop.” *Id. Velazquez v. City of Long Beach*, 793 F.3d 1010 , 1019 (9th Cir. 2015) “police [may] not interfere with the freedom of private persons unless it be for specific, legitimate reasons,” police may not exercise the awesome power at their disposal to punish individuals for conduct that is not merely lawful, but protected by the First Amendment. ... any action to punish or deter such speech—such as stopping or hassling the speaker—is categorically prohibited by the Constitution.””

Under Ninth Circuit law, if the police officer is behaving unlawfully by violating constitutional free speech rights, any further prosecution is prohibited. I do not have the resources to fully research Arizona law on this question. I assume that the Superior Court knows Arizona law and correctly stated Arizona law.

This Court should grant certiorari and resolve this question, otherwise people in Arizona have a lower standard of constitutional protection, than others in the Ninth Circuit.

2. The Ninth Circuit Faithfully Enforces This Court's Sixth Amendment

Jurisprudence, but Arizona Courts do not.

The trial court accepted Stuart's testimony about his physical and mental injuries as true. App. 132a-135a. "So I'll assume everything you told me is true, this last five minutes, about how this affected you, okay?... For the purposes of this hearing." The trial court, like the Superior Court declined to analyze the Barker factors. The trial court ruled that because Stuart filed motions seeking to protect his due process rights, there could be no speedy trial violation. App. 158a - 159a. The trial court's ruling contravenes *Barker*, because negligence and deliberate delays caused by the State seeking to hamper the defense, are time held against the State. "The government's negligence, which is the reason for the delay, weighs in *Gregory*'s favor. See *Barker*, 407 U.S. at 531, 92 S.Ct. 2182 (the government's negligence should weigh less heavily in defendant's favor than does a deliberate delay, but "nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant"). *U.S. v. Gregory*, 322 F.3d 1157, 1162 (9th Cir. 2003) The trial court erred by refusing to do the Barker factor analysis, and by depriving Stuart of the ability to prove that the State was deliberately causing the delays.

On appeal to the Superior Court the stated argued that Stuart's motion practice caused the delays. App. 162a- 165a It did not address the questions raised in Stuart's appeal brief, that the State was deliberately seeking to coerce Stuart into waiving his due process rights, by taking actions that it knew violated Stuart's rights. App. 107a- 109a The State argued that all of

Stuart's motions were frivolous and repetitive and unsuccessful. But it knew these statements were untrue. Stuart successfully disqualified the Scottsdale judges for a conflict of interest in July 2017. App. 167a-168a, 169a -172a. Stuart successfully forced a trial to be cancelled and the proceedings returned to Scottsdale in July 2019. The State did not argue that it did not know that the Scottsdale judges had a conflict of interest. The State did not argue that it did not know that trial must occur in Scottsdale, and that it deliberately set trials where they could never occur. Stuart successfully obtained an unbiased judge with an order from the Arizona Supreme Court. App. 172a. The State does not explain why it twice set trials with judges it knew had a conflict of interest. Because these events could not have happened in July 2019, Stuart could not have raised them, and they could not have formed the basis for any ruling on the Sixth Amendment. The State in effect argued that it has no obligation to ensure that trials are fair and comport with due process. This notion of winning at all costs has always been rejected by this Court. If a court was presented with the entire sequence of events, it probably would have concluded that the State was intentionally engaging in dilatory tactics. Even if this Court assumes negligence, the State is still responsible for the delays. There was no valid reason for this case to leave Scottsdale after July 2017. A judge pro tem could have been appointed and a trial could have occurred in 2017. The State wanted to delay and prolong the pre-trial proceedings, so it allowed the case to travel all over Maricopa County, and set trial dates where it knew no trial could occur. " It is improper for the prosecution intentionally to delay to gain some tactical advantage over defendants

or to harass them." *Barker v. Wingo*, 407 U.S. 514, note 32 (1972)

According to the Superior Court Arizona law requires a showing that acquittal might have resulted , except for the delays. App. 41a, note 19 The Superior Court described Stuart's prejudice as irrelevant to the sixth amendment analysis. App. 41a -42a, note 19, note 20. The Superior Court refused to analyze the Barker factors App. 43a, note 21. In summary Arizona law simply ignores the Barker analysis, unless the outcome would have been different. Of course one cannot prove that the outcome would have been different. This is not the purpose of the Speedy Trial Clause of the Sixth Amendment. The purpose of the Speedy Trial Clause is to force the State to call a trial quickly and to force the state to abide by its obligations to ensure that the proceedings comport with due process.

"Reflecting the concern that a presumptively innocent person should not languish under an unresolved charge, the Speedy Trial Clause guarantees "the accused " "the right to a speedy ... trial ." U.S. Const., Amdt. 6 *Betterman v. Montana*, 578 U.S. 437, 443 (2016) "The sole remedy for a violation of the speedy trial right—dismissal of the charges, see *Strunk v. United States*, 412 U.S. 434, 440, 93 S.Ct. 2260, 37 L.Ed.2d 56 (1973)" Id. 445

"The Speedy Trial Clause limits the government's ability to delay criminal trials once it has "arrested or formally accused" a defendant of a crime. *Betterman v. Montana*, 578 U.S. 437, 441 (2016). The purpose of the Clause is to "prevent[] undue and oppressive incarceration prior to trial, minimiz[e] anxiety and concern accompanying public accusation, and limit[]

the possibilities that long delay will impair the ability of an accused to defend himself." *Id.* at 1614 (quoting *United States v. Marion*, 404 U.S. 307, 320–21 (1971))." *United States v. Lonich*, 23 F.4th 881, 893 (9th Cir. 2022)

To assess whether the Speedy Trial Clause was violated, we apply the four-part balancing test from *Barker v. Wingo*, 407 U.S. 514 (1972), considering (1) the length of the delay, (2) the reason for the delay, (3) whether the defendant asserted his rights, and (4) the prejudice to the defendant. *Id.* at 530–33; see also *Doggett v. United States*, 505 U.S. 647, 651 (1992) (explaining that "[o]ur cases . . . have qualified the literal sweep of the [Speedy Trial Clause] provision by specifically recognizing the relevance of four separate enquiries" set forth in *Barker*); *United States v. King*, 483 F.3d 969, 976 (9th Cir. 2007).

The "general consensus" is that an eight-month delay "constitutes the threshold minimum" to initiate the full Barker inquiry. *Gregory*, 322 F.3d at 1162 n.3. If the delay crosses that threshold, we generally proceed to the four-factor Barker test. *Id.* at 1161. "Although there is no bright-line rule, courts generally have found that delays approaching one year are presumptively prejudicial." *Id.* at 1161–62. *Lonich*, 23 F. 3d 893

"The government's negligence, which is the reason for the delay, weighs in *Gregory*'s favor. See *Barker*, 407 U.S. at 531, 92 S.Ct. 2182 (the government's negligence should weigh less heavily in defendant's favor than does a deliberate delay, but "nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant")." *U.S. v. Gregory*, 322 F.3d 1157, 1162 (9th Cir. 2003)

The Ninth Circuit enforces a presumption of prejudice from abnormally long delays. *Gregory*, 322 F. 3d 1163 "We have already concluded that Gregory is entitled to a presumption of prejudice, but presumptive prejudice is simply "part of the mix of relevant facts, and its importance increases with the length of the delay." *Beamon*, 992 F.2d at 1013 (quoting *Doggett*, 505 U.S. at 656, 112 S.Ct. 2686). As we have interpreted *Doggett*, "no showing of prejudice is required when the delay is great and attributable to the government." *United States v. Shell*, 974 F.2d 1035, 1036 (9th Cir. 1992).

One can't prove that denial of access to evidence needed to cross examine a police officer or a Mayor, would have yielded a different result. Your cross examination is necessarily hampered because you can't prove that an officer is lying without reference to incontestable facts, like surveillance videos and police radio transmissions.

Stuart sought evidentiary hearings to prove that the State has deliberately trying to deprive him of a fair trial. Stuart's requests for a hearing on this issue was denied.

(a) All of the Barker Factors Showed a Sixth Amendment Violation.³

1. The Length of the Delay is Uncommonly Long .

³ The exhibits referenced in this section are exhibits presented to the superior court in Stuart's appeal. Petitioner cannot afford to reproduce and include all of these exhibits in this petition.

The facts showed that a trial could have occurred in less than six months, once Stuart was provided with a non-conflicted judge. App. 107a A normal trespassing case requires about six months to be tried. Thirty-five months --- Feb. 7, 2017 to Jan. 27, 2020-- is six times times longer than normal. Therefore, factor one weighs in favor of finding a Sixth Amendment violation.

2. The State Caused the Delays to Prevent a Fair Trial.

When the State abdicates its obligation to ensure that a defendant receive a fair trial, or deliberately acts to violate a defendant's due process rights, then the State bears the responsibility for the delay. Delays caused by deliberate attempts to prevent a fair trial or hearing, or delays designed to hamper the defense should be weighted heavily against the government. *Doggett v. United States*, 505 U.S. 647, 656 (1992) The Ninth Circuit counts delays caused by government negligence against the State. *Gregory*, 322 F.3d 1162 Arizona courts do not count negligence against the state.

Stuart sought an evidentiary hearing to prove the State's bad faith, but was denied this opportunity to prove bad faith. Is it really believable that the State did not know that judges whose employment contracts were, at that very moment, being reviewed for renewal by the Mayor and the City Attorney, did not have a disqualifying conflict of interest? Is it believable that the State did not know that a judge who was already disqualified for a conflict of interest, could not set a trial date , or preside over a trial?

The State did not dispute that it was trying to deprive Stuart of a fair trial. It only argued that Stuart filed motions seeking to enforce his due process rights, therefore these were delays caused by Stuart. App. 161a-162a

Twice, the State tried to hold a trial with judges that the State knew had a conflict of interest. First, in April 2017, then again in August 2019. EX_09: 2-3 The State tried to trick and coerce Defendant into waiving his due process rights. The State forced Defendant to seek impartial judges to protect his due process rights. The State's tactics caused long delays, almost the entire thirty-six months.

The State knew that the justice courts lacked subject matter jurisdiction over the SRC 19-13 charge. The State knew that the SRC 19-13 charge could not be heard by a justice court. Still, the State sought to have a trial in a court without subject matter jurisdiction. This tactic caused a trial delay from Sept. 2017 to Sept. 2019.

Again, the State sought to coerce and trick Defendant into waiving his due process rights.

The State knew that a trial could not occur outside the McDowell Mountain Justice Court precinct. Still the State filed two motions to set trial in courts where trials could not occur by law. Allowing the case to be transferred out of M.M.J.C. and set for trial outside of M.M.J.C. caused a delay of two years, Sept. 2017 to Sept. 2019.

The State tried to hold a trial thirty-eight (38) miles away from M.M.J.C. to increase Defendant's costs and to hamper Defendant's defense. The State sought to make it difficult, expensive and virtually impossible for the Defense to present its own

witnesses at trial. The State did not dispute these facts.

The State did not dispute its bad faith motivations or even attempt to explain its actions in its response to the R8-6th Motion. EX_07: 4,L14-23; 8,L14- 10,L20

The State abdicated its responsibility and deliberately sought to hamper the Defense with its dilatory tactics. Therefore, the second factor weighs heavily in favor of finding a Sixth Amendment violation.

3. Defendant Asserted His Speedy Trial Rights Promptly.

Defendant formally asserted his speedy trial rights on April 25, 2018, more than twenty-one (21) months before trial. FB ¶ 43(h)(i); State's EX_01: 1-8 App. 160a-161a Defendant successfully raised the issue of a due process violation because of a conflicted judge in July 2017, more than thirty (30) months before trial. This factor weighs heavily in favor of finding a violation of Defendant's Sixth Amendment rights.

4. Defendant was Prejudiced by the Delay.

Defendant was presumptively prejudiced by the long delay. *Doggett*, 505 U.S. 656. Defendant was actually prejudiced by the long delay.

"Excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify. The importance of presumptive prejudice increases with the length of delay." "Bad faith in causing delay will be weighed heavily against the government." *Doggett*, 505

U.S.656 When the State ignores and intentionally abdicates its obligation to see that a defendant has a fair trial, it acts in bad faith. Doggett's conviction was reversed and vacated for violating his Sixth Amendment rights, solely based upon presumptive prejudice. Like the Defendant in Doggett, Defendant was presumptively prejudiced by the bad faith tactics of the prosecution, and possibly by the State's negligence. "When the Government's negligence thus causes delay six times as long as that generally sufficient to trigger judicial review, see n. 1, *supra*, and when the presumption of prejudice, albeit unspecified, is neither extenuated, as by the defendant's acquiescence, e.g., 407 U.S., at 534-536, nor persuasively rebutted, the defendant is entitled to relief."

The State did not rebut that its negligence and bad faith caused these delays. It argued that it had no obligation to ensure that the proceedings comported with due process. Since the Defendant filed motions to protect his due process rights, those delays were attributable to him

Based upon this presumption of prejudice from delay, Defendant's conviction should be reversed and vacated.

(a) Defendant Suffered Prejudice from the Long Delay.

"The most important Barker factor is prejudice to the Defendant. To assess prejudice, we consider the interests the speedy trial right protects: (1) preventing "oppressive pretrial incarceration," (2) minimizing "anxiety and concern of the accused," and (3) limiting "the possibility that the defense will be

impaired by diminishing memories and loss of exculpatory evidence." Of these forms of prejudice, "the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." "If the court finds the defendant has been prejudiced, the matter must be dismissed with prejudice pursuant to *Barker v. Wingo*, *supra*." *Doggett*, 505 U.S. 654-655 Any delay that significantly impairs the defense is included in the analysis of prejudice. *United States v. Marion*, 404 U.S. 307, 320 (1971) "Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends."

Defendant requested an evidentiary hearing, prior to trial, to document the prejudice to the defense. EX_06: 23,L13; 24,L5-9 The trial court erred by denying defendant a pre-trial evidentiary hearing.

1.) Defendant's Financial Resources were Drained by the Delay.

Defendant has spent more than \$30,000 defending this prosecution. EX_06: 5 paras. 8,22 ; 23 section b); 24,L13-24 ; 25,L9-12 If this case had remained in Scottsdale with a non-conflicted judge, defense costs would have been closer to \$6,000. The delay caused by the transfers around Maricopa County drained Defendant's financial resources. Defendant filed bankruptcy in May 2019, in part because of the reduction of his financial resources caused by this prosecution. EX_06: Id.

If your financial resources are diminished, so that you can't afford to hire a competent attorney, obviously your ability to present a complete defense is impaired. Presumably, experienced defense lawyers are better than pro se non-lawyers at putting on a defense.

2.) Defendant Suffered Physical and Psychological Injuries Because of the Long Delays.

In the R8-6th Motion Defendant documented anxiety, depression and physical injuries caused by the lengthy prosecution. EX_06: 4,paras. 3-4,paras. 9-16; 29-47; EX_05: 4-9 Defendant also testified about the psychological and physical injuries he sustained because of the abnormally long prosecution. TRANS_01: 151,L5 - 25; 152,L15- 153,L22 Defendant's testimony was cut short by the trial court, preventing him from making a complete record of the injuries. Defendant's injuries were not disputed by the State and were assumed to be true by the trial court. TRANS_01: 154,L9-10 ; EX_07: 4,L13-23 App. 135a

If your mental abilities are degraded, it obviously effects your ability to put on a defense.

3.) The Defense was Harmed by the Delays.

Defendant's mental skills were diminished by the delays and the resulting psychological injuries. The diminishment of mental skills created errors at trial, which would not otherwise have occurred. The errors at trial prevented Defendant from presenting a

complete defense. Defendant forgot to subpoena Bruce Washburn and Luis Santaella as witnesses, to prove the prosecutor's conflict of interest. Defendant had sought ,unsuccessfully, to depose Washburn and Santaella in June 2018. Defendant had also sought subpoenas for Washburn and Santaella for the trial that was vacated in 2018 and in 2019. Defendant would have brought Washburn and Santaella as witnesses at trial if he were not mentally impaired.

Defendant forgot to call the prosecutor as a witness, to document the prosecutor's conflict of interest, because of his diminished mental skills. EX_06:7,L13-14; 8,L20 Defendant was not able to schedule his wife's testimony to corroborate his physical and psychological injuries, because of his impaired mental skills. TRANS_01: 150,L11-13 Defendant forgot to include his own testimony to support his Sixth Amendment motion, because of his impaired mental skills. TRANS_01: 150,L14-151,L5

Defendant was forced to proceed pro se, with only advisory counsel, because he lacked the funds to pay for full-fledged representation. Diminishment of funds resulted from the abnormally high costs caused by this abnormally long prosecution. Full-fledged legal representation would have yielded more effective cross-examination of the Mayor and the Officers, helping to prove that they knew their orders to Defendant were unlawful. Full-fledged legal representation would have led to increased credibility with the trial court, especially on the constitutional issues, leading to a dismissal of the SRC 19-13 charges. Full-fledged legal representation would have prevented the scheduling errors described above, leading to the creation of a complete defense and

dismissal of the charges for due process and Sixth Amendment violations.

The long delays led to the destruction of evidence by the State, the police radio transmissions and the surveillance videos. EX_10: 8,L6--9,L26; 11-13 ; Defendant formally requested the Officers radio transmissions and the surveillance videos in June 2017. EX_10: 4,paras. 12-14,16-17 The State refused to provide this evidence, and then destroyed it , so that Defendant could not obtain it via a public records request. EX_10: 4,paras. 11- 23; 9,L6--10,L20;19,paras. 7 – 18 Destruction of this evidence prevented Defendant from preparing his cross-examinations of the Mayor and the Officers, and showing that these witnesses were not credible. TRANS_01:12,L14-24;18,L23--23,L21;172,L7-23;180,L10-20 This evidence created an unbiased record which could have been used to impeach these witnesses and examine and exploit inconsistencies with their testimony. EX_10: 22 – 23; 25- 27. This evidence was Brady/Giglio material, and its destruction necessarily harmed the Defense. Milke v. Morz, 236 Ariz. 276 (App. 2014)

The long delays allowed the Officers to lawyer up with outside attorneys and refuse to answer questions about their interactions with Washburn and Luis Santaella concerning the events that created Defendant's arrest. EX_06: 14,L23--15,L7 The long delays led to memory loss by the Officers, which hampered Defendant's ability to prepare his defenses. EX_06: 21,L25--23,L10 Contrived memory loss or coordination of memories harms the defense, because it makes it more difficult to prove the truth with objective recollections.

Defendant was prejudiced by the inordinately long delays. Thus, the fourth Barker factor weighs conclusively in favor of dismissal for a Sixth Amendment violation. "When the presumption of prejudice is not persuasively rebutted, the defendant is entitled to relief." *Doggett*, 505 U.S. 658

All of the Barker factors weigh in Petitioner's favor. It was fundamental error for the Superior Court and the Trial Court to refuse to engage in the Barker analysis. According, this Court should grant certiorari and resolve the conflict between the Arizona Supreme Court and the Ninth Circuit, or order a remand so that Stuart can prove that the State intentionally caused the delays.

III. Vindictive Prosecutions Should Be Prohibited in All Situations Where a Person is Peacefully and Lawfully Exercising Free Speech Rights

If Petitioner was prevented from speaking and arrested and prosecuted because he is black or brown, this case would have been tossed. The Superior Court acknowledged this in its ruling. App. 28a, note 14

If the prosecutor had sought increased charges, because of actions Petitioner took in preparing for trial or in refusing to accept a plea bargain, then Petitioner could have received a hearing on the vindictive prosecution defense. The trial court acknowledged this fact. App. 147a

It is undisputed that this arrest and prosecution occurred, only because Petitioner insisted on peacefully and lawfully exercising his free speech rights at open public comment. Petitioner was

arrested and prosecuted only because he insisted on lawfully exercising his free speech rights. App. 74a; 143a-144a

"To punish a person because he has done what the law plainly allows him to do is a due process violation "of the most basic sort." *Bordenkircher v. Hayes*, 434 U.S. 357, 363. In a series of cases beginning with *North Carolina v. Pearce* and culminating in *Bordenkircher v. Hayes*, the Court has recognized this basic — and itself uncontroversial — principle. For while an individual certainly may be penalized for violating the law, he just as certainly may not be punished for exercising a protected statutory or constitutional right. *United States v. Goodwin*, 457 U.S. 368, 372 (1982) "[F]or an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.'" *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (quoting *Chaffin v. Stynchcombe*, 412 U.S. 17, 32-33, n. 20).

The context of *Goodwin* was a prosecutorial charging decision, and not a lawful exercise of free speech as occurred here. The State admitted that it was seeking to punish Petitioner, only because he defied city attorney Washburn's unconstitutional letter, and the Mayor's unconstitutional commands not to speak. App. 68a- 70a; 74a; 127a -131a; 171a - 176a. This Court described this proposition as a basic — and uncontroversial — principle. There is no logical reason why *Goodwin* should not apply to peaceful and lawful exercise of free speech rights.

This Court can judicially notice that Putin has arrested and prosecuted thousands of Russian's for protesting the war in Ukraine.
<https://www.npr.org/2022/03/07/1084967986/russia->

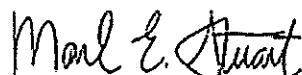
arrests-more-protesters In Russia, speaking out after the government has told you not to is a crime. This case indicates that government abuse of power, backed by police power and prosecutor's power is a problem in Arizona. This Court should grant certiorari and explain that all government actions "whose objective is to penalize a person's reliance on his legal rights is `patently unconstitutional.'" Government prosecutions of free speech should not be excepted from the law prohibiting prosecutorial vindictiveness.

Can speaking at open public comment, peacefully and lawfully, in a city council meeting on an issue of ongoing public importance ever be a crime?

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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