

No. _____

IN THE

Supreme Court of the United States

DONALD LEE SCOTT,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

On Petition for Writ of Certiorari
To the Arizona Court of Appeals, Division 1

APPENDIX

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Appendix A

State v. Scott,

Decision of the Arizona Court of Appeals,
Division 1

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

DONALD LEE SCOTT, *Appellant*.

No. 1 CA-CR 21-0024
FILED 2-24-2022

Appeal from the Superior Court in Maricopa County
No. CR2018-106340-001
The Honorable Suzanne E. Cohen, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Jennifer L. Holder
Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Mikel Steinfeld
Counsel for Appellant

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MEMORANDUM DECISION

Presiding Judge Cynthia J. Bailey delivered the decision of the Court, in which Judge Peter B. Swann and Judge D. Steven Williams joined.

B A I L E Y, Judge:

¶1 Donald Lee Scott appeals his conviction and sentence for first-degree murder. For the following reasons, we affirm.

FACTS¹ AND PROCEDURAL HISTORY

¶2 Late one evening in December 1988, Scott took his then-wife, Diana,² on a drive through the desert near the Cave Creek Highway. The couple rarely went to the desert, and then only in the daytime to practice shooting Scott's guns.

¶3 About half a mile south of the highway, Scott pulled directly up to the body of a deceased woman, later identified as Amy. After walking out to Amy's body, Scott calmly informed Diana that the woman had visible gunshot wounds. Scott drove to the nearest phone and contacted law enforcement.

¶4 Officers arrived and Scott easily directed them to Amy, even though the area was particularly dark and desolate. Scott told them that they happened upon Amy while driving around in the desert. Scott claimed he knew the area because it was where he met Diana years earlier, a fact she would later refute. Shortly after finding Amy's body, Scott instructed Diana to tell officers they were together the entire day leading up to their discovery. At that time, however, Scott was not considered a suspect and would not be contacted again until years later.

¶5 At the crime scene, officers saw that Amy was lying in a pool of blood and had suffered multiple gunshot wounds. Amy's pants were partially open, she had no underwear, and her shoes were coming off her

¹ We view and thus recount the facts in the light most favorable to sustaining the jury's verdict. See *State v. Payne*, 233 Ariz. 484, 509, ¶ 93 (2013).

² We use pseudonyms to protect the privacy of the victim and witnesses.

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feet. It appeared she had been shot and then dragged a short distance. A medical examiner determined that Amy was shot three times, including one gunshot wound to the back of her head. The evidence suggested that Amy died the day her body was discovered. The examiner found premortem bruising on Amy's legs and an abrasion on her genitals. The examiner collected a swab from Amy's vaginal canal for future testing.

¶6 Over the next 30 years, as DNA technology advanced, forensic scientists continued to test Amy's vaginal swab. The scientists found sperm cells with intact "tails" on the swab, which do not typically survive past 24 hours of ejaculation. The scientists eventually identified a single source DNA profile in the sperm cells. In 2018, a cold case detective matched Scott's DNA to the DNA profile on the vaginal swab and Amy's clothing.

¶7 The State charged Scott with one count of first-degree murder, alleging alternate theories of premeditated and felony murder. At trial, Defense counsel argued that Scott had consensual sex with Amy days before her murder, he had no contact with her after that encounter, and he was not involved in her murder. The jury returned a guilty verdict. Nine jurors found premeditated and felony murder, two jurors found premeditated murder, and one juror found felony murder. The superior court sentenced Scott to life imprisonment with the possibility of release after 25 years.

¶8 We have jurisdiction over Scott's timely appeal pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1), 13-4031, and 13-4033(A).

DISCUSSION

I. Denial of Motion to Admit Hearsay Statements

¶9 Scott argues the superior court erred by denying his motion to admit hearsay statements under Arizona Rule of Evidence 807(a), the residual hearsay exception. He claims the court's ruling violated his right to due process. We review the court's ruling on the admissibility of evidence for an abuse of discretion, and related constitutional challenges *de novo*. See *State v. Ellison*, 213 Ariz. 116, 129, ¶ 42 (2006).

¶10 Hearsay is an out-of-court statement offered to prove the truth of the matter asserted, and is presumptively inadmissible. See Ariz. R. Evid. 801(c), 802. Under the residual hearsay exception, a hearsay statement may be admitted if: "(1) the statement is supported by sufficient

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guarantees of trustworthiness—after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; and (2) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.” Ariz. R. Evid. 807(a). To qualify, the statement “must be so trustworthy that adversarial testing would add little to its reliability.” *Idaho v. Wright*, 497 U.S. 805, 806 (1990). As a result, the exception applies “only in rare and exceptional circumstances.” *State v. Luzanilla*, 179 Ariz. 391, 397 (1994).

¶11 In determining whether the residual hearsay exception applies, we may consider spontaneity, consistency, knowledge, mental state, motivation to lie, criminal history, and the time and place statements were made. *See State v. Burns*, 237 Ariz. 1, 20, ¶¶ 69-70 (2015); *State v. Cruz*, 218 Ariz. 149, 162, ¶¶ 62-63 (2008); *State v. Valencia*, 186 Ariz. 493, 498 (App. 1996).

¶12 Before and during trial, Scott moved to admit hearsay statements made by Amy’s friends and acquaintances, who had either passed away or suffered memory loss. He argued portions of their interview transcripts, along with handwritten notes by an interviewing detective, were admissible under the residual hearsay exception. Scott sought to admit statements regarding Amy’s conduct and physical appearance in the days before her murder, her sexual history and orientation, and any suspects that may have been involved in her murder. After hearing argument, the superior court denied the motion.

¶13 All of the relevant statements were made in response to questioning by detectives, generally reducing their likelihood of trustworthiness. *See Burns*, 237 Ariz. at 20, ¶ 70. Most of the statements were speculative, emotionally charged, inconsistent or muddled, and based on second-hand information. And, many of the witnesses admitted to involvement in unrelated criminal activity and issues with substance abuse. To the extent any of the statements met the standard of trustworthiness, the documents containing those statements did not. Although the interview transcripts and notes were likely created by law enforcement in the initial investigation, they do not list the author of the document, the manner of transcription, or any avowals as to their accuracy. Lacking any indicia of reliability, the documents and the statements contained therein lacked the requisite guarantees of trustworthiness. This case did not involve the “rare and exceptional circumstances” in which the residual hearsay exception can be applied. *See Luzanilla*, 179 Ariz. at 397.

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¶14 Beyond that, any error in excluding the statements would have been harmless given the overwhelming evidence of Scott's guilt, including a highly improbable explanation for finding Amy's body and DNA evidence linking him to her murder. *See State v. Bible*, 175 Ariz. 549, 590 (1993) (finding error harmless where improper evidentiary ruling had no impact on the jury's guilty verdict).

II. Denial of Motion to Dismiss for Pre-Indictment Delay

¶15 Scott next argues the pre-indictment delay violated his due process right and the superior court erred by denying his motion to dismiss. We review the court's ruling on a motion to dismiss for pre-indictment delay for an abuse of discretion. *See State v. Lemming*, 188 Ariz. 459, 460-63 (App. 1997). We review due process claims *de novo*. *See State v. Rosengren*, 199 Ariz. 112, 116, ¶ 9 (App. 2000).

¶16 The primary guarantee against "overly stale criminal charges" is the relevant statute of limitations. *United States v. Ewell*, 383 U.S. 116, 122 (1966). A charge of first-degree murder has no such limitation. *See* A.R.S. § 13-107(A). Due process provides an additional, although limited, protection against unreasonable delay. *See United States v. Lovasco*, 431 U.S. 783, 789 (1977). To prevail on a due process claim, the defendant must show 1) the State intentionally delayed filing charges to harass or gain a tactical advantage over the defendant, and 2) the delay caused the defendant actual prejudice. *See State v. Broughton*, 156 Ariz. 394, 397 (1988). This two-prong test, adopted by our Supreme Court, has remained the method of evaluating the implication of pre-indictment delay on a defendant's right to due process for over 40 years. *See State v. Torres*, 116 Ariz. 377, 378 (1977); *State v. Marks*, 113 Ariz. 71, 74 (1976).

¶17 Before trial, Scott moved to dismiss for pre-indictment delay and argued, in pertinent part, that Arizona's two-prong test unfairly places the burden on defendants to prove intentional delay. Scott asked the superior court to forgo well-established Arizona law and perform a balancing test that shifts the burden to the State. After the State responded in objection, the court issued a minute entry denying the motion. Scott raises the same claim on appeal, arguing Arizona's two-prong test for evaluating pre-indictment delay violates the due process guarantees of the United States and Arizona constitutions.

¶18 Scott asks for a ruling we lack the authority to provide. Since adopting the two-prong test, our Supreme Court has cast no doubt on the constitutionality of that approach in its subsequent decisions. *See State v.*

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Lacy, 187 Ariz. 340, 346 (1996); *State v. Williams*, 183 Ariz. 368, 379 (1995); *Broughton*, 156 Ariz. at 397. We are bound by those decisions, and any departure falls within “the exclusive purview of that court.” *State v. McPherson*, 228 Ariz. 557, 563, ¶ 16 (App. 2012). We have previously rejected a similar request to ignore or overturn the two-prong test and Scott provides no basis for us to deviate from that rationale. *See State v. Romero*, 236 Ariz. 451, 454, ¶ 7 (App. 2014), *vacated in part on other grounds*, 239 Ariz. 6 (2016).

¶19 Scott concedes that he cannot demonstrate intentional delay under Arizona’s two-prong test. Because he has failed to make this showing, we cannot find reversible error and need not address whether the delay caused him prejudice. *See Broughton*, 156 Ariz. at 397. Even so, Scott has not met the heavy burden of proving actual, non-speculative prejudice. *Id.* at 397-98. He claims the loss of witness testimony, either through their death or memory loss, resulted in actual prejudice. Scott has failed to establish such testimony would have been admissible, credible, and beneficial to his defense. *See State v. Dunlap*, 187 Ariz. 441, 451 (App. 1996) (finding loss of witnesses insufficient to establish prejudice without a showing their testimony would have impacted the verdict). On this record, we see no due process violation. The superior court properly denied the motion to dismiss.

¶20 Lastly, Scott argues the superior court’s failure to conduct a hearing or allow time for a reply constituted error. Scott was not, as he contends, deprived of a meaningful opportunity to litigate the issue. His motion adequately preserved the issue on appeal, and nothing from the record suggests the court improperly applied the law. *See State v. Trostle*, 191 Ariz. 4, 22 (1997) (“Trial judges are presumed to know the law and to apply it in making their decisions.” (citation omitted)); *see also* Ariz. R. Crim. P. 1.9(d)-(e) (providing courts with the authority to set hearings and waive procedural requirements). We see no error.

CONCLUSION

¶21 For the foregoing reasons, we affirm Scott’s conviction and resulting sentence.



AMY M. WOOD • Clerk of the Court
FILED: AA

Appendix B

Arizona Supreme Court ruling denying review



Supreme Court

STATE OF ARIZONA

ROBERT BRUTINEL
Chief Justice

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TRACIE K. LINDEMAN
Clerk of the Court

August 29, 2022

RE: STATE OF ARIZONA v DONALD LEE SCOTT

Arizona Supreme Court No. CR-22-0079-PR

Court of Appeals, Division One No. 1 CA-CR 21-0024

Maricopa County Superior Court No. CR2018-106340-001

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on August 26, 2022, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

Justice Montgomery did not participate in the determination of this matter.

Tracie K. Lindeman, Clerk

TO:

Linley Wilson

Mikel Steinfeld

Amy M Wood

ga

Appendix C

Donald Scott's Motion to Dismiss

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**IN AND FOR THE COUNTY OF MARICOPA****THE STATE OF ARIZONA,**

Plaintiff,

vs.

DONALD SCOTT,

Defendant.

CASE NO. CR2018-106340-001DT

**DEFENDANT DONALD SCOTT'S MOTION
 TO DISMISS FOR PRE-INDICTMENT
 DELAY**

(Assigned to the Honorable Chuck Whitehead)

Donald Scott, through undersigned counsel, respectfully requests that this Court dismiss this case with prejudice on the grounds that the State unconstitutionally delayed charging of this case, in violation of the United States and Arizona Constitutions by denying Mr. Scott of his right to due process and a fair trial. U.S. Const. Amend. V, XIV; Ariz. Const. art. 2, §§ 4, 11. The State further unconstitutionally delayed charging of this case, in violation of the United States and Arizona Constitutions by depriving Mr. Scott of his right to effective assistance of counsel. U.S. Const. Amend. VI, XIV; Ariz. Const., Art. 2, § 2; Ariz. R. Crim. P. 6.1(a), (b). This Motion is further supported by the following Memorandum of Points and Authorities.

I. STATEMENT OF FACTS

On December 10, 1988, the victim in this matter was discovered deceased in the desert north of Phoenix, Arizona. Semen was detected in swabs taken from the victim's vaginal vault during the

1 autopsy examination. The death was investigated, but no charges were brought against anyone until the
2 charges in our case, which were filed on February 6, 2018, almost thirty years after the death. Donald
3 Scott reported the body to law enforcement and was questioned on the scene in 1988. Mr. Scott
4 submitted a written statement to law enforcement on scene detailing the events that lead to the
5 discovery of the body. Mr. Scott's written statement has been lost by law enforcement. There were
6 also 911 calls related to the discovery that were not preserved by law enforcement.

7 In 1994, further investigation took place where the DNA of two potential suspects, William
8 McKenna and Scott Lehr, was compared to the DNA located in the victim's vaginal cavity. No other
9 comparisons were pursued by law enforcement at that time for reasons unknown to the Defense. The
10 DNA profile from the victim's vaginal cavity was entered into CODIS in April of 2003, with no
11 matches. In 2015, an additional DNA analysis was performed to exclude suspect Walter Moore.
12 Finally in 2016, a CODIS hit occurred allegedly linking the DNA in the victim's vaginal vault to
13 Donald Scott. A confirmation analysis of that hit was completed January 25, 2018.

14 During the almost thirty-year delay between the victim's death and charges against Mr. Scott,
15 the medical examiner that conducted the autopsy has passed away. Additionally, the victim's close
16 friend, Diana Price (Salem), who was one of the last people to have contact with the victim on the day
17 of the incident, has passed away. The victim's brother, William McKenna, passed away a few days
18 after the victim under suspicious circumstances, and he had an attorney that had potentially relevant
19 information. William McKenna's attorney's whereabouts are currently unknown, and he may have
20 passed away during the thirty-year delay. Law enforcement officers involved have also passed away
21 during the thirty-year delay, particularly Deputy Schoenstene with MCSO, who was one of the original
22 responders to the scene.

23 II. LAW

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1 The almost thirty-year pre-indictment delay deprived Mr. Scott of his due process right to a fair trial
 2 and his right to effective representation of counsel. The United States Constitution guarantees that no
 3 person shall “be deprived of life, liberty, or property, without due process of law.” U.S. Const. amends.
 4 V, XIV. The Arizona Constitution separately guarantees due process in Article 2, § 4. While the Sixth
 5 Amendment guarantees a speedy trial once an indictment is filed, the Due Process Clause protects a
 6 person from intolerable pre-indictment delay. *U.S. v. Marion*, 404 U.S. 307, 324, 92 S.Ct. 455, 465
 7 (1971). Ordinarily, statutes of limitation protect defendants from “overly stale charges.” *U.S. v. Ewell*,
 8 383 U.S. 116, 122 (1966). But no statute of limitations existed for first-degree murder in 1988. *See*
 9 A.R.S. § 13-107 (1986). The only relief for a defendant faced with stale first-degree murder charges is
 10 the Due Process Clause’s protection from intolerable pre-indictment delay. *Marion*, 404 U.S. at 324,
 11 92 S.Ct. at 465.

12 To obtain a dismissal due to pre-indictment delay, a defendant must demonstrate the state
 13 unreasonably delayed prosecution, and the state’s delay caused actual and substantial prejudice to the
 14 defendant. *Id.* at 324–25, 465–66; *State v. Marks*, 113 Ariz. 71, 74, 546 P.2d 807, 810 (1976) (citing
 15 *State v. Saiz*, 103 Ariz. 567, 447 P.2d 541, 544 (1968)). The Arizona Supreme Court clarified a two-
 16 pronged test for determining whether pre-indictment delay violates due process:

17 To establish that pre-indictment delay has denied a defendant due process, there must be
 18 a showing that [1] the prosecution intentionally delayed proceedings to gain a tactical
 19 advantage over the defendant or to harass him, and [2] that the defendant has actually
 been prejudiced by the delay.

20 *State v. Broughton*, 156 Ariz. 394, 397, 752 P.2d 483, 486 (1988) (emphasis in original); *see also State*
 21 *v. Hall*, 129 Ariz. 589, 592–93, 633 P.2d 398, 401–02 (1981); *State v. Torres*, 116 Ariz. 377, 378, 569
 22 P.2d 807, 808 (1977). While *Hall* and *Torres* suggest both factors must be established, the “ultimate
 23 question” is whether due process was violated. *State v. Van Arsdale*, 133 Ariz. 579, 581, 653 P.2d 36,
 24 38 (Ct. App. 1982). Pre-indictment delay that violates due process requires dismissal of the charges.

1 *U.S. v. Marion*, 404 U.S. 307, 324 (1977); *State v. Lemming*, 188 Ariz. 459, 462, 937 P.2d 381, 384
2 (Ct. App. 1997).

3 **A. The State intentionally delayed prosecution and aimed to gain a tactical advantage over**
4 **Mr. Scott.**

5 A defendant must show the state intentionally delayed prosecution, aiming to gain a tactical
6 advantage over the defendant. *State v. Hall*, 129 Ariz. 589, 633 P.2d 398 (1981); *State v. Torres*, 116
7 Ariz. 377, 569 P.2d 807 (1977); *State v. Marks*, 133 Ariz. 71, 546 P.2d 807 (1976). Courts generally
8 hold that pre-indictment delay due to an ongoing investigation does not violate a defendant's due
9 process rights. *State v. Broughton*, 156 Ariz. 394, 397, 752 P.2d 483, 486 (1988); *State v. Hall*, 113
10 Ariz. 589, 593, 633 P.2d 398, 402 (1981). Although investigative delay has not been thoroughly
11 defined, examples of investigative delay are abundant. *State v. Broughton*, 156 Ariz. 394, 397–98, 752
12 P.2d 483, 486–87 (1988) (over one-year delay in indictment for assault against prisoner defendant was
13 because the Department of Corrections investigator became seriously ill following the offense,
14 underwent brain surgery, and subsequently lost all memory of the case); *State v. Hall*, 129 Ariz. 589,
15 592–93, 633 P.2d 398, 401–02 (1981) (holding prisoners were not “arrested” to trigger constitutional
16 rights when moved to investigative lockup—for further investigation to be conducted—for seven
17 months before being formally charged). If no legitimate reason for the pre-indictment delay exists, due
18 process is violated when the delay provides the prosecution a tactical advantage over the defendant.
19 *Torres*, 116 Ariz. at 379, 569 P.2d at 809.

20 A prototypical example of appropriate investigative delay involved the prosecution of a litany of
21 white-collar crimes, including embezzlement and fraud. *State v. Van Arsdale*, 133 Ariz. 579, 580, 653
22 P.2d 36, 37 (Ct. App. 1982). The almost four-year investigation of Van Arsdale leading up to his
23 indictment was complex, involving over 100 pounds of documents; flow charts officers created to
24 understand the intricate transactions; multiple co-defendants; and the ongoing investigation uncovered
25 new evidence against Van Arsdale. *Id.* at 582, 653 P.2d at 39. Finding the prosecutors and police did

1 not strategically delay prosecution, the court stated the minimal delay did not violate ““fundamental
2 conceptions of justice which lie at the base of our civil and political systems.”” *Id.* (citing *United States*
3 *v. Walker*, 601 F.2d 1051, 1055 (9th Cir. 1979)). Still, the court acknowledged there was a “minimal
4 delay.” *See id.* The delay between dates of offense and indictment ranged from two years, seven
5 months for one date of offense; to three years, three months for the other date of offense. *Id.* at 580,
6 653 P.2d at 37.

7 The court in *State v. Torres* similarly found the pre-indictment delay was investigative, rather
8 than tactical. 116 Ariz. at 379, 569 P.2d at 809. The state indicted the defendant seven months after
9 the alleged drug sale. *Id.* The investigating officer delayed filing charges because he did not want to
10 disclose his identity as an undercover detective. *Id.* Because of the state’s “interest in protecting the
11 identity of an undercover narcotics officer during the period of his investigation,” the delay was
12 investigative not tactical. *Id.* Thus, the seven-month delay did not violate the defendant’s due process
13 rights. *Id.*

14 The Court also held investigative delay did not violate due process in *State v. Broughton*. 156
15 Ariz. at 398, 752 P.2d at 487. Prosecutors charged Broughton, an Arizona State Prison inmate, with
16 assaulting another prisoner and a correctional officer one year after the alleged crime occurred. *Id.* at
17 396, 752 P.2d at 485. There, the pre-indictment delay was due to the initial investigator’s serious
18 medical problems. *Id.* As a result of his declining health, police reports arrived at the county attorney’s
19 office ten months after the attack. *Id.* Further, the defendant never alleged the delay was deliberate.
20 *Id.*

21 Unlike the delays in *Van Arsdale*, *Torres*, and *Broughton*, the delay here was not investigative.
22 In fact there was little investigation going on at all, and the investigation that was done was incomplete.
23 DNA analysis was first done on two suspects in 1994 (William McKenna and Scott Lehr). Donald
24 Scott was known at that time as he was the first person police contacted the night of the death in 1988.
25

1 Running Mr. Scott's DNA at the same time in 1994 would have allowed the State to determine if he
2 was a suspect and prevented an additional 24 years of delay between 1994 and 2018. DNA work was
3 done a second time in the investigation in 2003 when the DNA located in the victim's vaginal cavity
4 was added into CODIS. If Mr. Scott's DNA had been run at that time, and the State determined
5 whether he was a suspect, an additional 15 years of delay could have been avoided between 2003 and
6 2018. During these periods of delay, crucial witnesses have passed away and countless numbers of
7 potential leads on information have been lost.

8 The state deliberately delayed prosecution and aimed for a tactical advantage over Mr. Scott by
9 failing to even attempt to investigate and postponing prosecution for over thirty years. This is not a
10 case of an investigator falling ill and delaying prosecution for a couple of months, like *Broughton*.
11 Unlike *Van Arsdale*, no complex financial investigation involving multiple defendants slowed the
12 investigation here. No officer needed to maintain his undercover identity for a couple of months like in
13 *Torres*. Moreover, the length of the delay in this case is startling in comparison to the delays
14 considered by Arizona's higher courts, such as *Van Arsdale*, which was about four years; *Torres*, which
15 was 7 months; and *Broughton*, which was one year.

16 There is no discernable, let alone legitimate, reason for the extremely excessive delay in this
17 case. In 1994 and 2003 after conducting incomplete DNA analysis (not including Mr. Scott), the State,
18 believing a conviction was uncertain, decided to forgo prosecution. As a result of the thirty-year delay,
19 the State has been able to gain a significant tactical advantage: witnesses have passed away and
20 recollections of the events from 1988 have faded, many witnesses- including those who may have had
21 exculpatory or impeachment evidence- have died, evidence has been lost or destroyed, and defense
22 counsel cannot fully present a defense. Additional factual information regarding specific prejudice Mr.
23 Scott has suffered is provided in the subsection below.
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1 The Arizona Constitution requires justice to be administered without unnecessary delay. Art. 2, §
 2 11. Here, the State unreasonably and unnecessarily delayed prosecution in violation of Mr. Scott's due
 3 process rights, so much so that it shocks the conscience. *See United States v. Salerno*, 481 U.S. 739,
 4 746, 107 S. Ct. 2095, 2101 (1987) ("substantive due process" prevents the government from engaging
 5 in conduct that "shocks the conscience). Considering the evidence, but for the incomplete DNA
 6 investigation, remained the same for thirty years, there is no reason for a delay of this length other than
 7 a deliberate, strategic choice to wait until evidence and witnesses' memories and existence have waned
 8 or extinguished. The State violated Mr. Scott's due process rights by intentionally delaying prosecution
 9 to gain a tactical advantage.

10 **B. Mr. Scott has suffered actual substantial prejudice by the delay, which has also impeded**
 11 **his Sixth Amendment right to effective assistance of counsel.**

12 **a. Effective Assistance of Counsel**

13 States are required to appoint counsel to those who are unable to retain counsel, to protect the
 14 fundamental Sixth Amendment right to counsel. *Gideon v. Wainwright*, 372 U.S. 335, 339-40 (1963);
 15 U.S. Const., Amends. VI & XIV; Ariz. Const., Art. 2, § 2; Ariz. R. Crim. P. 6.1(a), (b). The Sixth
 16 Amendment to the United States Constitution and Article 2, section 4 of the Arizona Constitution
 17 entitle each defendant to the right of effective assistance of counsel. *McMann v. Richardson*, 397 U.S.
 18 759, 771 n.14 (1970) ("the right to counsel is the right to effective assistance of counsel").
 19 "Government violates the right to effective assistance when it interferes in certain ways with the ability
 20 of counsel to make independent decisions about how to conduct the defense." *Strickland v.*
 21 *Washington*, 466 U.S. 668, 686 (1984) (citations omitted).

22 Case law is clear: To competently represent a defendant and protect his constitutional right to
 23 effective assistance of counsel, defense counsel has the duty to conduct a thorough investigation to
 24 present a complete defense for their client. However, defense counsel has been unable to follow leads
 25 when they could have been identified and substantiated if the case was brought sooner. Moreover, his

1 defense team has been unable to provide the effective assistance of counsel to which he is
2 constitutionally entitled because evidence has been lost and destroyed, essential witnesses with
3 exculpatory information have either no recollection after thirty years, have passed away, or cannot be
4 located.

5 **b. Substantial Prejudice**

6 A defendant must show prejudice “above and beyond that which is inherent in workings of [a]
7 clogged judicial system.” *Broughton*, 156 Ariz. at 397, 752 P.2d at 486. Generally, courts find
8 “diminished recollection by witnesses does not, *by itself*, constitute the substantial prejudice warranting
9 a finding of a due process violation.” *Id.* at 398, 752 P.2d at 487 (emphasis added). Defendants must
10 demonstrate definite, not speculative, prejudice as a result of the state’s intentional delay. *Id.* at 398,
11 752 P.2d at 487. Additionally, although courts find prejudice can “result from the shortest and most
12 necessary delay,” a lengthy pre-indictment delay presents more opportunities for actual, substantial
13 prejudice. *See Marion*, 404 U.S. at 324. The length of delay is not necessarily determinative. *State v.*
14 *Dunlap*, 187 Ariz. 441 (Ct. App. 1996). The Courts have, by contrast, provided factors to consider in
15 assessing prejudice when considering post-indictment delay. One such factor is “the possibility that the
16 defense will be impaired.” *State v. Miller*, 234 Ariz. 31, 37, 316 P.3d 1219, 1225 (2013).

17 Arizona courts have contemplated pre-trial delays in a variety of cases, spanning from a one-
18 month delay to a ten-year delay, although in each case the courts affirmed because the defendants did
19 not allege intentional tactical delay. *See State v. Lacy*, 187 Ariz. 340, 929 P.2d 1288 (1996) (eight-year
20 delay); *State v. Broughton*, 156 Ariz. 394, 752 P.2d 483 (1988) (one-year, one day delay); *State v.*
21 *Torres*, 116 Ariz. 377, 569 P.2d 807 (1977) (seven-month delay); *State v. Marks*, 113 Ariz. 71, 546
22 P.2d 807 (1976) (one-month delay); *State v. Medina*, 190 Ariz. 418, 949 P.2d 507 (Div.1 1997) (two-
23 and-a-half-year delay); *State v. Dunlap*, 187 Ariz. 441, 448, 930 P.2d 518, 525 (Div.1 1996) (ten-year
24
25

1 delay). Here, and as set forth above, Mr. Scott is expressly alleging an intentional, tactical, strategic
2 purpose for the thirty-year delay.

3 The *Broughton* court decided that although the defendant presented two different allegations of
4 prejudice, the defendant did not *prove* actual prejudice. *Id.* In the one-year delay between the prison
5 assault and the indictment, officials destroyed prison disciplinary tapes and the knife remained untested
6 for DNA evidence. *Id.* However, nothing in the court record explained who testified at the disciplinary
7 hearings or what the witnesses said. *Id.* The defendant's argument that tapes *could have* served as
8 impeachment was "speculative" and "amount[ed] to nothing more than the assertion that some of the
9 witnesses may have had diminished recollections." *Id.* Defendant's second claim of prejudice also
10 failed. *Id.* Police failed to test the knife used in the assault for a little under a year. *Id.* However, no
11 testimony showed earlier testing would have produced any evidence, let alone exculpatory evidence.
12 *Id.* The *Broughton* court concluded, even if Broughton presented intentional delay by the state, he
13 failed to show the necessary prejudice. *Id.*

14 The defendant in *Lovasco* argued the deaths of two witnesses during the eighteen-month delay
15 between the alleged crime and indictment caused him prejudice. 431 U.S. at 785–86. The *Lovasco*
16 court held the delay did not violate "those fundamental conceptions of justice...and define the
17 community's sense of fair play and decency" because the defendant did not state how the deceased
18 witnesses would have helped his defense. *Id.* at 790 (internal citations omitted). Additionally, even
19 though a material eyewitness disappeared during the seven-month delay in *Torres*, due process was not
20 violated because the witness disappeared so quickly after the initial alleged drug sale. 116 Ariz. at
21 379, 569 P.2d 809.

22 Unlike the defendants in *Lovasco*, *Torres*, and *Broughton*, who presented highly speculative and
23 indefinite claims of prejudice, Mr. Scott has been actually prejudiced by the astronomically long thirty-
24 year delay in prosecution. Had the state charged Mr. Scott in 1988, 1994, *or* even in 2003, Mr. Scott
25

would not have suffered such deleterious prejudice. Mr. Scott has lost crucial exculpatory witnesses, potentially exculpatory evidence is gone forever, and information about other suspects in the victim's disappearance is impossible to find. This prejudice has impacted Mr. Scott at every stage of his case. At this point, it is impossible for Mr. Scott to receive the effective assistance of counsel which he is entitled to under the United States and Arizona Constitutions.

C. The delay in this matter offends our fundamental conceptions of justice.

The Ninth Circuit interpreted *U.S. v. Marion* differently than the approach taken by the Arizona Supreme Court in *State v. Broughton* and its progeny. Instead of requiring "intentional delay" to prove a violation of due process, the Ninth Circuit illustrated a more holistic standard, holding the state can violate due process in pre-indictment delay without explicitly intending to do so. *United States v. Valentine*, 783 F.2d 1413, 1416 (9th Cir. 1986). The Fourth Circuit adopted a similar test. *See U.S. v. Automated Medical Laboratories, Inc.*, 770 F.2d 399, 403–04 (4th Cir. 1985).

The Arizona Court of Appeals has stated "under the two-pronged test of *Lovasco*, as interpreted by the lower courts, it will be extremely difficult for a defendant to prevail on his due process claim." *State v. Dunlap*, 187 Ariz. 441, 450, 930 P.2d 518, 527 (Ct. App. 1996) (citing Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* § 18.5, at 428 (1984)). Given that a myriad of circumstances can give rise to a pre-indictment claim in any particular case, a balancing test would allow courts to adhere to the *Marion* standard while more properly allocating the burden of proof equally between the parties. *See Marion*, 404 U.S. at 324-25. The Court in *Marion* recognized a bright-line test may not be efficient, especially because pre-indictment delay claims require "a delicate judgment based on the circumstances of each case." *Marion*, 404 U.S. at 325. If the majority view's two-pronged test is applied here, the United States Supreme Court's recommendation to consider the totality of the circumstances in each case would essentially be disregarded. *See generally United States v. Lovasco*, 431 U.S. 783, 790 (1977).

Further, the majority approach unfairly places the burden of proving the delay in indicting on the defendant rather than the government. *See, e.g., United States v. Colonna*, 360 F.3d 1169, 1176-77 (10th Cir. 2004) (“pre-indictment delay is a violation of due process” when the defendant suffers “actual prejudice,” but the burden of proof is placed on the defendant to show he or she has suffered “definite and not speculative prejudice”); *United States v. Soto-Beniquez*, 356 F.3d 1, 25 (1st Cir. 2003) (defendants bear “the *heavy burden* of showing not only that the preindictment delay caused him actual, substantial prejudice, but also that the prosecution orchestrated the delay to gain a tactical advantage over him”); *United States v. Foxman*, 87 F.3d 1220, 1222 (11th Cir. 1996). In *Lovasco*, the United States Supreme Court held that if and when a defendant proves prejudice from pre-indictment delay, a court must then consider the government’s reasons for the delay. *Lovasco*, 431 U.S. at 789. The burden of proving intentional delay by the government is a hard burden to carry, and defendants who need to prove such are seemingly always unable to meet that standard.

The fairer approach used by the minority of circuits is a better standard to apply in pre-indictment delay analyses. While the defendant is still tasked with proving actual and substantial prejudice caused by the delay, the government is delegated the burden of providing its reason for the delay was legitimate. *See United States v. Corona-Verbera*, 509 F.3d 1105, 1112 (9th Cir. 2007); *Howell v. Barker*, 904 F. 2d 889, 895 (4th Cir. 1990); *United States v. Sowa*, 34 F.3d 447, 451 (7th Cir. 1994). Subsequently, the court is tasked with balancing the prejudice to the defendant against the government’s reasons for the delay. *Id.* Under this balancing test, defendants are not faced with the impossible hurdle of proving the opposing party’s motives behind its actions.

Ultimately, a dismissal with prejudice is required when pre-indictment delay prejudices a defendant, and the length of the delay, “when balanced against the government’s reasons for the delay, offends those ‘fundamental conceptions of justice which lie at the base of our civil and political institutions.’” *United States v. Valentine*, 783 F.2d 1413, 1416 (9th Cir. 1986) (citations omitted).

With this in mind, the more appropriate test is to consider is: 1) the prejudice suffered by the defendant, and 2) whether the delay, when weighed against the government's reasons for delay, offends the "fundamental conceptions of justice" or "the community's sense of fair play and decency." *Id.* (internal citations omitted). The implementation of such a balancing test more closely aligns with the pre-indictment delay protection afforded to defendants by the United States Supreme Court in both *Marion* and *Lovasco*.

III. CONCLUSION

As illustrated above, Mr. Scott suffered actual, insurmountable prejudice as a result of the state's thirty-year delay in bringing charges. When weighing the state's long, unjustified delay against the inherent unreliability of any trial conducted in this case and prejudice Mr. Scott has suffered over time, Mr. Scott's due process rights and right to effective assistance of counsel must triumph.

RESPECTFULLY SUBMITTED this 13th day of November 2019.

SHERRI McGUIRE LAWSON
Office of the Legal Defender

By: /s/ Thomas Garrison
Thomas Garrison

/s/ Robert S. Shipman
Robert S. Shipman
Attorneys for Defendant Donald Scott

ORIGINAL of the foregoing e-filed
this 13th day of November 2019, with:

Clerk of the Superior Court
Central Court Complex
201 West Jefferson
Phoenix, AZ 85003

COPY of the foregoing e-delivered
this 13th day of November 2019, to:

1 The Honorable Chuck Whitehead
2 Central Court Building,
3 201 W. Jefferson St.
4 Phoenix, AZ 85003

5 **COPY** of the foregoing e-mailed
6 this 13th day of November 2019, to:

7 Vince Imbordino and Elizabeth Reamer
8 Deputy County Attorney
9 301 West Jefferson
10 Phoenix, AZ 85003

11 By: /s/ Robert S. Shipman
12 Robert S. Shipman
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Appendix D

State's Response to Motion to Dismiss

ALLISTER ADEL
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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

THE STATE OF ARIZONA,

Plaintiff,

vs.

DONALD LEE SCOTT,
aka DONALD SCOTT

Defendant.

CR2018-106340-001

**STATE'S RESPONSE TO DEFENDANT'S
MOTION TO DISMISS FOR PRE-
INDICTMENT DELAY**

(Assigned to the Honorable Chuck
Whitehead, Div. CRJ05)

The State of Arizona, by and through undersigned counsel, responds to Defendant's
Motion to Dismiss for Pre-Indictment Delay.

Submitted November __, 2019.

ALLISTER ADEL
MARICOPA COUNTY ATTORNEY

BY: Vince Imbordino
/s/ Vince Imbordino
Deputy County Attorney

FACTS

On December 10, 1988, the Defendant called MCSO and reported finding the body of a woman in a remote desert area north of Phoenix. He reported that he and his wife were driving in this area because they had been there on date before getting married. They came upon our victim's body. When MCSO responds to the 911 call, Defendant and his wife lead deputies to the scene. The victim was clothed but pants were loose around the waist and zipper slightly down. Both he and his wife claimed not to know the victim. The investigation revealed she had three distant gunshot wounds. One to the arm which would be indicative of her attempting to shield herself, one to the face, and one to the neck which was the fatal injury. The bullet to the neck damaged her spine and would have disabled her immediately.

On the day prior to her body being found, the victim was last seen by a friend getting into a vehicle similar in description to one driven by Defendant. Friends also reported that while the victim did not work as a prostitute, she had on occasion agreed to engage in oral sex with men in return for transportation or a drink if necessary. However, her friends told police she would not have engaged in vaginal intercourse with a stranger.

A sexual assault exam revealed semen in the victim's vagina. There was also an abrasion to her labia majora. The investigation met a dead end until the cold case unit submitted the sexual assault kit to the crime lab for DNA testing. On April 15, 2003, the

profile developed from the sex assault kit examination was entered into CODIS with negative results. It was not until 2016 that Defendant's DNA profile was entered into CODIS as a result of his felony convictions. On December 6, 2016, the Arizona Department of Public Safety notified MCSO of a CODIS match to the Defendant. An additional known DNA sample from the Defendant was required to be submitted for comparison and confirmation. MCSO investigators obtained a known buccal swab of the Defendant that Scottsdale PD had taken in the investigation of an unrelated matter. On January 25, 2018, an Arizona Department of Public Safety report was finalized confirming the CODIS results.

On February 2, 2018, MCSO interviewed the Defendant and his ex-wife, Dawn Scott. During his interview with police, the Defendant denied knowing the victim or having sexual contact with her. His former wife recalls being in the desert that night but did not know why they were out there. She claimed the Defendant is the one who wanted to take her out to the area and they drove around for a long time before he "discovers" the body. She says the Defendant got out of the car but did not walk up to the body. He told her the victim had been shot.

Just recently, MCSO submitted the victim's jeans for DNA testing. On October 7, 2019, the Arizona Department of Public Safety finalized a report in which a sperm fraction from the crotch area of the jeans also matched the DNA profile of the Defendant.

LAW**The Defendant's Due Process Right Have Not Been Violated**

The statute of limitations is the primary guarantee against bringing overly stale criminal charges. See *United States v. Livescu*, 431 U.S. 783, 789 (1997). The Due Process Clause has only a limited role to play in protecting against oppressive delay. *Id.* To establish that pre-indictment delay had denied a Defendant due process, the Defendant must show 1) that the prosecution intentionally delayed proceedings to gain a tactical advantage over or to harass the Defendant; and 2) that the Defendant has actually been prejudiced by the delay. See *State v. Monaco*, 207 P.3d 553 (App. Div. 2, 2004). Investigative delay is fundamentally unlike delay undertaken to gain a tactical advantage over the accused. See *Lovasco*, 431 U.S. at 796.

The Due Process Clause does not permit courts to abort criminal prosecutions simply because they disagree with a prosecutor's judgement as to when to an indictment. See *Lovasco*, 431 U.S. at 790. Prosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt. *Id.*; see also *State v. Lacy*, 187 Ariz. 340, 346, 929 P.2d 1288, 1294 (1996) (citing *Lovasco* indicating that the State has no requirement to file charges immediately upon securing sufficient evidence to prove guilt). "Rather than deviating from elementary standards of "fair play and decency," a prosecutor abides by them if he refuses to seek indictments until he is completely

satisfied that he should prosecute and will be able promptly to establish guilt beyond a reasonable doubt. Penalizing prosecutors who defer action for these reasons would subordinate the goal of “orderly expedition” to that of ‘mere speed,’” See *Smith v. United States*, 360 U.S. 1, 10, 79 S.Ct. 991, 997, 3 L.Ed.2d 1041 (1959). The court in *Lovasco* reasoned that the determination of when the evidence available to the prosecution is sufficient to obtain a conviction is seldom clear-cut, and reasonable persons often will reach conflicting conclusions.

In *State v. Dunlap*, the Court of Appeals of Arizona held that a ten-year delay from dismissal without prejudice of a murder charge until it was refiled did not violate the Due Process Clause of the Fourteenth Amendment. 187 Ariz. 441, 930 P.2d 518 (Ariz. App. 1996).

To make a showing of actual and substantial prejudice, “it is not enough to show the mere passage of time nor to offer some suggestion of speculative harm; rather the defendant must present concrete evidence showing material harm.” *State v. Dunlap*, 187 Ariz. 441, 450, 930 P.2d 518, 527 (App. 1996) quoting *United States v. Angaston*, 974 F.2d 939, 942 (7th Cir. 1992). The *Dunlap* court held that “[t]he length of delay is not determinative of whether there has been a due process violation.” *Id.*; See also *Pharm v. Hatcher*, 984 F.2d 783, 785-86 (7th Cir. 1993) (holding there was no due process violation in thirteen-year delay between crime and trial); *Wilson v. McCaughtry*, 994 F.2d 1228, 1234 (7th Cir.1993) (holding there was no due process violation in

sixteen-year delay between crime and indictment); *Stoner v. Graddick*, 751 F.2d 1535, 1543 (11th Cir.1985) (holding there was no due process violation for nineteen-year delay between crime and filing charges); *Story v. State*, 721 P.2d 1020, 1028-29 (Wyo. 1986) (holding there was no due process violation in charging defendant with crimes committed seventeen years earlier).

In *Dunlap*, the defendant further argued that the memory of witnesses was affected by the lengthy delay before indictment. The court however held that diminished recollection by a witness “does not by itself constitute the type of substantial prejudice warranting a finding of a due process violation.” *Dunlap*, 187 Ariz. at 451, 930 P.2d at 528 (App. 1996) *quoting Broughton*, 156 Ariz. at 398, 752 P.2d at 487 (citations omitted). An argument that the witnesses’ memories will fade is purely speculative and the argument that even if the witnesses’ memories *were* affected, they would prejudice the case is based in conjecture. *Id.* The *Broughton* court made clear that “[c]ourts have consistently [held] that diminished recollection by witnesses does not, by itself, constitute the type of substantial prejudice warranting a finding of a due process violation.” *Broughton*, 156 Ariz. at 398, 752 P.2d at 487; *See also United States v. Otto*, 742 F.2d 104 (3rd Cir.1984); *State v. Varagianis*, 128 N.H. 226, 512 A.2d 1117 (1986); *State v. Littlejohn*, 199 Conn. 631, 508 A.2d 1376 (1986).

Even if the delay was intentional to gain a tactical advantage, the Defendant must prove that she/he suffered actual and substantial prejudice. *See State v. Lemming*, 188

Ariz. 459, 937 P.2d 381 (App. Div. 1 (1997); see also *Lovasco*, 431 U.S. at 789-790 (proof of prejudice is a generally necessary but not sufficient element of a due process claim). To show actual and substantial prejudice, the Defendant's ability to meaningfully defend himself must actually be impaired due to the delay. See *Lemming*, 188 Ariz. At 462 (citation omitted). A Defendant has a heavy burden to prove that pre-indictment delay caused actual prejudice; the proof must be definite and not speculative. See *State v. Broughton*, 752 P.2d 483, 487 (1998).

For a Defendant to show that he suffered "actual and substantial prejudice" from pre-indictment delay, the Defendant must show that his ability to meaningfully defend himself was actually impaired. The Arizona Supreme Court said that the unavailability of a witness, without more, is not enough to establish prejudice.

To establish actual impairment, a Defendant must show that a defense witness became unavailable during the delay, that such witness would have testified on the Defendant's behalf, the substance of the testimony, and that such testimony is not available through substitute sources. *United States v. Bartlett*, 794 F.2d 1285, 1289-1290 (8th Cir. 1986); *United States v. Cederquist*, (641 F.2d 1347, 1351 (9th Cir. 1981), 641 F.2d at 1351 (ability to meaningfully defend not actually impaired because Defendant's briefs reveal that substitutes for lost evidence exist). The detail provided by the Defendant must be sufficient for a court to determine whether the missing witness is material to the defense. *Bartlett*, 794 F.2d at 1290.

CONCLUSION

In this case, the State charged the Defendant as soon as practical once DNA test results were obtained and the case was submitted to the Maricopa County Attorney's Office for charging. There has been no pre-indictment delay after the discovery of evidence confirming the Defendant's guilt. This Motion should be denied.

ALLISTER ADEL
MARICOPA COUNTY ATTORNEY

BY: Vince Imbordino
/s/ Vince Imbordino
Deputy County Attorney

Copy mailed/delivered November __, 2019, to:

The Honorable Chuck Whitehead
Judge of the Superior Court

Thomas R. Garrison & Robert Shipman
222 N Central Ave Ste 8100
Phoenix, AZ 85004-2237
Attorneys for the Defendant

BY: Vince Imbordino
/s/ Vince Imbordino
Deputy County Attorney

Appendix E

Trial court's ruling denying Motion to Dismiss

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2018-106340-001 DT

11/26/2019

HONORABLE ROY C. WHITEHEAD

CLERK OF THE COURT
S. Yoder
Deputy

STATE OF ARIZONA

VINCE IMBORDINO

v.

DONALD LEE SCOTT (001)

THOMAS R GARRISON JR.
ROBERT S SHIPMAN

MINUTE ENTRY

The Court has reviewed and considered Defendant Donald Scott's Motion to Dismiss for Pre-Indictment Delay (filed on November 13, 2019) and the State's Response.

IT IS ORDERED denying the Motion to Dismiss.

Appendix F

Excerpts of Peggy Levee's testimony

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,
Plaintiff,

vs.

DONALD LEE SCOTT,
Defendant.

1 CA-CR 21-0024

CR 2018-106340-001

Phoenix, Arizona
November 17, 2020

BEFORE: The Honorable SUZANNE E. COHEN, Judge

REPORTER'S TRANSCRIPT OF PROCEEDINGS

(Jury Trial)

Prepared for Appeal

Reported by: Mr. Scott M. Coniam, RDR, CRR
Certified Court Reporter #50269

Pages 2 through 74 omitted

1 you go through it. Fair?

2 MR. SHIPMAN: Yes, Your Honor.

3 THE COURT: Okay. Ready.

4 (The jury entered the courtroom.)

5 THE COURT: Thank you, folks. Please be
6 seated.

7 Back on the record, CR 2018-106340.

8 Counsel is present. Defendant is present.
9 Jury is present.

10 Good afternoon, ladies and gentlemen. I
11 hope you all had a lovely four-day weekend. And we
12 apologize and we thank you for your willingness to work
13 with us today and come at 1:30 as opposed to this morning.
14 I promise you we were in here working. We were working.
15 They didn't get a four-day weekend but you did.

16 All right. Mr. Imbordino.

17 MR. IMBORDINO: Thank you.

18 We call Peggy Levee, please.

19 Ms. Levee, if you could come up here.

20 You're going to need to stand -- if you could stand right
21 here and that young lady is going to swear you in.

22

23 PEGGY LEEVE,

24 called as a witness herein, having been first duly sworn,
25 was examined and testified as follows:

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MR. IMBORDINO: Ms. Levee, right around this way.

THE COURT: Ma'am, that bar is your microphone. If you can try and get as close to that as possible, please. Thank you.

And if you need any water, please let me know.

THE WITNESS: Thank you.

DIRECT EXAMINATION

BY MR. IMBORDINO:

Q. Okay. Ms. Levee, there are jurors -- I think I've told you this already -- jurors sitting over here to your left, there are also some jurors sitting in the very back on the left-hand side of the courtroom as you look back there, so as you are speaking, you need to really be careful and speak into that microphone so everybody can hear you, okay?

A. Okay.

Q. Can you tell these folks your name, please.

A. Peggy Levee.

Q. How do you spell your last name?

A. L-E-V-E-E.

Q. All right. I think -- and I apologize. I think

1 during the trial I may have said "Levy" but it's Levee is
2 the way it's pronounced; correct?

3 A. (No oral response.)

4 Q. Is that "yes"?

5 A. Yes.

6 Q. Okay. You need to -- have you testified before?

7 A. No.

8 Q. All right. So one of the things that happens
9 occasionally is that if a question brings about a "yes" or
10 "no" answer, a witness may nod their head as opposed to
11 uttering the words "yes" or "no" and this young man needs
12 to know what word it is you are using as opposed to a nod
13 of your head. So if you can remember to say "yes" or "no"
14 as opposed to just a shake of your head, okay?

15 A. Uh-huh. Yes.

16 Q. Is that "yes"?

17 A. Yes.

18 Q. All right. Now, what is your relationship to
19 Anne Levee?

20 A. I'm her older sister.

21 Q. And just so everyone knows, am I correct that at
22 least on some occasions you have been watching this trial
23 from a distance away?

24 A. Yes.

25 Q. On a computer?

1 A. Yes.

2 Q. Do you live in Arizona?

3 A. I live in New Jersey.

4 Q. I want to ask you -- there's a couple of
5 photographs that are in evidence that I want to put on the
6 screen for you. First is Exhibit 31. Give it a minute
7 to -- can you see that photograph?

8 A. Yes.

9 Q. Who is that, please?

10 A. That's my sister, Anne.

11 Q. And for the -- again, for the purposes of the
12 record, I have referred to her as Anne. How did -- by
13 what name did you call her?

14 A. Anne.

15 Q. Exhibit 33. Who is the adult person in that
16 photograph?

17 A. That's my sister, Anne.

18 Q. Now, can you give us an estimate of when this
19 particular photograph would have been taken?

20 A. That was about the last time we saw her alive,
21 Thanksgiving.

22 Q. All right. I'm going to get to that in just a
23 moment.

24 Let's -- in fact, let's get to it right now.

25 As you're aware -- I think as you're aware --

1 there's evidence in this case that her body was found on
2 or about the 10th of December 1988.

3 When was the last time you had seen her alive?

4 A. It was at that Thanksgiving.

5 Q. Thanksgiving of 1988?

6 A. Yes.

7 Q. And where did that take place?

8 A. That was at a -- it was an upstate resort,
9 mountain house in Upstate New York that we got together
10 for Thanksgiving that year.

11 Q. All right. How much time did you spend with her
12 on that occasion?

13 A. Well, we were there for a couple of days, so that
14 was pretty much about it.

15 Q. Okay. Did you interact with her during those two
16 days?

17 A. Yeah. We all interacted, yes.

18 Q. Did you talk to her?

19 A. Yes.

20 Q. I'm not asking you what was said, but in your
21 interaction with her over those two days, did she appear
22 any different to you than she had on other occasions when
23 you had been together?

24 A. No.

25 Q. Other than maybe older than the last time?

1 A. Yeah.

2 Q. Are you able to tell us approximately how long
3 she had been living in Arizona before her death?

4 A. For at least six years.

5 Q. All right. Had you visited her in Arizona at
6 some point during those years?

7 A. I did come out, yes. Once.

8 Q. Was that -- where was she living then?

9 A. Scottsdale.

10 Q. Excuse me.

11 Did you grow up with her?

12 A. Yes.

13 Q. Now, we've had some testimony that at least
14 recently she had begun staying in the same apartment with
15 a Mr. McKenna. Do you know who that is?

16 A. Will, my stepbrother.

17 Q. And you called him Will?

18 A. Will.

19 Q. All right. So Mr. McKenna was your stepbrother;
20 correct?

21 A. Yes.

22 Q. Would that have made him Anne's stepbrother?

23 A. Yes.

24 Q. I want to ask you some questions about how that
25 came to be, how he came to be your stepbrother.

1 Now, your father and Anne's father are the --
2 were they the same person? Her father is -- was your
3 father?

4 A. Yes.

5 Q. Is he still alive?

6 A. No.

7 Q. At some -- is your mother still alive?

8 A. No.

9 Q. When did she die --

10 A. 1970 --

11 Q. -- approximately?

12 A. I would say around 1980.

13 Q. All right. So after your mother died, did your
14 father remarry?

15 A. Yes, he did.

16 Q. Who did he marry? Who was his second wife?

17 A. Barbara McKenna, Will's mother.

18 Q. All right. So am I correct, then, that your dad
19 after -- some time after your mother died, wound up
20 marrying Mr. McKenna's mother?

21 A. Yes.

22 Q. Making Will your stepbrother?

23 A. Yes.

24 Q. Can you describe for us the nature of your
25 relationship with your sister? In other words, I guess

1 someone might ask were you close?

2 A. We were somewhat close. I was five years older
3 than Anne and, you know, when she was about -- I had moved
4 out of the house around 21, when I was 21, so when she
5 got -- was in her teens, I didn't spend as much time with
6 her, you know, because I had moved out.

7 Q. So if you were five years older and you moved out
8 when you were about 21, would she have been approximately
9 16 when you moved out of the house?

10 A. Yes.

11 Q. Prior to that, did the two of you live
12 together --

13 A. Yes.

14 Q. -- in the residence?

15 A. Yes, we did.

16 Q. How many other sisters do you have?

17 A. Two other sisters.

18 Q. What were their names or are their names?

19 A. Alice is the oldest and then Mary.

20 Q. Is -- now, Will's mother, her name was Barbara?

21 A. Yes.

22 Q. Was Will her only child?

23 A. No. Will has three sisters, Laura, Margaret, and
24 Christine.

25 Q. How did you -- do you have a recollection of

1 how -- first of all, in 1988, where were you living?

2 A. I was living in Manhattan.

3 Q. How did you find out that Anne had been killed?

4 A. My father called me.

5 Q. And after that phone call, did you come to
6 Arizona?

7 A. No. My sister, Mary, and my father came out
8 here.

9 Q. All right. What can you tell us about your
10 sister, for example, from your -- the time you spent with
11 her, your experience with her?

12 A. About Anne?

13 Q. Did she keep herself clean?

14 A. She was -- yes. Yes.

15 Q. Did she take baths or showers, for example?

16 A. Showers.

17 Q. Was her hygiene important to her?

18 A. Yes.

19 Q. What about her clothing, the things that she
20 wore?

21 A. She had more of an androgynous style and she
22 liked -- she just had a certain style about her, you know.

23 Q. Was the way that she looked important to her?

24 A. Yes.

25 Q. Did she keep herself clean?

1 A. Yes.

2 Q. Did she keep her clothes clean?

3 A. Yes.

4 Q. We've had some testimony that -- well, again --
5 and you've been watching the trial; correct?

6 A. Yes.

7 Q. So did you hear the testimony that -- from a
8 witness that that witness's memory was that your sister,
9 Anne, was a frequent customer at a lesbian bar where she
10 managed?

11 A. Yes.

12 Q. The witness managed.

13 Did you hear that testimony?

14 A. Yes, I did.

15 Q. Did it surprise you?

16 A. No.

17 Q. Why?

18 A. Because she was openly gay.

19 MR. IMBORDINO: May I have just a moment,
20 Your Honor?

21 THE COURT: Yes.

22 BY MR. IMBORDINO:

23 Q. Let's talk -- let me ask you about -- what kinds
24 of things, for example, did she like to do?

25 A. She liked animals. She liked working out. She

1 even -- she went to school for a while to become an auto
2 mechanic.

3 Q. Okay. You know, are you familiar with -- aside
4 from that -- over the years what -- maybe what different
5 kinds of jobs that she had?

6 A. The -- working as an auto mechanic. She had
7 those kind of -- you know, she worked that because she did
8 some training at UTI.

9 Q. All right. Did she have -- and in terms of
10 hobbies, would that include the -- like, her interest in
11 animals?

12 And are you talking about wild animals, pets?

13 A. Pets, you know.

14 Q. When you visited her in Scottsdale, how long were
15 you here?

16 A. Just for a few days.

17 Q. What kinds of things did you do?

18 A. Going out to dinner. Shopping. Just things like
19 that.

20 Q. Other than this case, had you ever heard the name
21 Donald Scott?

22 A. No.

23 Q. Had you ever seen Donald Scott?

24 A. No.

25 MR. IMBORDINO: That's all the questions I

1 have, Judge.

2 THE COURT: All right. Cross?

3

4 CROSS-EXAMINATION

5 BY MR. SHIPMAN:

6 Q. Good afternoon. I want to follow-up a little bit
7 on the timeline.

8 I know on direct examination you mentioned that
9 Anne had been living in Arizona for six years?

10 A. Yes.

11 Q. Do you know what year -- it would have been about
12 1982, then, that she moved to Arizona?

13 A. Yes.

14 Q. And I believe I recall you said you were 25 at
15 the time, is that -- or was she 25? You gave an age
16 range. You said there was a gap of five years?

17 A. Yes.

18 Q. How old was she at the time, do you recall?

19 A. How old was she? Let's see.

20 In '80, she would have been about 20. She would
21 have been about 21.

22 Q. About 21 at the time.

23 And you mentioned while she lived here for six
24 years that you visited her once when she was living in
25 Scottsdale; correct?

1 A. Yes.

2 Q. Do you remember approximately what year that was?

3 A. That was when she first moved out here, so that
4 would have been around -- right around '80, I guess,
5 around '82.

6 Q. '82 or '83, would that --

7 A. Yeah.

8 No, she was already in -- she was already in
9 Phoenix by '83.

10 Q. So it would have been '82?

11 A. Yeah.

12 Q. And then you mentioned you visited her once and
13 then you mentioned the last time you saw her was that 1988
14 Thanksgiving trip she took to New York; correct?

15 A. Yes.

16 Q. Do you recall how many other times she visited
17 New York during that six-year period when she was in
18 Arizona?

19 A. She didn't come out -- she didn't come back out.
20 My father -- my father and other family members would come
21 out to visit her here.

22 Q. Okay. Sounds like it was more common for family
23 to come visit her --

24 A. Yes.

25 Q. -- than for her to go visit family back in

1 New York?

2 A. Yes.

3 Q. You heard testimony -- or the question and
4 testimony about Anne being at the Incognito Bar. You
5 recall that; correct?

6 A. I'm sorry? Excuse me?

7 Q. You heard the prior testimony about Anne being at
8 the Incognito Bar, that testimony from Stephanie Hrkman?

9 A. I thought the bar was Ain't Nobody's Bizness.

10 Q. Sorry. Ain't Nobody's Bizness.

11 A. Uh-huh. Yes.

12 Q. You mentioned you weren't surprised to hear that
13 she was at that bar?

14 A. No.

15 Q. Were you surprised at all to hear that she was
16 there with a male?

17 A. Yes.

18 Q. Yes.

19 But you did hear that testimony that Stephanie
20 Hrkman had mentioned she recalled seeing Anne there with a
21 male?

22 A. Yes.

23 Q. Did she ever mention anything to you or were you
24 ever aware of her going to a bar called The Brass Rail?

25 A. No.

1 Q. Just one more question. You know, there was some
2 prior testimony about Anne and Will McKenna. Do you know
3 how they first met?

4 A. They were in their teens. Yeah, they were in
5 their teens. There was some kind of -- I don't remember
6 exactly. Something -- I'm not sure how they first -- but
7 they were -- became very, very close friends, like best
8 friends.

9 Q. I heard you mention teens.

10 A. Yeah. They were teenagers, yeah.

11 Q. Was that back in New York or was that --

12 A. That was in Connecticut.

13 Q. In Connecticut?

14 A. Connecticut, yes.

15 Q. So they knew each other before they both were in
16 Arizona?

17 A. Yes.

18 Q. Okay. One follow-up question on that. It does
19 appear, then, that they met before the parents got
20 married; correct?

21 A. That's how my parents --

22 Q. Through them?

23 A. Through them, yes.

24 MR. SHIPMAN: Defense has no further
25 questions, Your Honor.

1 THE COURT: Redirect?

2 Thank you, Mr. Shipman.

3
4 REDIRECT EXAMINATION

5 BY MR. IMBORDINO:

6 Q. Ma'am, you told counsel a moment ago that you
7 recall hearing testimony that Ms. Hrkman recalled seeing
8 your sister -- I don't remember exact words but if I'm
9 wrong, I apologize -- having a drink together, correct, on
10 a particular day; right?

11 A. Yes.

12 Q. Would you agree with me that that's the only
13 thing that she said? She didn't know anything about the
14 nature of the relationship?

15 A. Right. Correct.

16 Q. When counsel asked you were you surprised that
17 she was seen with a man, why did that surprise you?

18 A. I mean, it's a surprise that a man would be in a
19 bar like that and -- you know.

20 Q. You weren't saying you were surprised that she
21 might be seen with a man somewhere?

22 A. Not surprised that she would be seen with a man
23 but -- I mean, she was -- she was a lot of fun. She was a
24 great -- she was an incredible person. I mean, she was
25 the funniest person you're ever going to meet. The

1 funniest. And I could see why, you know, people would
2 gravitate towards her, you know. So I wouldn't --
3 wouldn't be surprised that people would -- you know,
4 anyone would want to hang out with her so --

5 Q. But as you said earlier, she was openly gay?

6 A. Yes.

7 MR. IMBORDINO: That's all I have.

8 THE COURT: All right. Any questions for
9 this witness from the jury?

10 Counsel.

11 (The following took place on the record at
12 the bench between court and counsel out of the hearing of
13 the jury.)

14 THE COURT: Okay. Let's take this in parts.

15 25, first question: Do you recall her
16 reason for moving to Arizona?

17 Any objection to that one?

18 MR. IMBORDINO: Not from the state.

19 MR. SHIPMAN: No, Your Honor.

20 THE COURT: All right. The other two are
21 very similar but any objection to either of those?

22 MR. IMBORDINO: No.

23 MR. SHIPMAN: No, Your Honor.

24 THE COURT: Okay.

25 (Bench conference ended.)

1 THE COURT: Ma'am, do you recall Anne's
2 reason for moving to Arizona?

3 THE WITNESS: I believe she moved out here
4 because she met a woman and that's how she wound up coming
5 out.

6 THE COURT: All right. Do you know if Anne
7 ever had relationships with men?

8 THE WITNESS: Not that -- no, she never had
9 any that -- no.

10 THE COURT: Did Anne also -- and the next
11 question: Did Anne also date men while living here in
12 Arizona?

13 THE WITNESS: No.

14 THE COURT: Did those questions lead to any
15 follow-up from the state?

16 MR. IMBORDINO: No.

17 THE COURT: Any follow-up from defense?

18 MR. SHIPMAN: One moment, Your Honor.

19 Yes, Your Honor.

20

21 FURTHER EXAMINATION

22 BY MR. SHIPMAN:

23 Q. So the six-year period that Anne was living in
24 Arizona, how often did you talk to her on the phone?

25 A. Sporadically.

1 Q. So you talked to her sporadically on the phone
2 and you saw her in person twice during that period;
3 correct?

4 A. Yes.

5 Q. So that's what you are basing your knowledge on
6 that she had no relationships with men at all?

7 A. Well, from general family knowledge, she had
8 girlfriends.

9 Q. But for that six-year period, you had contact
10 with her twice and sporadically on the phone, did you know
11 what she was doing on a daily basis?

12 A. She had a lot of friends. She was working. She
13 was going to a school at UTI.

14 MR. SHIPMAN: No further questions from
15 defense, Your Honor.

16 THE COURT: All right. May this witness be
17 excused?

18 MR. SHIPMAN: Yes, from defense, Your Honor.

19 MR. IMBORDINO: I don't get a follow-up?

20 THE COURT: Sorry. I'm looking right at you
21 and it just went over my head, Mr. Imbordino. Yes, you
22 get a follow-up.

23

24 FURTHER EXAMINATION

25 BY MR. IMBORDINO:

1 Q. In the phone conversations that you had with her
2 over those years, in the times that you were with her
3 together, did you -- had her sexual preference changed?

4 A. No.

5 MR. IMBORDINO: That's all I have.

6 THE COURT: All right. Now -- sorry -- may
7 this witness be excused?

8 MR. IMBORDINO: Yes, Your Honor.

9 THE COURT: All right. Thank you, ma'am.
10 And feel free to stay in the court.

11 Any other witnesses from the state?

12 MR. IMBORDINO: No, Your Honor.

13 And subject to making sure that the exhibits
14 that both parties want to be in evidence, the state rests.

15 THE COURT: Okay.

16 Defense, any witnesses?

17 MR. GARRISON: Yes. Did you want to do
18 Dr. Spence now? We're ready.

19 THE COURT: I'm sorry. Why don't you
20 approach because my allergies are affecting my hearing
21 today.

22 (The following took place on the record at
23 the bench between court and counsel out of the hearing of
24 the jury.)

25 MR. GARRISON: I'm sorry, Judge. First of

Pages 95 through 199 omitted

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I, SCOTT M. CONIAM, a Certified Court Reporter, Certificate No. 50269, do hereby certify that the foregoing pages constitute a true and correct transcript of my stenographic notes taken at said time and place, all done to the best of my skill and ability.

I FURTHER CERTIFY that I am in no way related to any of the parties hereto, nor am I in any way interested in the outcome hereof.

DATED at Phoenix, Arizona, on February 27, 2021.

/s/ Scott M Coniam

SCOTT M. CONIAM, RDR, CRR
Certified Court Reporter
Certificate No. 50269

Appendix G

Excerpts of Dianna Price's statement

MARICOPA COUNTY SHERIFF'S OFFICE

Supplemental Report

Occurrence Date: December 10, 1988

DR#: 88-26192

Occurrence Location: 1.9 mi E/99th Avenue S/O Carefree Highway

Occurrence Type: Homicide

Victim: LEVEE, ANNE

INFORMATION:

Interview Transcript of DIANNA PRICE

INVESTIGATIVE LEAD:

PRICE (SALEM), DIANNA GAYE

White female, 4'9", 100 lbs, Brown/Brown

DOB: 11-5-53, [REDACTED]

1631 East Harvard #1

Phoenix, Arizona

No phone

EMPLOYER:

Brookshire's Restaurant

1602 East McDowell Road

Phoenix, Arizona

254-2577

DATE/TIME:

December 12, 1988 (Monday)

2020 Hours (8:20 p.m.)

LOCATION:

Maricopa County Sheriff's Office

102 West Madison

Phoenix, Arizona

DETECTIVE:

P. J. RILEY #679

R. AYALA #231

Investigator: P. J. RILEY #679

Reviewer: Captain MOORE

Typed By: A 1873

Date/Time: 5-9-89 Tue 14:50:56

Pages 10 through 24 omitted

MARICOPA COUNTY SHERIFF'S OFFICE

Supplemental Report

Occurrence Date: December 10, 1988

DR#: 88-26192

Occurrence Location: 1.9 mi E/99th Avenue S/O Carefree Highway

Occurrence Type: Homicide

Victim: LEVEE, ANNE

DIANNA: Oh shit, I knew something had happened. I just knew something had happened, she was supposed to be at the house today.

RILEY: What was she, what was she supposed to be at the house today for?

DIANNA: Just, just were still very close friends (crying), close friends.

RILEY: Just, just take a minute to go ahead and just think a minute, take a few deep breaths. I know its upsetting.

DIANNA: Somebody killed her? (sobbing) She was such a good girl, I mean she was crazy, her brother did it. Her brother had to have done it. When I saw her Saturday, she had big gouges in her arms from him hitting her and beating her. And they've been doing a lot of speed, I know he did it. I know he did it.

RILEY: The, what Saturday, what gouges are you talking about, which arm...

DIANNA: Big scratches in this arm over here. (pointing to her right arm)

RILEY: Right arm?

DIANNA: I believe so.

RILEY: What did she tell you about that?

DIANNA: That her and her brother, she's an alcoholic. And her, she said that her and her brother had been doing alot of speed and this was after a comde down. Oh, God...You know how people get real violent sometimes?

RILEY: Uh huh. Did she say that her brother did that?

DIANNA: Uh hm. Oh I've seen them come to blows lots of times. There's no

Investigator: P. J. RILEY #679

Reviewer: Captain MOORE

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MARICOPA COUNTY SHERIFF'S OFFICE

Supplemental Report

Occurrence Date: December 10, 1988

DR#: 88-26192

Occurrence Location: 1.9 mi E/99th Avenue S/O Carefree Highway

Occurrence Type: Homicide

Victim: LEVEE, ANNE

doubt in my mind that he did this.

RILEY: Okay. Saturday

DIANNA: (crying) have her folks been (Unintel)

RILEY: Yes, they've been, we've talked to them. On Saturday, DIANNA, you said it was around noon that uh,

DIANNA: It was before noon.

RILEY: Before noon?

DIANNA: Uh hm.

RILEY: What kind of mood was she in?

DIANNA: Very good. Very happy, very joking. She's always, unless she's real drunk. She's always real uh, (crying)

RILEY: Did she seem like she had anything to drink that day?

DIANNA: No. No.

RILEY: Did she seem like she had anything to drink?

DIANNA: Um she, well, she wakes up in the morning and has and drinks, so...I I don't, you know she didn't, she's one of those people that doesn't act drunk when she's drunk, but she she can't crawl out of bed without a drink.

RILEY: And as far as you know, the apartment that they moved into is around 27th Avenue and Thomas?

DIANNA: And Thomas.

RILEY: Okay, do you know which side of 27th Avenue that is, or?

Investigator: P. J. RILEY #679

Reviewer: Captain MOORE

Typed By: A 1873

Date/Time: 5-9-89 Tue 14:50:56

Pages 27 through 63 omitted

MARICOPA COUNTY SHERIFF'S OFFICE

Supplemental Report

Occurrence Date: December 10, 1988

DR#: 88-26192

Occurrence Location: 1.9 mi E/99th Avenue S/O Carefree Highway

Occurrence Type: Homicide

Victim: LEVEE, ANNE

AYALA: About what time?

DIANNA: Um, I think it was about 10 or 10:15, somewhere around there. I know that she was picked up by a man and given ten dollars to perform sex acts.

AYALA: What is that?

DIANNA: She gave him some head.

AYALA: Some what?

SIWECK: Well, you can talk.

AYALA: Yeah, you can talk.

DIANNA: Oh, okay. Well, yeah she gave him some head, so, for \$10 and we laughed because I said, "Oh, you're such a cheap whore, you know, one of these days, you're gonna get killed", and she just laughed, said I don't, all I know is that it was an older man.

SIWECK: Is that a normal thing for her to do?

DIANNA: I've known of doing it two times, but she never did it while she was with me, you know, right, right after we split up, um, she wasn't working, I was, and I know that she had some, did the same thing for some black man on Van Buren for a pair of tennis shoes.

SIWECK: The same sex act?

DIANNA: Um, I really don't know the details, but I think.

SIWECK: She never told you what she did with the black guy?

DIANNA: All I know is that for whatever, that she did she got a new pair of

Investigator: P. J. RILEY #679

Reviewer: Captain MOORE

Typed By: A 1873

Date/Time: 5-9-89 Tue 14:50:56

MARICOPA COUNTY SHERIFF'S OFFICE

Supplemental Report

Occurrence Date: December 10, 1988

DR#: 88-26192

Occurrence Location: 1.9 mi E/99th Avenue S/O Carefree Highway

Occurrence Type: Homicide

Victim: LEVEE, ANNE

uh, high-tops and she, you know, she laughed about, you know, how that most women get a hundred bucks, but she had asked for a pair of high-tops.

RILEY: How long ago was this?

DIANNA: When we broke up, we broke up in, end of October.

RILEY: End of October?

DIANNA: Around my birthday, my birthday is the 5th of November. And I moved back in with SMOKEY on the, on the 4th.

RILEY: On the 4th of November?

DIANNA: Uh hm. And in between time I stayed with my mom maybe like 3 or 4 days.

RILEY: So this sex act with the black guy would have been just prior to that.

DIANNA: Yeah, right after we had broken up, but we, see, we've stayed very close friends. I mean there was no, well there was a little, couple bitter arguments, but um...

SIWECK: When you say "broke up", I'm having a hard time understanding exactly what you mean. Are you talking about, you lived together for 8 months?

DIANNA: Uh hm.

SIWECK: Okay. And let's be frank, what kind of, what was your relationship that 8 months.

Investigator: P. J. RILEY #679

Reviewer: Captain MOORE

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Pages 27 through 63 omitted

MARICOPA COUNTY SHERIFF'S OFFICE

Supplemental Report

Occurrence Date: December 10, 1988

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Occurrence Type: Homicide

Victim: LEVEE, ANNE

is the maroon cut off sleeves and black and white checkered...

AYALA: Okay, now, I'm talking about Thursday.

DIANNA: Uh, Thursday was uh, maroon sweater, pullover sweater, and I believe the blue tank top. But I'm not, I can't say for sure. And uh, that the same pair of pants, I believe on Saturday that she had on Thursday.

AYALA: She was wearing the same pair of pants, she's hygiene conscious.

DIANNA: Yeah, well, she doesn't have alot of clothes so she washes 'em, you know, like she'll wash everything she has and I you know, and still wear 'em, but like when, she, we used to have an ongoing argument because I had, when we moved, I had boxes and boxes and boxes of things and she had a backpack, and that was it.

AYALA: Okay so Thursday's a blue tank top,

DIANNA: Uh hm.

AYALA: Maroon pullover sweater

DIANNA: Maroon pullover sweater.

AYALA: And the same baggy, faded

DIANNA: Uh hm.

AYALA: Gray, green, pants.

DIANNA: Yeah, I think. And the, and the gray jacket.

AYALA: Gray jacket?

DIANNA: Uh hm.

Investigator: P. J. RILEY #679

Reviewer: Captain MOORE

Typed By: A 1873

Date/Time: 5-9-89 Tue 14:50:56

Appendix H

Excerpts of prosecutor's closing argument

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,
Plaintiff,

vs.

DONALD LEE SCOTT,
Defendant.

1 CA-CR 21-0024

CR 2018-106340-001

Phoenix, Arizona
November 19, 2020

BEFORE: The Honorable SUZANNE E. COHEN, Judge

REPORTER'S TRANSCRIPT OF PROCEEDINGS

(Jury Trial)

Prepared for Appeal

Reported by: Mr. Scott M. Coniam, RDR, CRR
Certified Court Reporter #50269

Pages 2 through 64 omitted

1 that information in your jury instructions what that
2 means.

3 Kidnapping that you see in TV and movies is
4 getting zip tied and thrown in the back of the car and
5 taken in the desert and shot and killed, let's say. Sure,
6 that's kidnapping. But it doesn't have to look like that.
7 Kidnapping is restraining someone's movement. It can
8 happen in just mere moments. Or it could happen for five
9 days of course.

10 So what evidence is there that she was
11 kidnapped? And kidnapping is with the intent to inflict
12 death, physical injury, or a sexual offense on Anne. So
13 did the defendant, based on this case, based on the
14 evidence, restrain her movement with the intent to either
15 kill her, injure her, or sexually assault her?

16 The evidence we have is, again, she was half
17 a mile into the desert. She was 30 miles from where we
18 know she lived and where we know she frequented, which is
19 the Ain't Nobody's Bizness Bar. She was not dressed for
20 the desert. This is December. It is freezing in the
21 desert in December in the Valley. She's wearing a tank
22 top. She has injury consistent with a struggle. There's
23 injury to her knee. There are cuts on her arm. We know
24 from the evidence that those could not have happened after
25 she died. Your blood has to be pumping. Your heart has

1 to be working.

2 Kidnapping. What other evidence is there
3 that she was being restrained, that her movement was
4 restricted? The angle of the gunshot. If someone is free
5 to leave, free to move, free to do whatever they want,
6 someone going like this? Is someone free to leave, free
7 to move, free to do whatever they want shot like this?

8 Is someone free to leave, free to move, free
9 to do whatever they want shot in the back of the head and
10 killed?

11 We know kidnapping happened. We know his
12 intent was to kill her because he did. We know his intent
13 was to sexually assault her because he did.

14 So, again, we were just talking about
15 kidnapping. Now, we're going to talk about sexual
16 assault. What is the evidence that he either attempted to
17 or committed sexual assault? Sexual assault requires that
18 the defendant intentionally or knowingly engaged in sexual
19 intercourse. The defense is not even disputing that that
20 happened. That is not a fact that we're disagreeing on.

21 That it was engaged in without the consent
22 of the victim and that he knew it was without his consent.

23 So let's talk about the evidence. How do we
24 know that she was sexually assaulted? Number one, she's
25 got an injury on her genitalia.

Pages 67 through 69 omitted

1 very much. You heard from Dr. Fischione that there was a
2 slightest, slightest bit of decomposition, ears, lips,
3 skin slip. But that's it. And the reason that was able
4 to happen is because she was killed in the desert in
5 December and elements preserved her body. It is,
6 therefore, not a shock to learn that those same things
7 preserved the semen and sperm in her body and on her
8 jeans.

9 We know from the evidence that Anne kept
10 clean. That she cared about her appearance, her hygiene.
11 Those things play into whether or not she would be wearing
12 jeans with sperm on them intentionally. Whether she would
13 have just disregarded that part of her appearance and put
14 on dirty clothes. We know from the evidence that's not
15 who she was.

16 Ladies and gentlemen, defense has said
17 throughout this trial 30 hours, 35 hours, 35 hours,
18 32 hours, 30 hours. That's not the time frame that
19 matters.

20 You heard from Mr. Milne today the time
21 frame that matters is the time from deposit of the foreign
22 DNA -- by foreign I mean someone else's DNA on me, someone
23 else's DNA on Anne -- from time of deposit to the time of
24 preservation of the sample. That wasn't 35 hours, ladies
25 and gentlemen. It wasn't. It would have been if Anne was

Pages 71 through 77 omitted

1 You disregard them completely if you find
2 that the defendant committed felony murder or premeditated
3 murder. You get to them only if you find him not guilty
4 of both of those things which are first degree murder.

5 The State submits to you that we have proven
6 to you that the defendant committed first degree murder,
7 so you don't have to do anything with either of them.

8 I want to make sure I touch on Anne Levee as
9 a human. She loved clothes. She was funny. Charismatic.
10 She liked to frequent Ain't Nobody's Bizness. She was an
11 open lesbian with her family. She did not make it to her
12 30th birthday. She didn't get to be 30. Why? Because
13 the defendant, Donald Scott, on December 10th, 1988,
14 killed her. He raped her. And then he killed her and
15 then he left her in the desert in the middle of nowhere so
16 that she would die there alone, taking with her any
17 evidence that the defendant did this. Because remember in
18 1988, this man would have had no reason to believe that
19 the semen he left behind would be step one in holding him
20 responsible for what happened. Unfortunately for the
21 defendant technology improved. The police did not let
22 this case die with Anne Levee and here we are.

23 Ladies and gentlemen, we ask you find the
24 defendant guilty of first degree murder because that is
25 what the evidence shows and because that is what justice

Pages 79 through 136 omitted

1 rid of it. If Ms. Levee's panties are in the car or
2 vehicle, he had time to get rid of that before he picks up
3 his wife and brings her back out there.

4 So I'm not asking you to suppose those
5 things, to assume they happened. But when counsel says
6 there's circumstantial evidence, all I'm saying is there's
7 time for him to have done things not only to help
8 establish an alibi but to get rid of physical evidence.
9 He just didn't get rid of the semen.

10 It really isn't that complicated. The
11 tails -- the presence of tails tells you that when this
12 sample was collected, a period of time -- a long enough
13 period of time had not passed for them to degrade to where
14 you would not find them. It doesn't -- the experts agree.
15 I mean, I'm not a forensic scientist -- that there is a
16 time range.

17 But that's not the only evidence that there
18 is. If you want to believe that a young woman who was
19 cognizant of her hygiene, who took showers, if I remember
20 what Peggy said, who cared about her clothing, who cared
21 about the way she looked, that she's going to walk around,
22 ladies and gentlemen, for a couple of days with the
23 defendant's semen inside her vagina having drained onto
24 her jeans, I can't stop you from thinking that. I mean,
25 nothing that I -- if you believe that that's possible, I

1 suspect there's nothing that I can say to you to convince
2 you otherwise.

3 What I'm saying to you is it isn't
4 reasonable from what you know about Anne. I know it isn't
5 a lot. But it is not reasonable to conclude that.

6 So let's think about what we have then. I'm
7 trying to summarize here and finish up for those of you
8 that are getting tired of my voice.

9 We have a cold desert night. We don't know
10 the exact time the defendant took Ms. Levee out there but
11 Ms. Levee, an openly gay woman, who hung out 30 miles away
12 with no warm clothing on winds up in the middle of the
13 desert with his semen in her. Injuries consistent with
14 being assaulted, sexually assaulted.

15 Now, Mr. Garrison wants you to discount this
16 abrasion to her labia but remember Dr. Fischione said we
17 don't always find physical evidence of a sexual assault
18 like this and the medical examiner who documented it and
19 made sure a picture was taken of it, it was important
20 enough to document. So surely it means something. I hope
21 it means something to you.

22 Why else would -- why else, based on the
23 evidence, would Anne Levee have been shot three times in
24 the desert with the defendant's semen in her? What's the
25 possible motive for that? It wasn't robbery. We have her

Pages 139 through 146 omitted

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I, SCOTT M. CONIAM, a Certified Court Reporter, Certificate No. 50269, do hereby certify that the foregoing pages constitute a true and correct transcript of my stenographic notes taken at said time and place, all done to the best of my skill and ability.

I FURTHER CERTIFY that I am in no way related to any of the parties hereto, nor am I in any way interested in the outcome hereof.

DATED at Phoenix, Arizona, on February 27, 2021.

/s/ Scott M Coniam

SCOTT M. CONIAM, RDR, CRR
Certified Court Reporter
Certificate No. 50269

Appendix I

Verdict

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CLERK OF THE SUPERIOR COURT

FILED

11-20-2020 1:36pm
Q. Moore, Deputy

THE STATE OF ARIZONA,

CR 2018-106340 001

Plaintiff,

vs.

VERDICT

DONALD LEE SCOTT,

Count 1: First Degree Murder

Defendant.

We, the Jury, duly empanelled and sworn in the above-entitled action, upon our oaths, unanimously do find the Defendant as to Count 1, First Degree Murder, as follows (check only one):

☐ Not Guilty☒ Guilty

If your verdict is guilty of First Degree Murder, indicate the number of jurors finding each type of First Degree Murder:

2 Number of jurors finding only Premeditated Murder1 Number of jurors finding only Felony Murder9 Number of jurors finding both Premeditated Murder and Felony Murder

If you find the Defendant guilty of First Degree Murder, **do not** complete the remainder of this verdict form, except for the foreperson's signature block.

Second Degree Murder is only a lesser included offense of First Degree Premeditated Murder. There is no lesser-included offense of the crime of First Degree Felony Murder.

We, the Jury, duly empanelled and sworn in the above-entitled action, upon our oaths, do find the Defendant on the lesser-included offense of Second Degree Murder, as follows (check only one):

_____ Not Guilty

_____ Guilty

If you find the Defendant guilty of Second Degree Murder, **do not** complete the remainder of this verdict form, except for the foreperson's signature block.

We, the Jury, duly empanelled and sworn in the above-entitled action, upon our oaths, do find the Defendant on the lesser-included offense of Manslaughter, as follows (check only one):

_____ Not Guilty

_____ Guilty

Foreperson:

Lori Schroeder
(Signature)

Lori Schroeder
(Printed Name)

Juror Number 3