Patti Wortman, Chief Deputy
Bryan B. Chambers, Chief Deputy/Civil Division
Jeff Dalton, Child Support Division

Ramai Alvarez
Carolyn Borcherding
Pascal Brown
Joshua Clark
Lacy Cooper
June Ava Florescue
Raymond Geiser
Kyle Mann
Wendy McHood
Joy Riddle

GILA COUNTY ATTORNEY

Daisy Flores

May 20, 2011

The Honorable William G. Montgomery
Maricopa County Attorney's Office
301 West Jefferson, Suite 800
Phoenix, AZ 85003

RE: Review of Conflict Matter - State v. Stapley II

Dear Mr. Montgomery:

On December 7, 2009, Donald T. Stapley, Jr., (Stapley) was indicted by the Maricopa County Attorney's Office (MCAO) on twenty-seven (27) separate felony counts. This matter is commonly referred to as State v. Stapley II.[1] On February 24, 2010, the MCAO case against another supervisor, Mary Rose Wilcox, was dismissed by the Honorable John S. Leonardo. The MCAO on February 24, 2010, dismissed the matter of State v. Stapley II due to Judge Leonardo's ruling in the Wilcox matter and so that the MCAO might conflict the matter out to a special prosecutor.[2] In March 2010, former County Attorney Andrew Thomas (Thomas) requested that my office accept the recently dismissed matter of State v. Stapley II as a conflict matter for review and prosecution. All items provided by the MCAO and additional information gathered by my office were reviewed and staffed by three experienced prosecutors, including myself.[3]

All counts contained in the December 7, 2009 Indictment fall into five offense categories: fraudulent schemes and artifices, perjury, forgery, false swearing and theft. My office further considered additional potential charges as to conflict of interest and false swearing that were tangential

[1] The previous matter indicted as State v. Stapley CR 09-0682 is commonly referred to as Stapley I and was conflicted to the Yavapai County Attorney's Office (YCAO) by former County Attorney Andrew Thomas. On August 25, 2009, the Maricopa County Superior Court ruled that Stapley was not legally required to file a financial disclosure statement and dismissed all applicable counts. Thereafter, YCAO dismissed all remaining counts to pursue an appeal of the Superior Court's ruling. After the Court of Appeals upheld the Superior Court's ruling in March 2011, YCAO declined to re-file the matter by letter dated March 28, 2011.

[2] *See* MCAO Motion to Dismiss.

[3] The review in this matter required extensive examination of over 36,000 pages of investigative reports, voluminous bank records, public records, loan documents, pleadings and court records.

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to the original indicted offenses. **As to all counts contained in the December 7, 2009 Indictment there is insufficient evidence to go forward with the prosecution of Stapley. However, there is sufficient evidence to prove that Stapley committed seven (7) separate felony offenses of false swearing related to the NACo campaign and 2004 – 2008 Campaign Finance Reports. Although I believe Stapley committed multiple separate crimes of false swearing, it is my determination that it is in the interest of justice not to pursue these charges due to overriding concerns as to the investigation by the Maricopa County Sheriff's Office (MCSO) and prosecution by the MCAO.**[4] I will address each offense category as contained in the December 7, 2009 Indictment and the seven (7) felony counts that I believe are viable for prosecution. I will also review the basis upon which I have determined it is in the interest of justice to let this suspect go free in order to maintain the integrity of our justice system and the faith in the role of the prosecutor as a minister of justice.

I. From the December 7, 2009 Indictment - Count 1 Fraudulent Schemes and Artifices:

It is alleged that between May 1, 2005, and July 31, 2008, Stapley, pursuant to a scheme or artifice to defraud, obtained multimillion dollar commercial loans from Mortgages Limited, Choice Bank and Silver State Bank by overstating his assets, understating his liabilities, mischaracterizing his income and not reporting that he was a party to a bankruptcy on commercial loan applications in violation of A.R.S. §13-2310.[5]

A. Relevant Facts:

Stapley, an elected member of the Maricopa County Board of Supervisors (MCBS), owns an Arizona real estate development company called, Arroyo Pacific Investments, Inc. (API). This is Stapley's primary real estate investment company. In addition to this company, Stapley also has an ownership interest in Arroyo Pacific Partners, LLC and Arroyo Pecan Partners, LLC which are also real estate investment companies in Arizona. In 2005, Stapley embarked on an aggressive plan to invest in high-end residential real estate developments in Arizona.

1. Mortgages Limited Loans

In October 2005, Stapley obtained two separate real estate development loans from Mortgages Limited. The first loan (#843706) was obtained on October 3, 2005, in the amount of $5,800,000 for the development of 19 custom home lots in Gilbert, Arizona. This project is known as Sonterra. The primary guarantor was API, but both Stapley and his wife, Kathleen Stapley, and Stapley's son Donald T. Stapley, III (Tommy) and his wife, Leigh Stapley, personally guaranteed this loan. The second Mortgages Limited

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[4] This general reference in this decline to the MCSO and the MCAO is not intended to include the many hard-working employees that conducted themselves in a professional and ethical manner in the handling of these matters. Rather, all references to the MCSO or the MCAO with overtones of potential unprofessional or unethical behavior is limited to the conduct occurring prior to early April 2010, by those referenced in the various investigations discussed in Section V.

[5] A.R.S. §13-2310 provides: (A) Any person who, pursuant to a scheme or artifice to defraud, knowingly obtains any benefit by means of false or fraudulent pretenses, representations, promises or material omissions is guilty of a class 2 felony. (B) Reliance on the part of any person shall not be a necessary element of the offense described in subsection A of this section.

loan (# 843806) was acquired on October 4, 2005, in the amount of $4,050,000 for the development of 17 custom home lots in Queen Creek, Arizona. This project is known as Paseo de Pecans development. The primary guarantor was API, but both couples (Stapley and his wife and Stapley's son Tommy and his wife) personally guaranteed this loan.

For both Mortgages Limited loans, Stapley and his wife completed a Personal Financial Statement which was signed on September 20, 2005. MCSO investigators reported that Stapley falsely completed this financial statement (and a subsequent one to be discussed below) in a number of respects. First, according to MCSO investigators, Stapley falsely answered the question: "Have you or any firm in which you were a *major* owner ever declared bankruptcy or settled any debts for less than the amounts owed?" (Emphasis added). Stapley's response to this question was "no." Records uncovered by MCSO investigators show that Stapley had a 20% ownership interest in the Val Vista Lakes Development that filed Chapter 11 Bankruptcy in U.S. Bankruptcy Court, District of Arizona, in February 1991.[6]

MCSO investigators also assert that Stapley failed to report that he was in the process of obtaining a $1 million loan from Express One Mortgage to refinance his home mortgage when he completed the Personal Financial Statement. In fact, Stapley signed a promissory note for the Express One Mortgage on September 21, 2005, just one day after completing the Personal Financial Statement. On September 26, 2005, Express One Mortgage recorded the $1 million loan. According to MCSO investigators, this new loan increased Stapley's monthly home mortgage payment to $5,713 from $2,900. In sum, MCSO investigators' theory was that Stapley's income to debt ratio and Stapley's reporting of his own net worth was very misleading.

MCSO investigators concluded that, in an effort to obtain millions of dollars in loans, Stapley intentionally mislead Mortgages Limited by failing to disclose a bankruptcy and by inaccurately depicting his financial status. MCSO investigators' conclusion was that the scheme to defraud continued into 2006 when these loans were refinanced by Stapley, which is more thoroughly discussed below.

2. **Silver State Bank Loan**

In September 2006, Silver State Bank granted a $5.5 million loan (# 60681) to Arroyo Pacific Partners, LLC (one of Stapley's companies) and Tangelo Avenue Investments, LLC, to refinance the Mortgages Limited loan (#843706), also known as the Sonterra development. Both couples (Stapley and his wife and Stapley's son Tommy and his wife) personally guaranteed this loan in addition to a guarantee from the D.T. Stapley Family Trust. Tangelo Avenue Investments, LLC members, Meir Yuval and Jack Sofer, were also personal guarantors of the loan. Yuval and Sofer each had substantially higher net worth than Stapley (combined total of $272 million).[7] MCSO investigators concluded that Stapley again inflated his net worth on this loan application. Most notably, investigators concluded that Stapley

[6] Also, in 2000 Stapley, who holds an Arizona real estate broker's license, was sanctioned by the Arizona Department of Real Estate for failing to disclose the Val Vista Lakes Development bankruptcy.

[7] With respect to this loan, Stapley submitted a Financial Statement on May 10, 2006, and there is no allegation by the MCSO that Stapley failed to list a prior bankruptcy for this loan.

over-stated his net value in the Paseo de Pecans development by approximately $1 million. In sum, MCSO investigators concluded that Stapley's *estimation* of his overall net worth is $1.5 million more than what investigators calculated it to be. It should be noted, however, MCSO investigators conceded that it is difficult to tie down Stapley's then existing net worth due to the differences in dates of the information which affect the value of real property, other factors such as the debts being held jointly with other guarantors, and unlisted miscellaneous assets and liabilities.[8]

3. **Choice Bank Loan**

In November 2006, Arroyo Pecan Partners, LLC (one of Stapley's companies), obtained a $4,800,000 loan from Choice Bank for the purpose of refinancing Mortgages Limited loan #843806, also known as the loan for the Paseo de Pecans development.[9] Again both couples (Stapley and his wife and Stapley's son Tommy and his wife) personally guaranteed this loan. The Loan Request prepared in connection with this loan referenced the Personal Financial Statement that Stapley signed on May 10, 2006.[10] As pointed out in the analysis of the Silver State Bank loan, MCSO investigators concluded that Stapley again significantly inflated his net worth by approximately $1.5 million. But once again, investigators admit that it is difficult to tie down Stapley's then existing net worth as discussed above.

To bolster the theory that Stapley fraudulently obtained loans from Silver State Bank and Choice Bank, MCSO investigators placed significant weight on Stapley's reported income on his 2005 Federal Tax Return. According to investigators, it seemed highly suspicious that although Stapley reported on his 2005 Federal Tax Return a business loss of $73,000, he was able to obtain approximately $10 million worth of loans just on his $60,000 per year salary as a member of the Board of Supervisors. Even more troubling to MCSO investigators was how the $73,000 business loss was shown on the Choice Bank Loan Request as *positive business income*. To solve that riddle, MCSO Det. Jonathon Halverson (Halverson) interviewed Timothy Kirby (Kirby) who was the loan officer who processed this loan. Kirby acknowledged that Stapley's income was weak which was why he asked Stapley to provide documentation regarding his additional sources of income. In response to that request, Kirby received a letter from Stapley's attorney that outlined option agreements Stapley had negotiated on the 70 and 80 acre parcels of land in Pinal County, which Stapley had pledged as collateral for the loans. The option agreements provided Stapley with a $15,000 per month guaranteed cash flow. The letter showing the guaranteed cash flow was used to mitigate or, as Kirby explained, "wash" the business loss to show it as a positive. Kirby explained that in the commercial lending business it is common for people who have negative numbers on their tax returns to get loans if they can mitigate those numbers with evidence of other assets or income and can show a good payment history.

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[8] Supplement to DR #08-226607 p.12 by Dr. Beverly Owens dated May 19, 2009.

[9] There is no allegation by the MCSO that Stapley failed to list a prior bankruptcy with respect to this loan.

[10] The use of the May 10, 2006 Financial Statement for both the Silver State Bank and Choice Bank loans is explained by Silver State Bank's acquisition of Choice Bank in September 2006. In March 2008, the two banks merged operations with Silver State Bank as the named bank. In September 2008, Silver State Bank became insolvent and was seized by the FDIC.

Halverson also contacted Brent Horne (Horne), Stapley's accountant, to explore Stapley's income reporting. Horne acknowledged that he prepared Stapley's 2005 tax return that listed the $73,000 business loss. Halverson questioned Horne about the legality of not reporting the $15,000 per month in option payments as income on Stapley's Federal Tax Return. Horne explained that under the IRS Code, option payments are not considered income. Rather, it is considered to be "cash flow" and that it does not become income for reporting purposes until the option is either exercised or terminated. In the case of Stapley's 2005 Federal Tax Return, Horne did not factor the option payments as income because he had no evidence that the options had been exercised or terminated.[11]

B. Application of the Law to the Facts:

MCSO investigators assert that beginning in September 2005, Stapley initiated a complex and continuing scheme to defraud banks into lending him millions of dollars so that he could develop high-end residential properties. It began when Stapley obtained two commercial loans from Mortgages Limited. Investigators concluded that by submitting a Personal Financial Statement that failed to acknowledge a prior bankruptcy and which did not accurately reflect his true net worth, Stapley unlawfully received the benefit of multimillion dollar commercial real estate development loans.

It is true that Stapley responded "no" to the question on the Personal Financial Statement whether he or any firm in which he was a *major* owner ever declared bankruptcy. But Stapley's answer to that question is not necessarily false if he was not a "major" owner. Importantly, Stapley only owned a 20% share in the Val Vista Lakes Development which is the company that declared bankruptcy in 1991. It was not Stapley himself who declared bankruptcy, but the company. The critical inquiry then is whether Stapley was a "*major*" owner of Val Vista Lakes Development considering his interest was only 20%. The word "major" is defined by Webster's New World Dictionary as "constituting a majority." "Majority" is defined as "the greater part or larger number; more than half of a total." Since he held only a 20% interest Stapley could not be considered a "major" owner of Val Vista Lakes Development and, therefore, he did not falsely answer that question.

The second area of concern is Stapley's failure to identify his true net worth on the Personal Financial Statement he submitted in connection with the Mortgages Limited loans. On the date when he signed the Personal Financial Statement, his stated net worth was essentially accurate. The concern is that exactly one day later he obtained a $1 million loan to refinance his residence which effectively increased his monthly mortgage payment by $2,813 and reduced his overall net worth since the net

[11] Based on our review of the Federal Tax Code, Stapley was not required to report the option payments as "income" because under the IRS code option payments themselves are not taxable events. An option payment is not a taxable event until or unless one of two things occur: 1) the option is terminated (meaning the contractual agreement ends on its own terms without the option being exercised) or 2) the option is exercised and a capital gain is realized (meaning that the person holding the option wishes to complete the transaction—in this case it would have been ABCDW, LLC buying the land from Stapley who is the grantor of the option).

value of his home was reduced by $200,000. Technically speaking, Stapley did not falsify the Financial Statement when he completed it on September 20, 2005. A review of the bank records does not indicate Stapley informed Mortgages Limited about this added indebtedness when it funded the loans in October 2005. However, that is not to say Stapley did not notify Mortgages Limited; there is simply no record one way or the other. Finally, there is no way to ascertain whether Mortgages Limited would have rejected the loans had it discovered the additional indebtedness since MCSO investigators never interviewed anyone from Mortgages Limited. It is also noteworthy that Mortgages Limited suffered no economic harm since these loans were fully repaid with interest when they were refinanced in 2006. Based on the reasons indicated above, there is insufficient evidence to show that Stapley obtained the Mortgages Limited loans as part of a fraudulent scheme.

According to MCSO investigators, by means of a fraudulent scheme Stapley obtained two additional loans in 2006 from Silver State Bank and Choice Bank that re-financed the Mortgages Limited loans. As before, with the exception of the bankruptcy issue, investigators assert that Stapley overstated his net worth by $1.5 million based on the May 10, 2006 Financial Statement he submitted as part of the application process. The difficulty in proving such a scheme is that the net worth listed by Stapley was only an estimate on his part. In fact, MCSO investigators acknowledged pinning down Stapley's net worth was complicated by outside factors. To prove a fraudulent scheme on estimates of net worth would be next to impossible. There is no hard evidence to prove that Stapley knowingly lied on his Financial Statements in an effort to obtain these loans. With respect to the Silver State Bank loan, the true guarantors of that loan were the members of Tangelo Avenue Investments, LLC, whose financial net worth dwarfed Stapley's by over $265 million. Moreover, Tangelo Avenue Investments, LLC, bought out Stapley's interest in March 2008 and assumed full responsibility for repayment of the loan. There is no evidence that Silver State Bank suffered any economic harm by virtue of Stapley's actions.

MCSO investigators supported their theory of a fraudulent scheme by emphasizing questionable income listed in the Choice Bank Loan Request form and by suggesting that Stapley was not properly reporting option payments as income on his taxes. The Loan Request form was completed by Kirby. It was Kirby who listed a $73,000 business loss as business income on the Loan Request form, not Stapley. As discussed previously, it is important to note that Stapley was not required to list option payments as income on his taxes since by law it is not income until the option is exercised or terminated.[12] The option payments were a source of cash flow for Stapley and could be properly considered by a bank in making a lending decision. Kirby included the $15,000 per month ($180,000 per year) cash flow Stapley received from option payments to the loan committee to shore up Stapley's weak income so that the loan would be approved.

What must also be fully understood is that regardless of Stapley's income picture, Choice Bank liked the development project itself. In fact, the Bank President visited the development site and approved of it. In addition, Kirby noted that the loan was backed up by collateral posted by Stapley and Stapley had a good payment history. But according to Kirby, there was a lack of quality control at the bank. Even risky borrowers got loans if they had a track record of success and the bank could earn a

[12] *See* 26 USC §1234 and 26 USC §1031.

return on the investment. This was at a time when land speculation and risky lending was at its peak. As Kirby put it, "banks were flying by the seat of their pants on a lot of these loans." For both Stapley and the banks, the risky speculation on their part caught up to them. According to bank records, in June 2008, Stapley informed the bank that he was unwilling to put up money to fund the interest reserve on the loan and walked away from the project. In July 2008, a Notice of Trustee Sale of the development property and Stapley's posted collateral was initiated. This action was halted when the bank itself became insolvent and was seized by the FDIC.

Based on all of the foregoing facts, there is insufficient evidence to prove that Stapley engaged in a scheme to fraudulently obtain loans from Silver State Bank and Choice Bank. Therefore, Count 1 of the December 7, 2009 Indictment cannot be pursued.

II. From the December 7, 2009 Indictment - Counts 3 & 4 Perjury, Counts 5 & 6 Forgery, and Counts 7 & 8 False Swearing:

It is alleged that between March 29, 2005, and January 6, 2006, Stapley, an elected member of the MCBS, filed Campaign Finance Reports (CFRs) containing false information. The December 7, 2009 Indictment charges Stapley with three separate type of offenses by alternative application of A.R.S. §13-2702 (Perjury); A.R.S. §13-2002 (Forgery); and A.R.S. §13-2703 (False Swearing).

A. Relevant Facts:[13]

In 2004, Stapley sought re-election to the MCBS. Stapley filed CFRs in connection with this election. Stapley again sought re-election in 2008, and again filed the requisite CFRs.[14] For both elections Stapley formed a political committee and opened bank accounts. For purposes of this analysis the 2004 election is referred to as *Stapley for Supervisor*. The 2008 election is referred to as *Stapley '08.*

According to MCSO investigators, in the course of investigating Stapley under DR 08-091464 (Stapley I) investigators reviewed the CFRs from both election campaigns. Investigators discovered areas of concern with respect to Stapley's reporting of campaign expenditures and the movement of campaign funds to different non-campaign accounts.[15] In 2010, Stapley filed amended CFRs to both *Stapley for Supervisor* and *Stapley '08* in an apparent attempt to remedy what Stapley referred to as

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[13] The relevant facts for perjury, forgery and false swearing are in the most part the same as the indictment of December 7, 2009, essentially charged the matter three different ways premised upon the same underlying facts. This is the same approach that was taken by the MCAO as to the prosecution of Mary Rose Wilcox.

[14] Pursuant to A.R.S. §13-903 "each candidate who intends to receive contributions or make expenditures of more than five hundred dollars in connection with a campaign for office shall designate in writing a political committee for each election to serve as the candidate's campaign committee." Pursuant to A.R.S. §13-913 "each political committee shall file a campaign finance report setting forth the committee's receipts and disbursements according to the schedule prescribed..." Stapley filed the requisite campaign committee statement of organization for each election cycle reviewed. Importantly, the duty to file CFRs is wholly separate from the duty (discussed in subsequent sections) as an elected official to file a Financial Disclosure Statement which was the issue at the heart of State v. Stapley CA-CR 09-0682 recently decided by the Court of Appeals in Stapley's favor.

[15] In addition to potential criminal charges, the analysis of the CFRs by the MCSO investigators showed that Stapley had not properly reported donations to his elections. Such violations, if proven, are usually subjected to monetary penalties and are not criminally prosecuted. *See* A.R.S. §16-924.

"errors" in the original CFRs. In addition to his elected position to the MCBS, in 2004 Stapley sought election for 2nd Vice-President of the National Association of Counties (NACo).[16] On September 30, 2004, Stapley opened a Bank of America checking account entitled Stapley for NACo. The presumed purpose of this account was to deposit campaign donations and pay for campaign related expenses for his NACo candidacy.

1. Opening the Stapley for NACo Account

Instead of using his personal money or a NACo campaign donation to open the account, Stapley transferred $100 from his *Stapley for Supervisor* account to open the Stapley for NACo account. This expenditure was never reported in the CFR for the Pre-General Election, for the period September 28, 2004, through October 13, 2004, that was filed on October 21, 2004. This document was signed under penalty of perjury by Stapley on October 21, 2004. The $100 expenditure was never reported on any subsequent CFR filings until after Stapley was indicted in Stapley II on December 7, 2009. On February 10, 2010, Stapley reported this $100 transfer by filing an Amended Pre-General Election Report. In the amended CFR, Stapley lists the $100 expenditure under Schedule D as "AZ Teller Transfer to NACo for Supervisor Account." Stapley describes the expenditure as "Transferred in error/redeposited to *Stapley 08* account." It is noteworthy that a review of the Stapley for NACo account through October 2009, shows the $100 in question was never refunded back to either the *Stapley for Supervisor* or *Stapley '08* accounts.

2. Stapley for Supervisor January 31st Report

In November 2004, Stapley was re-elected to his position on the MCBS. On December 1, 2004, Stapley filed his Post General Election Report, for the period of October 14, 2004, through November 22, 2004. It was signed by Stapley on December 1, 2004, as true under penalty of perjury. Stapley reported his cash on hand for the end of this period to be $8,471.42. On April 4, 2005, Stapley filed his *Stapley for Supervisor* January 31st Report, for the period of November 23, 2004, to December 31, 2005, which was signed by Stapley as true under penalty of perjury on March 29, 2005. In this filing he reported that on March 23, 2005, he transferred $8,471.42 to his new election campaign account for *Stapley '08.* Stapley's representation of where and when it was transferred was **false** for a number of reasons discussed below.

a. False Accounting of Transfer

On the January 31st Report for *Stapley for Supervisor*, Stapley falsely reported that on March 23, 2005, that $8,471.42 was transferred from his *Stapley for Supervisor* account to his *Stapley '08* account. That is because on January 28, 2005, Stapley had removed the remaining balance in the *Stapley for Supervisor* account and transferred it directly into his Stapley for NACo account, which effectively closed out the *Stapley for Supervisor* account. Even more troubling, Stapley falsely stated the amount of the

[16] The National Association of Counties (NACo) is a Washington D.C. based national organization which is comprised of various counties in the United States. Its primary purpose is to represent county governments before Congress and federal executive agencies. Maricopa County is a member of NACo

January 28, 2005 transfer. The actual amount transferred in was $9,115.67, not $8,471.42 as Stapley reported.

b. Improper Transfer to Stapley for NACo

In addition, Stapley falsely listed the date of the transfer as March 23, 2005. The $8,471.42 was transferred from the Stapley for NACo account to *Stapley '08* account not on March 23, 2005, but on April 5, 2005, which was the first deposit into the *Stapley '08* account. Since Stapley did not transfer the full $9,115.67, he intentionally left $644.25 of *Stapley for Supervisor* political campaign funds in his Stapley for NACo account, which is a private non-political account. This is an impermissible disposal of surplus campaign funds under Arizona campaign finance laws.[17] Stapley never reported transferring these campaign funds into the NACo account in any subsequent CFR filings until February 10, 2010, when he filed an Amended January 31st Report on his *Stapley '08* CFR. In the amended *Stapley '08* CFR Stapley lists the $9,115.67 as being "Transferred in error-returned to account-see June 2010 report." However, a review of the June 2010 amended report reflects only a lengthy list of refund checks issued with no explanation as to how or why the $9,115.67 was "transferred in error."

c. False Documentation of Contributions, Dates, and Sources

Stapley also falsely completed his *Stapley '08* January 31st Report, for the period of November 23, 2004, through December 31, 2005. This document was signed by Stapley on March 29, 2005, as true under penalty of perjury. This document, however, was not filed until January 6, 2006. In this report under Schedule B, Contributions from Political Committees, Stapley lists a contribution of $8,471.42 from *Stapley for Supervisor* and that it was received on March 23, 2005. Again, this is a false statement for a number of reasons. First, it was not received from *Stapley for Supervisor*. Instead it was received from Stapley for NACo. Second, it was not received on March 23, 2005, it was received and deposited on April 5, 2005.

d. Improper Expenditure of Campaign Funds for Business Expenses

Stapley made an additional false statement on his *Stapley '08* January 31st Report, for the period November 23, 2004, through December 31, 2005. This report was filed on January 6, 2006, but was signed by Stapley as true under penalty of perjury on March 29, 2005. In this report Stapley reports no expenditures. However, on December 27, 2005, Stapley made an on-line transfer of $2,117.34 from the *Stapley '08* account directly to his API account. As indicated above, API is one of Stapley's real estate investment companies. A review of API's December 2005 bank statement shows a payment of $2,117.34 to Bank of America Business Card Bill Payment on the very same day as the on-line transfer. On December 28, 2005, the very next day, a National City Mortgage Bill payment in the amount of $2,078.62 was made from the API account. Had the on-line transfer from *Stapley '08* not been made the API account would have been overdrawn by $579.53. There is no explanation how these expenses (credit card or mortgage payment) are or could reasonably be related to his *Stapley '08* campaign.

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[17] *See* A.R.S. §16-915.01 as to disposal of surplus campaign monies.

e. Unsubstantiated and Questionable Campaign Expenditure

On February 19, 2010, Stapley filed an Amended January 31st report in which he listed the $2,117.34 as "Reimbursement for purchase of computer for campaign purposes." In February 2011, at our request, an MCSO investigator did a secondary review of Stapley's API credit card account and found that there was no purchase of a computer on that particular credit card and there was no purchase of any item for the exact amount of $2,117.34. However, in an effort to give Stapley the benefit of the doubt, the investigator reviewed Stapley's personal credit card and found Apple Computer charges for $1,938.24 on March 27, 2005; $145.54 on March 27, 2005; $319.09 on March 30, 2005; and $1,465.00 on April 1, 2005. None of these purchases match the $2,117.34 amount and none occurred on December 27, 2005.[18]

B. Application of the Law to the Facts - Perjury:

In order to prevail on the charges of perjury under A.R.S. §13-2702 [19] as contained in the indictment dated December 7, 2009, it must be shown that Stapley made a false sworn statement in regard to a material issue believing at the time that such statement was false. Applying the first part of the perjury statute, it can be proven that all of the CFRs were, in fact, signed by Stapley. However, Stapley did not sign them in the presence of a notary. Therefore, it cannot be shown that the CFRs are "sworn statements." Applying the second part of the statute, it can be proven that Stapley's signing the CFRs under penalty of perjury clearly amounted to a false unsworn verification. The facts of the case undeniably demonstrate that Stapley believed or knew that the relevant contents of the CFRs were false. However, that does not end the analysis to determine whether the crime of perjury was committed. For one to commit perjury the verification of the relevant contents of the CFRs must be "material." To meet the materiality definition what must be proven, as a matter of law, is that the false sworn verification affected the "course or outcome of any proceeding or transaction." Here, there simply was no *proceeding* to effect. Similarly, the act of making a false verification of a CFR does not equate to *a transaction* as commonly understood. The charge of perjury is simply not applicable to the facts of this case.

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[18] Mr. Kurt Altman, Esq., Stapley's attorney in Stapley II, provided to this office a February 1, 2010 memo from Greg Thomas which claimed that Stapley used his credit card to purchase an Apple PowerMac G5 computer in December 2005, for approximately $2,111.00. A review of Stapley's bank and credit card accounts completely refutes this claim and we cannot accept this assertion as true.

[19] A.R.S. §13-2702 (A) provides: "A person commits perjury by making either: (1) A false sworn statement in regard to a material issue, believing it to be false; or (2) A false unsworn declaration, certificate, verification or statement in regard to a material issue that the person subscribes as true under penalty of perjury, believing it to be false."

C. Application of the Law to the Facts - Forgery:

In order to prevail on the charges of forgery under A.R.S. §13-2002[20] as contained in the indictment dated December 7, 2009, it must be shown that Stapley with the intent to defraud:

1. Falsely completed or altered a written instrument[21] (CFRs); or
2. Knowingly possessed a forged instrument[22] (CFRs) that had been falsely made, completed or altered; or
3. Offered or presented a forged instrument (CFRs) or the instruments (CFRs) contained false information.

Obviously the CFRs are written instruments. There is strong evidence that the CFRs contained false information. But to establish forgery, the State must prove Stapley had the intent to defraud at the time he signed the CFRs or that he filed them with the intent to defraud. To establish this criminal intent, *mens rea,* the State needs more than just mere proof that the documents contained false information. We need to establish Stapley's *intention to defraud* someone or something, such as a court, a public agency or political body. While the manner in which the false information was presented and the substance of the false information would make it appear that Stapley was truly attempting to hide some of his transactions, nothing from the bank records, CFRs or MCSO investigation provides evidence that Stapley completed, possessed or offered a forged instrument with the intent to defraud any person, public agency or political body. Therefore, the State cannot establish the necessary mental state to prove beyond a reasonable doubt that the crime of forgery was committed by Stapley.

D. Application of the Law to the Facts - False Swearing:

In order to prevail on the charge of false swearing under A.R.S. §13-2703,[23] it must be shown that Stapley signed the Financial Disclosure Statements wherein he attested to the truth of what was

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[20] A.R.S. §13-2002(A) provides: "A person commits forgery if, with the intent to defraud, the person: (1) Falsely makes, completes or alters a written instrument; or (2) Knowingly possesses a forged instrument; or (3) Offers or presents, whether accepted or not, a forged instrument or one that contains false information."

[21] *See* A.R.S. §13-2001(6) which provides: ""Falsely completes a written instrument" means to transform an incomplete written instrument into a complete one by adding, inserting or changing matter without the permission of anyone entitled to grant it, so that the complete written instrument falsely appears or purports to be in all respects an authentic creation of its ostensible maker or authorized by him." *See also* A.R.S. §13-2001(7), which provides: ""Falsely makes a written instrument" means to make or draw a complete or incomplete written instrument that purports to be an authentic creation of its ostensible maker but that is not either because the ostensible maker is fictitious, or because, if real, the ostensible maker did not authorize the making or drawing of the written instrument." *See also* A.R.S. §13-2001(12), which provides: ""Written instrument" means: (a) Any paper, document or other instrument that contains written or printed matter or its equivalent."

[22] A.R.S. §13-2001(8) provides: ""Forged instrument" means a written instrument that has been falsely made, completed or altered."

[23] A.R.S. §13-2703(A) provides: "A person commits false swearing by making a false sworn statement, believing it to be false." A.R.S. §13-2701(1) provides: ""Sworn Statement" means any statement knowingly given under oath or affirmation attesting to the truth of what is stated, including a notarized statement whether or not given in connection with an official proceeding."

stated, yet at the time he believed it to be false. False swearing requires that the person *knowingly*[24] make a false sworn statement. If the statement is done *negligently* or *recklessly,* it is insufficient to meet the *mens rea* requirement of the statute.

The CFRs discussed above were signed by Stapley under penalty of perjury: that is, Stapley attested to the truth of what was stated in them. Therefore, the CFRs are sworn statements. The next step in the inquiry is whether Stapley believed (knew) them to be false so that his conduct was done "knowingly". Even though there is no statutory requirement to prove motive or that a benefit was received, such facts are integral to showing a jury the Defendant acted knowingly when providing false information. This eliminates the claim that these were simple mistakes or oversights. In each instance it appears that Stapley's conduct was done knowingly. It is apparent his motive was to conceal transactions, "wash" money from one account to another, cover non-political debt with campaign resources, and in general - deceive the public.

On October 21, 2004, Stapley signed and filed his *Stapley for Supervisor* Pre-General Election Report for the period September 28, 2004, through October 13, 2004, that did not include an obvious expenditure of $100. This expenditure cannot be dismissed as an oversight since it had nothing to do with Stapley's 2004 election to the MCBS. Stapley intentionally withdrew $100 from his *Stapley for Supervisor* account and used it to open his own private non-political campaign account entitled Stapley for NACo. Stapley intentionally concealed this transaction by not reporting it. Therefore, there is overwhelming evidence Stapley committed false swearing as the State can prove that Stapley attested to the truth of the Pre-General Election Report believing it to be false.

On March 29, 2005, Stapley signed his *Stapley for Supervisor* January 31st Report for the period of November 23, 2004, to December 31, 2005. It was actually filed April 4, 2005. Stapley reported that on March 23, 2005, he transferred $8,471.42 from his *Stapley for Supervisor* account to his *Stapley '08* account. This was false. The evidence shows that Stapley actually transferred $9,115.67 from his *Stapley for Supervisor* account directly to his Stapley for NACo account on January 28, 2005. Therefore, there is overwhelming evidence Stapley committed false swearing as the State can prove that Stapley attested to the truth of the January 31st Report believing it to be false.

On March 29, 2005, Stapley signed his *Stapley '08* January 31st Report for the period of November 23, 2004, to December 31, 2005. It was filed January 6, 2006. Stapley listed a contribution of $8,471.42 from his *Stapley for Supervisor* campaign that was received on March 23, 2005. This was false. The *Stapley '08* campaign received the contribution from Stapley's NACo account, and it was not received on March 23, 2005, but on April 5, 2005. Therefore, there is overwhelming evidence Stapley committed false swearing as the State can prove that Stapley attested to the truth of the January 31st Report believing it to be false.

On March 29, 2005, Stapley signed his *Stapley '08* January 31st Report for the period of November 23, 2004, to December 31, 2005. It was filed on January 6, 2006. Stapley reported no

[24] A.R.S. §13-2703 uses the word "believes" in reference to mental state which means "knowingly." *See* Franzi v. Superior Court, 139 Ariz. 556 (1984).

expenditures. This was false. On December 27, 2005, Stapley made an on-line transfer of $2,117.34 from the *Stapley '08* account directly to his API account. The exact same day, Stapley made a $2,117.34 payment from his API account to a Bank of America Business credit card. There is overwhelming evidence Stapley committed false swearing as the State can prove that Stapley attested to the truth of the January 31st Report believing it to be false.

E. Viable Counts for Prosecution

After review of all material and consideration of all potential charges as outlined in the preceding section, there is overwhelming evidence that Stapley committed four (4) separate offenses of False Swearing, each a class 6 felony.[25]

Count 1:

On October 21, 2004, Stapley, under penalty of perjury, signed and filed the *Stapley for Supervisor* Pre-General Election Report for the period September 28, 2004, through October 13, 2004, believing it to be false. Specifically, Stapley did not include an obvious expenditure of $100.00 that was used to open his own private non-political campaign account entitled Stapley for NACo.

Count 2:

On March 29, 2005, Stapley, under penalty of perjury, signed the *Stapley for Supervisor* January 31st Report for the period of November 23, 2004, to December 31, 2005, which was filed April 4, 2005, believing it to be false. Specifically, Stapley falsely reported that on March 23, 2005, he transferred $8,471.42 from his *Stapley for Supervisor* account to *Stapley '08* account when, in fact, it was transferred to his Stapley for NACo account on January 28, 2005, and in the amount of $9,115.67.

Count 3:

On March 29, 2005, Stapley, under penalty of perjury, signed the *Stapley '08* January 31st Report for the period of November 23, 2004, to December 31, 2005, which was filed January 6, 2006, believing it to be false. Specifically, Stapley listed a contribution from *Stapley for Supervisor* in the amount of $8,471.42 that was received on March 23, 2005, when, in fact, it was received from Stapley for NACo on April 5, 2005.

Count 4:

[25]We also reviewed and considered an additional fifth count based on his February 19, 2010 Amended CFR filing signed under penalty of perjury wherein Stapley indicated that $2,117.34 was "[r]eimbursement for purchase of computer for campaign purpose." Essentially, as the original false information is embodied in Count 4 we would use the information of this dishonest subsequent remedial measure towards proving Count 4 and an additional charge for this is unnecessary.

On March 29, 2005, Stapley, under penalty of perjury, signed the *Stapley '08* January 31st Report for the period of November 23, 2004, to December 31, 2005, which was filed January 6, 2006, believing it to be false. Specifically, Stapley reported no expenditures, when in fact, on December 27, 2005, Stapley made an on-line transfer of $2,117.34 from the *Stapley'08* account to his personal company's (API) account to pay a credit card bill in the same exact amount.

III. From the December 7, 2009 Indictment (NACo Related) - Count 2 Fraudulent Schemes and Artifices and Counts 9 – 27 Theft:

It is alleged that between January 1, 2005, and November 1, 2008, Stapley, pursuant to a scheme to defraud, converted money donated to his campaign for Second Vice-President of NACo for his own personal use in violation of A.R.S. §13-2310.[26] In conjunction with the scheme to defraud, Stapley committed the offenses of theft by converting individual donations in varying amounts to his own personal use in violation of A.R.S. §13-1802.[27]

A. Relevant Facts:

On September 30, 2004, Stapley opened a Bank of America checking account for the purpose of depositing money received for his election campaign to the position of Second Vice-President of NACo. In addition to a Board of Directors, NACo has "elected" positions which are President, President-Elect, First Vice-President and Second Vice-President. Those elected serve a one year term. The elections occur during the business meeting at the NACo Annual Conference. The 2005 Annual Conference was held in Honolulu, Hawaii.

1. Legal Advice from Steven A. Betts, Esq. of Gallagher & Kennedy

Prior to opening the campaign account, Stapley obtained a legal opinion from Steven A. Betts, Esq. of Gallagher & Kennedy, regarding the application of the Arizona Campaign Finance Act as embodied in A.R.S. §16-901 *et seq.*[28] The opinion of Mr. Betts was that Arizona's campaign finance laws did not apply to the NACo election. Therefore, there was no restriction on the amount of money Stapley could collect, including money from corporate donors and he was not required to report any contributions on his CFRs for his elected position of a Maricopa County Board of Supervisor. We concur with this opinion. Stapley solicited contributions from individuals, businesses and corporations in person and by written correspondence. Stapley informed potential donors that he needed to raise $150,000 for his national campaign and he provided them Mr. Betts' opinion letter.

2. $139,648.80 in NACo Campaign Donations Collected

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[26] *See* footnote 5.

[27] For ease of discussion, the analysis of this portion of the case combines the Fraudulent Scheme and Artifices charge and the Theft charges.

[28] This opinion was provided in the form of a letter dated September 23, 2004.

The first donations were deposited in the Stapley for NACo account on October 22, 2004. For the year ending December 31, 2004, Stapley received a total of $16,050 for the NACo campaign. From January 1, 2005, to December, 31, 2005, Stapley collected $118,598.80 in campaign contributions. From January 1, 2008, to December 31, 2008, Stapley collected an additional $5,000 of campaign contributions. The total for all donations was $139,648.80.

3. How NACo Campaign Donations Were Used

MCSO investigators subpoenaed records for Stapley's various personal and business checking accounts, including the Stapley for NACo account, Stapley's personal credit card and the NACo credit card. From these bank records investigators examined purchases made with the NACo credit card and Stapley's personal credit card, identifying each purchase either as NACo campaign related or personal. Investigators identified numerous non-NACo campaign related expenditures for such items as clothing, luggage, home furnishings, spa services, pet grooming, florists, to name a few. In addition to bank records, MCSO investigators obtained records for Stapley's travel related expenses in 2004 and 2005. In order to evaluate the NACo related nature of these travel expenses, investigators compared these expenses with NACo related events during the relevant time period. Investigators concluded there were a number of trips and related expenses paid by NACo funds that were not NACo campaign related. Of particular significance was Stapley's rental of a beach house for his family during and after the conclusion of the 2005 NACo Annual Conference in Hawaii. In sum, investigators rightly concluded that Stapley used approximately $83,000 of NACo campaign donations for non-NACo related expenses which they classified as personal expenses.[29]

4. Theory of Misuse of NACo Funds as Theft - Donor Intent

To establish this non-NACo campaign related use of funds for personal expenses was unlawful and, therefore, a theft, MCSO investigators looked to the intent of the individual donor. Multiple theft counts pursued by the MCSO and the MCAO were premised upon the theory that individual donors were victims when the donation was used by Stapley for a purpose (personal) contrary to the donor's intention (for NACo campaign). Therefore, under this theory of prosecution the intention of the donor and any perceived control over the donation by the donor in dictating the use of the donation was essential to establishing a theft by Stapley. Between June 23 and September 4, 2009, investigators contacted numerous donors, either in their personal capacity or on behalf of their company, if the donation was written on a company check.[30]

5. Method of Investigation

Investigators often arrived unannounced at the donors' homes or businesses. Some interviews were conducted telephonically, if the donor resided out-of-state. In nearly every instance the interviews were audio recorded.[31] It is unclear if the donor knew that he or she was being recorded.[32] Upon

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[29] Using the first-in-first-out accounting method investigators were able to ascertain what expenditures were paid by each deposit thereby identifying how each individual donor's money was spent.

[30] In connection with this aspect of the investigation, the MCSO conducted twenty-nine (29) recorded interviews

[31] GCAO had all twenty-nine interviews transcribed and reviewed audio and transcription of interviews.

contacting the donors, investigators identified themselves as detectives with the MCSO. Typically, they would start the interview by explaining that they were conducting an investigation into donations made to NACo, or that they were following some leads on checks that were written to Stapley for NACo. They never started the interview by stating they were actually investigating Stapley. From there they asked donors their relationship with Stapley and how they were contacted by him. Investigators asked what benefit the donors received or thought they would receive from their contribution and whether they, in fact, had authorized the contribution. Investigators would then ask donors their understanding of how their contribution would be used by Stapley. They would then ask them if they thought it would be appropriate for Stapley to use any of the money for his personal use, or they would ask donors if they would have contributed to Stapley's NACo campaign if they knew the contribution was not going to be used strictly for campaign purposes. Investigators never gave any specific examples of what personal expenditures they thought Stapley had made. Investigators never informed the donors that they were considered victims and never asked them if they would be willing to testify against Stapley.

6. Mischaracterization of NACo Donor Interviews

On September 9, 2009, an MCSO investigative report was prepared that contained a brief summary of each interview. In most instances, the summary contains a concluding sentence to the effect that the donor said it would be inappropriate to use the contribution for personal use or that the donor expected the contribution was to be used for campaign purposes. However, upon listening to the audio recording of the interviews and reviewing the transcripts, some of the summaries often left out important details of the interview that affect the real answers given by the donor.[33]

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[32] While there is nothing inherently wrong with law enforcement's method of how this investigation was conducted, we make note of the potential surreptitious nature of the investigation due to our concerns with the accuracy of how some interviews were portrayed. It is also unknown by GCAO if the manner of how these interviews were conducted was at the direction of any prosecutor which could be an ethical violation for surreptitious recording done at an attorney's direction under these circumstances under Arizona Rules of Professional Conduct, Ethical Rule 8.4.

[33] The following are some examples of interview summaries that raised concerns: 1) Summary for interview of Stan Austin, a federal lobbyist: MCSO investigators reported Austin expected the donation to be used for NACo campaign purposes. However, Austin also stated that personal expenses were acceptable as long as it was somehow associated with the NACo campaign; that if he had known it would be used in other ways he **"might"** have specified that it go strictly to the NACo campaign. 2) Summary of interview of Stephen Wilson, a lobbyist: MCSO investigators reported Wilson made the contribution in good faith believing it would be for campaign purposes and that if Wilson knew the donation was not going to be used as solicited he would not have donated. However, MCSO investigators failed to note that Wilson made no stipulation on how the money was to be spent. Wilson indicated Stapley could use it in whatever manner Stapley felt was needed. The use of the donation was left to Stapley's discretion. Wilson stated that he would be **"surprised"** if the donation was used for something totally unrelated to the campaign. And 3) Summary of interview of Daryl Manhard, an attorney: Manhard made a personal $100 contribution. MCSO investigators reported that Manhard said the money was to be used for election costs at Stapley's discretion, but that it would have been *inappropriate* for the funds to be used for personal expenses. However, Manhard elaborated that what is defined as personal use is "in the eye of the beholder." Manhard said if personal use of funds was supportive of Stapley's campaign to become vice-president then it would have been an *appropriate* use of the money.

In three instances investigators mischaracterized the substance of the interviews so greatly that it calls into question the veracity of the report and premise of the theft counts:

Ross N. Farnsworth. MCSO investigators reported that Farnsworth, who is a real estate developer, donated $10,000 to Stapley's NACo campaign. According to investigators, Farnsworth told them that his contribution was for the election and he gave Stapley discretion for its use, but that any personal use of the funds would *not* have been appropriate.

> Farnsworth did not clearly state that it would have been inappropriate for Stapley to use the funds for personal use. In fact, Farnsworth, who is a close personal friend of Stapley, essentially told investigators that it was fine with him how Stapley spent the money. Additionally, Farnsworth had just recently given Stapley another $5,000 to pay for the defense of criminal charges brought by the MCAO.

Stuart Goodman. MCSO investigators reported that Goodman, who owns Goodman Schwartz, LLC, a state lobbying firm, made two $5,000 donations to Stapley's NACo campaign. On check # 2389 he wrote in the memo portion *Vanderbilt Farms* which is a real estate development company owned by the Wolfswinkle family and also a client of Goodman's. MCSO investigators reported Goodman believed he used money belonging to the Wolfswinkle family held as a retainer by Goodman. They also reported that Goodman felt it would have been *inappropriate* for the funds to be used for personal expenses.

> A review of the audio record and transcript of the Goodman interview shows that there is no evidence that Goodman wrote the check using retainer funds he received from the Wolfswinkle family. He wrote the check with his own funds on behalf of Vanderbilt Farms and noted Vanderbilt Farms in the memo section so that Vanderbilt Farms got the credit for the contribution. He said that his understanding of the contribution was for running a national campaign and not for personal use. However, he acknowledged that once the donation is made he had no control over how it was to be used.

Brent Bowden & Brock Hiatt: Bowden and Hiatt own Cardon Hiatt Investments—The Vineyard Group, LLC. This entity made two separate donations to Stapley for NACo totaling $6,666.68. MCSO investigators reported Bowden and Hiatt said the donated funds were for election costs and gave Stapley discretion on the use of the money. According to investigators, both Bowden and Hiatt said it would *not* have been appropriate for Stapley to use the money for personal use.

> Again a review of the audio recording and the transcript of the interview shows that all that was said by these men was they made the donations to Stapley's national campaign. Nowhere in the transcript or in the recording is it indicated that they said they felt it was inappropriate for Stapley to use the donations for personal expenses. They repeatedly told the investigator they wanted to speak to the case agent.

B. Application of the Law to the Facts –(NACo Related) Fraudulent Scheme and Theft:

Based on the review of Stapley's various accounts and interviews of donors to the campaign, MCSO investigators concluded that Stapley orchestrated a scheme to convert a substantial portion of NACo campaign contributions received from people and business entities for his own personal use. In conjunction with this scheme, Stapley committed multiple counts of felony and misdemeanor thefts from individual donors.

As a starting point, there is no question that Stapley used a significant portion of the money given to him for the NACo campaign for his own personal use and that of his family. However, it is doubtful the State can prove that the entire $83,000, as alleged by MCSO investigators, was used for personal rather than NACo purposes. Stapley has insisted to both the media and to prosecutors that all expenditures were related to the campaign. To date, Stapley has provided no written documentation supporting this claim, and it is highly improbable that he can. For example, Stapley would be hard pressed to explain how purchases from Joann Fabrics in Mesa, Bath and Body Works in Scottsdale, 4 Paws Pet Grooming in Mesa, an LDS bookstore in Salt Lake City, or his gym membership can possibly be related to the NACo campaign (there are dozens of other examples of similar clearly non-NACo campaign related expenditures).[34] Although there is powerful evidence of Stapley's personal use of NACo campaign funds, the critical inquiry is whether, under the law, his actions were illegal.

Stapley informed donors that he needed to raise $150,000 for a national campaign for Second Vice-President.[35] The reasonable assumption of those who contributed would be that their donation would be used for the purpose Stapley stated. To convict Stapley of Fraudulent Schemes and Artifices the State must prove that he created a plan to defraud people into donating to his campaign so that he could convert their money to his own personal use. The difficulty presented for the State is proving Stapley's intent to create a scheme to defraud, and if he did, when he implemented it. It would be necessary for the State to prove two things. First, that Stapley engineered a scheme to defraud donors of their money from the onset of his campaign, which would have been in September 2004. Second, that as a ruse (artifice), Stapley used his national campaign for a very visible position in a national organization to steal money from donors. While perhaps a great movie plot, it is not a plausible premise of a fraudulent scheme charge that could be proven beyond a reasonable doubt to a Maricopa County jury.

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[34] There are some very substantial purchases worth noting. For example, there is $10,036.70 purchase of home furnishings from Boyles Furniture in North Carolina and a $6,036.08 purchase of electronic equipment from Bang and Olufsen in Chandler, Arizona. Perhaps the most glaring example of his personal use of NACo campaign funds was the rental of the beach house in Hawaii during and **after** the 2005 Annual Conference had concluded. It is estimated that Stapley used approximately $11,000 of NACo campaign funds for rental of this property for himself and his family

[35] It was apparent to Stapley as early as December 2004, that he would have no opposition in the election and in fact had none.

To convict Stapley of the various theft charges under A.R.S. §13-1802[36], the State must prove one of the following:

1. That he controlled property (money) belonging to donors with the intent to deprive them of it (A.R.S. §13-1802(A)(1)); or
2. That he converted to his own personal use money that was donated to him for the limited, authorized purpose of campaigning (A.R.S. §13-1802(A)(2)); or
3. That he obtained money from donors by means of materially misrepresenting his true purpose with the intent to deprive them of their money (A.R.S. §13-1802(A)(3)).

Based on the evidence, it is clear that Stapley converted to his own personal use thousands of dollars that were ***given*** to him for the arguably limited authorized purpose of running for Second Vice-President of NACo in violation of A.R.S. §13-1802(A)(2). If the State can show Stapley solicited donations from individuals and companies for an expressed and limited purpose ("for my national campaign and delegate communication efforts which will start in January") and donors could restrict use of such gifts, there would be substantial evidence to prove multiple felony and misdemeanor theft charges.[37]

Unfortunately, our analysis must also take into account the nature of the donations. The money given to Stapley was not for payment of any services he performed for the donors. The donations were not loans to Stapley which would have to be repaid. They were essentially *gifts* to Stapley. The fact that some contributed money for what they thought would be used for a national campaign does not change the analysis. Ostensibly, Stapley was to use the donations to campaign for a position to a private non-profit organization, but the campaign was not governed by any campaign laws, including Arizona's campaign finance laws. There was no mechanism in place to account for how the money could be spent. The conclusion is that the donations were outright unconditional gifts to Stapley to do with whatever he pleased, which is what he did. The donor did not hold any further control or authority over the gift after it was given. Although Stapley's personal use of the money was immoral and unbecoming of an elected Arizona public official, it was not illegal. <u>There is no basis for the theft charges as all potential victims (donors) lacked any authority to limit Stapley's use of their donation.</u>

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[36] Pursuant to A.R.S. §13-1802 as applicable in 2004 and 2005: "(A) A person commits theft if, without lawful authority, the person knowingly: 1) Controls property of another with the intent to deprive the other person of such property; or 2) Converts for an unauthorized term or use services or property of another entrusted to the defendant or placed in the defendant's possession for a limited, authorized term or use; or 3) Obtains services or property of another by means of any material misrepresentation with intent to deprive the other person of such property or services....(E) Theft of property or services with a value of twenty-five thousand dollars or more is a class 2 felony. Theft of property or services with a value of three thousand dollars or more but less than twenty-five thousand dollars is a class 3 felony. Theft of property or services with a value of two thousand dollars but less than three thousand dollars is a class 4 felony. Theft of property or services with a value of one thousand dollars or more but less than two thousand dollars is a class 5 felony. Theft of property or services with a value of two hundred fifty dollars or more but less than one thousand dollars is a class 6 felony. Theft of any property or services valued at less than two hundred fifty dollars is a class 1 misdemeanor."

[37] Prosecution under this theory would be easiest and most expeditious by charging Stapley for a single count of Theft, as a class 2 felony, by aggregating the amounts pursuant to A.R.S. §13-1801(B).

C. Fling of Financial Disclosures Wherein NACo Gifts Are Not Disclosed

As an elected local official, Stapley believed from 2004 to 2008 that he was required to file annual verified Financial Disclosure Statements pursuant to A.R.S. §38-542, *et seq.* Pursuant to this belief, Stapley filed his annual Verified Financial Disclosure Statements. The disclosure form used during the relevant time period required the public official to disclose, inter alia, sources of income, business interests, business creditors and **gifts**. As discussed above, from 2004-2008 Stapley received over $139,000 in donations for his campaign for Second Vice- President of NACo. Nearly $83,000 of that money was used for his and his family's personal use. Since these donations do not fall under the reporting requirements of Arizona's campaign finance laws embodied in A.R.S. §16-901, *et seq.*, Stapley was not required to list them on his CFRs.

However, since this was money that was given to Stapley it must be classified as a gift, and if the donation was valued over $500, these donations should have been included in any *truthful* Financial Disclosure Statement. A review of Stapley's Financial Disclosure Statements for the relevant time period shows that Stapley did not report *any* gifts.[38] Even though the Arizona Court of Appeals in State v. Stapley 1 CA-CR 09-0682, upheld the Superior Court decision that Stapley had no legal obligation to complete the Financial Disclosure form in relation to Stapley I, the fact that Stapley did falsely complete a notarized document for 2004, 2005, 2006 and 2008 cannot be ignored. Importantly, even though the Court of Appeals may have determined he had no legal obligation to submit the notarized document, Stapley cannot be given a free pass for his dishonest answers given under the penalty of perjury.

1. Gifts Received from October 22, 2004, to December 31, 2004

From October 22, 2004, to December 31, 2004, Stapley received monetary gifts valued over $500 from the following donors that should have been reported on his Financial Disclosure Statement filed January 2005, for the reporting period 2004.

1. Goodman Schwartz, LLC	5,000.00
2. Farnsworth Companies	10,000.00
3. Cardon Hiatt, Investments, LLC	3,333.34
4. Cardon Bowden, Investments, LLC	3,333.34
5. Pinnacle West Corp.	1,000.00
6. Sienna Estates, LLC	5,000.00

2. Gifts Received from January 1, 2005, to December 31, 2005

[38] On April 20, 2011, Stapley filed a document with the Clerk of the MCBS entitled "SUPPLEMENTS AND AMENDMENTS TO FINANCIAL DISCLOSURE STATEMENTS." This filing lists the names of contributors to Stapley's NACo campaign for the years 2004-2008.

From January 1, 2005, to December 31, 2005, Stapley received monetary gifts valued over $500 from the following donors that should have been reported on his Financial Disclosure Statement filed January 2006, for the reporting period 2005.

1. Home Builders Association of Central AZ.	25,000.00
2. Stardust Management, Inc.	5,000.00
3. Cox Communications	5,000.00
4. Douglas Ranch El Dorado, LLC	10,000.00
5. Bill Levine	10,000.00
6. Horn & Associates, Inc.	1,500.00
7. De Rito Partners, Inc	5,000.00
8. Arizona Rock Products Association	5,000.00
9. Edward J. Robson	10,000.00
10. Goodman Schwartz, LLC	5,000.00
11. MR Tanner Construction	5,000.00
12. Austin Copelin & Reyes	1,000.00
13. Westcor/Meridian, LLC	5,000.00
14. AZ. Counties Research Foundation	1,000.00
15. AZ. Counties Research Foundation	1,258.78
16. Millett Family Properties, LTD	2,000.00

3. Gifts Received from January 1, 2008, to December 31, 2008

From January 1, 2008, to December 31, 2008, Stapley received monetary gifts from the following donors that should have been reported on his Financial Disclosure Statement filed January 2009, for the reporting period 2008.

1. John D. Davenport	2,000.00
2. Wolf Block Public Strategies, LLC	3,000.00

D. Review of Uncharged Offenses of False Swearing as Related to NACo Gifts

In order to prevail on the charge of False Swearing under A.R.S. §13-2703, it must be shown that Stapley signed the Financial Disclosure Statements in the presence of a notary wherein he attested to the truth of what was stated, yet at the time he believed it to be false. False swearing requires that the person *knowingly*[39] make a false sworn statement. If the statement is done *negligently* or *recklessly,* it is insufficient to meet the *mens rea* requirement of the statute. The Financial Disclosure Statements that Stapley submitted fits squarely within the definition of a sworn statement. The more difficult fact to

[39] *See* footnote 24.

prove is Stapley's state of mind at the time. To that end, it is important to examine Stapley's motive not to disclose these gifts.[40]

1. Potential Motive: Hide Use of NACo Campaign Donations for Non-NACo Related Purpose

It is absolutely inconceivable that Stapley would think that he had no duty to disclose tens of thousands of dollars worth of donations as gifts on his Financial Disclosure Statements. As discussed above, Stapley was given over $139,000 to spend how he pleased. Even if we take Stapley at his word that he spent all of the donations on legitimate campaign expenses, it is still money that was given (gifted) to him. How he spent the money does not matter for reporting purposes; if he completed the form honestly he had to report the names of those people or entities who gave him more than $500. Simply, whether or not he used the donations for personal or NACo purpose this was money gifted to him and an honest disclosure and candid report to his constituents would have included these donations. Had Stapley used all the money to fund his NACo campaign there would have been no reason for Stapley *not* to disclose the names of the donors. But he had a hidden purpose: Stapley did not disclose the names of the donors because he knew that he was not spending all the money for legitimate NACo campaign purposes as he led donors to believe. Arguably, Stapley understood that if he identified the names of the donors on his Financial Disclosure Statements he would risk discovery of his mischievous conduct; that someone might start asking questions about who was donating and in what amounts, questions that ultimately would lead to the discovery of his ill-gotten personal gains. [41]

2. Potential Motive: End Run Around Campaign Finance Laws

Arguably, Stapley had a secondary motive and that was to hide the identity of those from whom he received these gifts. Stapley received thousands of dollars from corporations and individuals who could not ordinarily donate such sums to Stapley's candidacy to the MCBS under Arizona's campaign finance laws. Yet with the NACo candidacy, Stapley could, and did, accept exorbitant amounts of money from a host of donors. By donating to the NACo election these donors could potentially do an end run around Arizona law to achieve what the law was intended to prevent: access and influence over elected officials.[42] Stapley understood that public disclosure of such generous donations would reveal his personal use of such gifts from a host of donors and potentially lead to questions of bribery, conflict of interest and/or a general distaste from his constituents for such behavior. As the Arizona Republic reported, from 2005-2009 Stapley voted favorably on county contracts and zoning changes involving five

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[40] We recognize that with the recent Fiesta Bowl gift reporting scandal, pending investigation and commentary there are some parallels to be drawn to Stapley's conduct. While making no comment on the Fiesta Bowl matter itself, the pure depth, duration and nature of Stapley's "gift" related conduct is significantly of a more sinister nature than the reported conduct of the elected officials involved in the Fiesta Bowl matter.

[41] Stapley's April 2011 Amended Financial Disclosure filing is again only a subsequent remedial measure that does not negate his criminal intent. We believe Stapley would never have disclosed these gifts, but for GCAO's investigation and notice to him and his counsel his failure to disclose these items was a crime.

[42] The GCAO is making no determination as to actual motive of donors.

donors who gave him a combined total of $35,000 for his NACo election. (*See* June 20, 2010 azcentral article: *Don Stapley: Investigation, donors and votes*).[43]

IV. Conclusion: Summary of All Potential Charges

Based on a full review of all materials provided by the MCAO and supplemental investigation by the MCSO at our request, there is sufficient evidence to charge Stapley with seven[44] separate counts of False Swearing, each a class 6 felony as listed below:

Count 1:

On October 21, 2004, Stapley, under penalty of perjury, signed and filed the *Stapley for Supervisor* Pre-General Election Report for the period September 28, 2004 through October 13, 2004, believing it to be false. Specifically, Stapley did not include as an obvious expenditure of $100.00 that was used to open his own private non-political campaign account entitled Stapley for NACo.

Count 2:

On March 29, 2005, Stapley, under penalty of perjury, signed the *Stapley for Supervisor* January 31st Report for the period of November 23, 2004, to December 31, 2005, which was filed April 4, 2005, believing it to be false. Specifically, Stapley falsely reported that on March 23, 2005, he transferred $8,471.42 from his *Stapley for Supervisor* account to *Stapley '08* account when, in fact, it was transferred to his Stapley for NACo account on January 28, 2005, and in the amount of $9,115.67.

Count 3:

On March 29, 2005, Stapley, under penalty of perjury, signed the *Stapley '08* January 31st Report for the period of November 23, 2004, to December 31, 2005, which was filed January 6, 2006, believing it to be false. Specifically, Stapley listed a contribution from *Stapley for Supervisor* in the amount of $8,471.42 that was received on March 23, 2005, when, in fact, it was received from Stapley for NACo on April 5, 2005.

Count 4:

On March 29, 2005, Stapley, under penalty of perjury, signed the *Stapley '08* January 31st Report for the period of November 23, 2004, to December 31, 2005, which was filed January 6, 2006, believing it to be false. Specifically, Stapley reported no expenditures,

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[43] To review all potential claims we considered and reviewed all known potential conflicts of interest arising from Stapley's actions as a member of MCBS in relation to NACo donors. We were unable to determine any conflict of interest violation provable beyond a reasonable doubt.

[44] For counts 5, 6 and 7 the State could charge each separate instance that a gift over $500 was not listed. Thus, Stapley could be held accountable for a total of twenty-four (24) counts in an Arizona court of law. However, for simplicity and jury appeal, the grouping of all such offenses into one count per each Financial Disclosure Statement has higher likelihood of successful prosecution and removes the appearance of over-charging.

when in fact, on December 27, 2005, Stapley made an on-line transfer of $2,117.34 from the *Stapley'08* account to his personal company's (API) account to make available funds for his personal company's (API) account to pay a credit card bill in the same exact amount.

Count 5:

On January 11, 2005, Stapley made a false sworn statement believing it be false, to wit: in the presence of a notary Stapley signed his Financial Disclosure Statement for the 2004 reporting year that failed to list the names of donors who gave him a gift with a value over $500.

Count 6:

On December 29, 2005, Stapley made a false sworn statement believing it be false, to wit: in the presence of a notary Stapley signed his Financial Disclosure Statement for the 2005 reporting year that failed to list the names of donors who gave him a gift with a value over $500.

Count 7:

On January 30, 2009, Stapley made a false sworn statement believing it be false, to wit: in the presence of a notary Stapley signed his Financial Disclosure Statement for the 2008 reporting year that failed to list the names of donors who gave him a gift with a value over $500.

V. Public Policy Implications of Pursuing Prosecution of Stapley based on Investigation by the MCSO and Prior Prosecution by the MCAO

The convoluted history of the prosecution of Stapley as embodied in the Stapley I and Stapley II cases is a mosaic of questionable investigative techniques and dishonorable conduct of those who were entrusted to protect the public. We cannot avoid the fact there have been significant sustained and pending findings of unprofessional and unethical conduct by major players in the prior MCAO prosecution and MCSO investigation. Notably, we must consider the conclusions and allegations against former MCAO Deputy Lisa Aubuchon (Aubuchon), former Maricopa County Attorney Andrew Thomas (Thomas) and former MCSO Chief Deputy David Hendershott (Hendershott). The facts and history of Stapley I and Stapley II have been thoroughly reviewed and considered through multiple investigations by the Arizona State Bar, the MCAO, the Maricopa County Employee Merit System Commission,[45] the Pinal County Sheriff's Office at the request of Sheriff Arpaio,[46] and the media. The time line attached to this decline letter was prepared from these available resources to assist us in reviewing the context of

[45] Recent appeal filed in Maricopa County Superior Court by Aubuchon may lead to further review by the court.
[46] Referred to herein as the Babeu Internal Investigation.

the prior MCSO investigation and the prior MCAO prosecution of Stapley so that we could determine how best to serve justice in this matter.

A. Role of the Prosecutor

In our system of justice the role of the prosecutor is critical in ensuring the rights of the accused are protected for the ultimate purpose of seeing that justice is served. The prosecutor acts not simply as an advocate for the government, but as a minister of justice.[47] To that end we must answer the ultimate question in this matter - will justice be served by continued prosecution of Stapley?

As prosecutors, it is clear that we have broad discretion and may decide to proceed with criminal charges or decline prosecution for many valid reasons.[48] However, while prosecutorial discretion is broad there are certain concepts set in place by the courts, ethical rules, professional standards, and office policy/philosophy that guide our decision to pursue criminal charges. The various court created concepts are well-reasoned prophylactic rules designed to protect the innocent and promote our American system of justice. If we were to proceed with prosecution of Stapley, we believe it is likely Stapley would argue these various court created prophylactic rules mandate court dismissal even though the prosecution is no longer in the hands of the MCAO or the MCSO. Significantly, even though the matter was transferred to the GCAO by Thomas as a conflict matter, we essentially stand in the shoes of the MCAO for the purpose of prosecution. Therefore, even if the GCAO were to prosecute this matter any taint of the earlier government conduct would still attach to our case. Accordingly, it is reasonable to assume that if we indicted Stapley for the offenses we believe are viable Stapley would raise defensive arguments that, when examined with the egregious facts of this case, could justify dismissal by the court.

In March 2010, Stapley, had a viable basis for motions alleging prosecutorial misconduct, prosecutorial vindictiveness and/or selective prosecution by the MCAO.[49] Over a year later and after the extensive investigations conducted by uninterested third parties, Stapley's arguments for dismissal have only gained factual validity. We believe we would be hard-pressed to convince a judge that any re-

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[47] Maretick v. Jarrett, 204 Ariz. 194, 62 P. 3d 170 (2003). (*See also* Comment one to the American Bar Association Rules of Professional Conduct, Rule 3.8.) The American Bar Association Rules of Professional Conduct, Rule 8.4 states that "it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice[.]"

[48] *See, e.g.*, Wayte v. United States, 470 U.S. 598, 607 (1985); Jones v. Sterling, 210 Ariz. 308, pars. 30-31, 110 P.3d 1271 (2005).

[49] It is important to note that the MCAO chose to indict Stapley and failed to seek the investigation or prosecution of his wife, Kathleen Stapley, as a co-conspirator or co-defendant for the fraudulent schemes and artifices allegations (original Counts 1 and 2) or the NACo theft allegations (original Counts 9 – 27). As Mrs. Stapley was a party to the alleged scheme to defraud the lending institutions, through signing of the alleged fraudulent Personal Financial Statements and obtaining of the additional indebtedness, a reasonable prosecutor would have sought to prosecute her in addition to the primary target, her husband. Additionally, Mrs. Stapley and other Stapley family members clearly benefitted from the NACo donations when Stapley converted these for the personal benefit of himself and his family. It is telling that Mrs. Stapley was never considered as a suspect or even a wrong-doer in the entire investigation and prosecution of Stapley. This tunnel-vision like focus on Stapley, to the exclusion of others, further supports the conclusion that the investigation and prosecution in this matter was improperly motivated.

indictment by the GCAO removes the taint of the earlier prosecutors' conduct.[50] We cannot help but concede that the MCAO's conduct could arguably form the basis for a successful motion to dismiss under the various legal arguments referenced.[51] Importantly, the prior prosecutors (Aubuchon and Thomas) in this matter abdicated their roles as a ministers of justice and their conduct was so egregious that we are unwilling to even attempt to justify it.[52]

B. General Considerations

It serves no purpose to discuss in depth the breadth of information considered in making the determination that justice can only be served by declining to prosecute Stapley. However, we are mindful this decision allows a suspect whom we believe to be guilty to go unprosecuted. Therefore, the following is a non-exclusive list of general considerations with the associated reasonable conclusions we relied upon to reach our decision:

1) What brought the allegations to the attention of the MCAO?
    a. Internet Research by the MCAO and/or the MCSO employees with no independent reporting party alleging a crime was committed.
    b. The timing of the investigation and charges is simultaneous with political discord amongst the MCAO/MCSO and the MCBS.

2) Was there any improper motivation in the initiation of the investigation?
    a. Judge Leonardo's decision in State v. Wilcox finds there was improper motivation (to retaliate against members of MCBS and to gain political advantage) and all information reviewed supports this conclusion.
    b. The civil litigation starting in 2006 shows discord and growing tensions.
    c. Based on MCSO Departmental Reports, State Bar Investigation and the Babeu Internal Investigation it is safe to assume that aspects of the investigation on Stapley II began as early as January 2007 at the hands of Aubuchon.
    d. The arrest of Stapley on September 21, 2009, against conflict counsel's advice and three days after Stapley I was dismissed shows vindictive intent by MCSO (Hendershott). Aubuchon's conduct close in time to this arrest raises the specter of her involvement in the planning of the arrest.

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[50] The United States Supreme Court has specifically rejected the argument that reindictment by a different prosecutor can overcome the presumption of vindictiveness. Thigpen v. Roberts, 468 U.S. 27, 104 S.Ct. 2916, 82 L.Ed.2d 23 (1984). The Court has determined that even when different prosecutors are involved "to the extent the presumption reflects institutional pressure that might subconsciously motivate a vindictive prosecutorial response to a defendant's exercise of his right to obtain a retrial of a decided question, it does not hinge on the continued involvement of a particular individual." Id at 31, 104 S.Ct. 2916, 2919.(alterations and citations omitted).

[51] It is assumed that Stapley's capable defense team would posit legal arguments justifying dismissal under current case law as well as extension of concepts for prosecutorial misconduct, prosecutorial vindictiveness, and selective prosecution. There are viable arguments as to why these concepts should not apply to the facts of Stapley II, however, whether or not these arguments would be successful is secondary to whether or not we believe the prosecutors' conduct should even be defended.

[52] Aubuchon's and Thomas' conduct in the related matters of Mary Rose Wilcox and Judge Donahoe was also considered in reaching this conclusion.

e. There is evidence that Aubuchon continued to advise MCSO even when cases were under the direction and control of conflict counsel, Yavapai County Attorney Sheila Polk.
f. Thomas reasonably knew or should have known he had a conflict in the handling of Stapley II because of the Albrecht letter. Ignoring this conflict, Thomas still took the cases back from Yavapai County.
g. Aubuchon obtained documents by November 2009 subpoenas at a time she knew or should have known the MCAO had a conflict in prosecuting the matter .
h. Stapley was a defendant in the 2009 RICO complaint filed prior to the December 7, 2009 Indictment in Stapley II.
i. The MCBS cut $6 million from the MCAO budget in December 2009.

3) How serious are the charges we believe are viable against Stapley?
   a. The counts we believe we can prove do not involve an actual victim and there is no injury to the public, even though the counts do involve deception of the public.
   b. While there is no loss of public funds there is a question of trust of Stapley as a public official.
   c. These are only class 6 felony offenses, minor crimes in the greater scheme of our criminal code.
   d. Stapley took remedial action of filing amended CFRs after being put on notice as to concerns with his prior filings.
   e. Stapley took remedial action by filing an Amended Financial Disclosure Statement listing the NACo gifts after being put on notice that we believe the NACo donations were gifts.
   f. If the failure to disclose the NACo donations as gifts had come to us cold and without prior investigation, after determination there was no conflict of interest – it is likely we would have considered resolution by civil fine, if any, or a discussion with the accused as to filing corrective statements.
   g. Of the counts involving the NACo donations, no person or entity identified previously by the MCAO or the MCSO as a victim of theft has contacted or actively sought redress or compensation with the GCAO.

4) Is this suspect being treated differently because of who he is or what his position is?
   a. In light of Judge Leonardo's ruling, we are locked into what we also agree is a legitimate finding that Stapley was politically targeted.
   b. Up until the time Stapley I was charged there were no cases in Arizona we could discern where an investigation or prosecution for similar crimes occurred. The only similar cases are State v. Wilcox and potentially the Fiesta Bowl matter.
   c. It seems unlikely that any other elected official in Maricopa County has had their personal life subjected to this level of scrutiny.

5) Are there overriding concerns with how the investigation was conducted or the conduct of those involved?
   a. Aubuchon played an integral role in the investigation and prosecution of Stapley II outside the usual bounds of a prosecutor. According to MCSO investigators, she in some instances was directing the investigation and serving as a *de facto* Hendershott.

b. Aubuchon directed MCSO detectives to use "creative writing" in preparation of a search warrant for the Board of Supervisors' Office.
c. Aubuchon's, Thomas' and Hendershott's apparent intent to try Stapley in the media and encouraged media coverage at multiple stages of all investigations.
d. Aubuchon directed the MCSO investigators to use a date for departmental reports in an attempt to evade the Statute of Limitations in Stapley I.
e. On or about November 12, 2009, Aubuchon issued over twenty (20) subpoenas fishing into Stapley transactions to investigate potentially illegal actions from 2005 forward. Many of these subpoenas ostensibly were refused by Polk prior to returning the case to the MCAO. But for some of the significant information found through these subpoenas many of the conclusions as to any wrong-doing would not have been made as to Stapley II by MCAO, as well as our decision as to viable charges.
f. MCSO looked at the mail received at Stapley's personal residence for a month which is a highly unusual practice. Nothing of evidentiary value was located.
g. Stapley was placed under surveillance at his home for the investigation of crimes that logically would not require such investigative techniques. This, among other unusual law enforcement methods, led us to conclude the intended purpose was to harass or intimidate him.
h. On date of arrest for Stapley II, Stapley was followed by MCSO Deputies from his home to the Maricopa County Parking Garage. Even though it was the practice of the MCSO to issue summons in white collar crime cases, Stapley was publically arrested in full view of video surveillance cameras at the Maricopa County facility. Arguably, this was done to strategically arrest Stapley with public cameras and footage available as the MCSO investigators subsequently requested the footage from county officials.
i. After arrest and being brought before a Judge, no prosecutor came forward to file charges. However, Aubuchon was at the MCSO office that day indicating to MCSO investigators that the MCAO intended to take cases back from Yavapai County.

6) Are the charges previously presented in the December 7, 2009 Indictment appropriate?
   a. While we concede reasonable prosecutors may differ, the GCAO's conclusion is that the charges pursued previously by the MCAO and the MCSO are not viable, were overcharged and presented in such a way to publicly create an impression of significant wrong-doing by Stapley.

VI. Conclusion

Thus, based on our review of all materials relevant to the Stapley investigation and prosecution we believe Stapley committed seven (7) felony offenses for which we have sufficient evidence to go forward with prosecution. However, the overall analysis of this case cannot be devoid of context or considered only within the sterile vacuum provided by the facts referenced within the departmental reports, financial statements, or other public records. Due to the sordid tapestry of how this case arose, was investigated by the MCSO under Hendershott's direction and prosecuted by the MCAO under the Thomas Administration, any subsequent prosecution of Stapley would be our ratification of government misconduct on the part of the MCAO and the MCSO. Such government misconduct is indefensible. The alleged ethical violations, the potential judicial finding

of prosecutorial misconduct by the MCAO, and the improper law enforcement conduct of the MCSO (as embodied by Hendershott) dictate that justice mandates prosecution of Stapley cannot proceed.[53]

As a prosecutor, I am not simply an advocate for the government, but I am a minister of justice. The nature of the United States Justice System is such that sometimes the guilty are permitted to go free because of the way in which an investigation or prosecution was conducted. The way in which the investigation and prosecution of Stapley progressed was fundamentally wrong and to pursue further criminal actions against Stapley would be a miscarriage of justice. The vast record is littered with behavior so egregious that a reasonable person's sense of fairness, honesty and integrity would be offended. The GCAO is left with no choice but to decline this matter.

Sincerely,

Daisy Flores
Gila County Attorney

cc: Sheriff Joe Arpaio

[53] The GCAO will retain all documents provided to us or obtained in our investigation. By copy herein the MCSO is notified that all evidence obtained and held solely for the purpose of the criminal investigation may be released to the rightful owner.

ATTACHMENT

STAPLEY II

TIME LINE

TIME LINE OF SIGNIFICANT EVENTS RELATED TO STAPLEY II INVESTIGATION

- On September 23, 2004, the Law Firm of Gallagher and Kennedy sent a letter to Donald T. Stapley, Jr. (Stapley) regarding whether Arizona Campaign Finance laws apply to contributions to Stapley's candidacy for Second Vice-President of the National Association of Counties (NACo).[1] The firm advised Stapley that the reporting requirements of the Arizona Finance Act were inapplicable to Stapley's campaign for NACo.[2]

- On November 2, 2004, Andrew Thomas (Thomas) was elected Maricopa County Attorney.

- On December 9, 2004, Stapley sent letters soliciting donations to raise $150,000 for his campaign for NACo. [3]

- Beginning no later than early 2006, Thomas had disputes with the Maricopa County Board of Supervisors (MCBS).[4] The MCBS believed that Thomas was making appointments of lawyers outside the Maricopa County Attorney's Office (MCAO) to represent the county "for political reasons" and "based upon who was favorable to him, not necessarily upon who was best qualified to represent the county."[5] In a series of letters Thomas wrote to Stapley in March and May 2006, Thomas warned that "he would be obligated to commence litigation against the Board should the Board move forward to pay outside counsel."[6]

- On June 14, 2006, Thomas announced that he had filed a lawsuit against the MCBS because the MCBS voted to limit the power of the MCAO and claim the right to determine which attorneys within the MCAO will provide legal representation in civil cases. Thomas goes on to state, "It bears noting that these recent lawsuits have occurred during, and largely because of, the unusual chairmanship of Supervisor Don Stapley. While respecting the attorney-client relationship I hold with Mr. Stapley and other members of the board, I would be remiss if I did not help the people of Maricopa County understand why the board has attracted so many costly lawsuits in such a brief period of time"[7]

- The issue was resolved by a Memorandum of Understanding (MOU) in which "Thomas agreed that he would dismiss the action and that he and the MCBS would follow a system with regard to appointment of outside counsel. The MOU expired by its terms on

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[1] Gallagher and Kennedy opinion letter dated September 23, 2004.
[2] *Id.*
[3] Stapley's NACo Solicitation Letter dated December 9, 2004.
[4] Arizona State Bar Complaint (Bar Complaint) dated February 2, 2011, p. 2.
[5] *Id.* at p. 4.
[6] *Id.* at pgs. 5-8
[7] Thomas Statement from June 14, 2006.

December 1, 2008."[8] The agreement also references that no bar complaint will be pursued against Thomas for his conduct associated with the matter.[9]

- In 2007, Thomas and Sheriff Joe Arpaio (Arpaio) created the Maricopa Anti-Corruption Enforcement (MACE) Unit with the goal of fighting political corruption and white collar crime.[10]

- Also, in 2007, MCAO Deputy Lisa Aubuchon (Aubuchon) was assigned to be the primary attorney in the MACE Unit. In addition to her office in the County Attorney's Office Suite at 301 W. Jefferson, she was also provided an office in the Wells Fargo Building on Washington Street.[11]

- It is unclear exactly how the investigation into Stapley's properties and his affiliates began. However, there is evidence that the investigation of Stapley began as early as January 2007, when "the joint task force between Thomas' office and the Sheriff's Office began to look into Stapley's business dealings and his financial disclosures on their own initiative." [12]

- On January 23, 2007, MCSO Sgt. Luth was told by Chief Hendershott to begin investigating Stapley, but to keep it confidential.[13] Aubuchon and/or another MCAO Deputy, Mark Goldman, also began investigating Stapley's financial disclosures in January 2007, on the internet.[14]

- By May 14, 2008, Aubuchon handed MCSO deputies documents printed from the internet in January/February 2007. [15] These handouts included a seventy-nine (79) count draft indictment containing allegations of misconduct by Stapley beginning in 1994.[16] In response to tatute of Limitations issues raised by MCSO deputies, Aubuchon instructed MCSO Lt. Travis Anglin to use the date of May 14, 2008, as the date for the MCSO report.[17] The misdemeanor charges that would have been barred by the Statute of Limitations were a part of Stapley I. [18]

- Both Thomas and Stapley were re-elected on November 4, 2008.

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[8] Bar Complaint p.10.
[9] *Id.*
[10] MCSO Deputy Chief Frank Munnell Memo (Munnell Memo) dated August 17, 2010, p. 5.
[11] Aubuchon v. MCAO Findings of Fact dated March 16, 2011, p. 3.
[12] Bar Complaint p. 14 and Babeu Internal Investigation pgs. 1018 – 1021.
[13] Bar Complaint at p. 14 and p. 25 and Babeu Internal Investigation pgs. 1018 – 1021.
[14] *Id.*
[15] *Id.* at p. 26 and Babeu Internal Investigation pgs. 1018 – 1021.
[16] Bar complaint at p. 26.
[17] *Id.* at p. 27 and Babeu Internal Investigation pgs. 1018 – 1021.
[18] *Id.* at p. 29. On May 18, 2011, significant information regarding the MCAO and the MCSO investigation of Stapley was released to the media in the form of the Arizona Attorney General's Office AGI/LF # P 002-201-000389 report. The GCAO has only reviewed this in a cursory manner and has not relied on it due to its late public disclosure.

- The first case against Stapley (Stapley I) was presented to the Grand Jury on November 20, 2008, and Stapley was indicted on 118 counts including Perjury, Forgery, False Swearing and Filing False/Incomplete Financial Disclosure Statements. This was the "first time in Arizona history that county supervisor's financial disclosures were the subject of criminal charges."[19]

- On December 2, 2008, the MCAO provided a news release which outlined some of the facts that were the basis for the 118 Count Indictment against Stapley.[20]

- Between December 5, 2008, and December 23, 2008, the MCBS voted to effectively cut the MCAO's civil budget by six million dollars.

- In early 2009, Thomas and Arpaio sent a letter to the Secret Service after Stapley was appointed by U.S. Vice-President Joe Biden to oversee implementation of the Economic Recovery Act. It notified the Secret Service that Stapley was under indictment and investigation. It encouraged the Secret Service to take any security or administrative measures they deemed appropriate.

- On February 12, 2009, MCSO Sgt. J. Gentry (Gentry) directed Deputy P. Roshetko (Roshetko) to contact individuals at the State Land Board main office to determine if anyone had any knowledge of any dealings Stapley may have had with the realignment of the Loop 202 Freeway (San Tan Freeway). Gentry told Roshetko that Aubuchon informed him that the San Tan Freeway was realigned to go through Stapley's property so that Stapley could receive kickbacks. Gentry told Roshetko that Aubuchon "refused to tell him where she had heard this information."[21] Numerous individuals were interviewed and there was no evidence of any kickbacks to Stapley.

- On February 26, 2009, the MCSO searched Stapley's office in connection with another investigation of Stapley.

- In March 2009, Chief Assistant County Attorney Sally Wells (Wells) called the U.S. Attorney's Office and spoke to John Tuchi about taking the cases.[22] Mr. Tuchi, the head of the public corruption unit, stated that he lacked the resources to take the cases.[23] The Attorney General's Office declined to take the cases as well.[24]

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[19] This information was taken directly from page 15 of the Bar Complaint. GCAO was unable to independently verify this information though we have no reason to believe it is inaccurate, it just seems to be overbroad without an office by office inquiry.

[20] MCAO News Release dated December 2, 2008.

[21] *See* MCSO DR#: 08-226607 (Supp) dated February 12, 2009.

[22] February 16, 2010 Hearing on Defendant's Motion to Dismiss Indictment and Disqualify County Attorney in State v. Wilcox (Wilcox 2-16-10 Hrg) Transcript p. 151.

[23] *Id.*

[24] *Id.* at 152.

- On March 10, 2009, the U.S. Department of Justice (DOJ) sent Arpaio a letter regarding the initiation of an investigation into the actions and practices of the MCSO.[25]

- The MCBS received a similar letter dated March 18, 2009, from the DOJ regarding a DOJ investigation of the MCBS.[26]

- On Monday, March 23, 2009, a meeting was arranged at the Wells Fargo Building on the 18th floor.[27] Present at the meeting with Aubuchon were MCSO Deputy Chief Patrol Bureau Commander Frank Munnell (Munnell), Lt. Rich Burden, Sgt. Jeff Gentry, Sgt. Rich Johnson, Sgt, Brandon Luth and Dr. Beverly Owens.[28] Aubuchon told the MCSO investigators to use "creative writing" to author their search warrants.[29] During the meeting Aubuchon showed the previously written search warrant used for the Stapley case as an example for them to follow.[30] According to Munnell, during the meeting Aubuchon stated that if they could not get charges on Stapley, that he would be tried in the media.[31]

- On April 2, 2009, Yavapai County Attorney Sheila Polk (Polk) received a phone call from Thomas requesting that Polk handle MCAO's ongoing criminal investigations regarding the MCBS.[32]

- On April 6, 2009, Thomas issued a News Release captioned, "County Attorney's Office Compromise to End Infighting, Sends Stapley case, Investigations to Yavapai County; Proposes Mediation."[33] The Release stated, "Thomas sent through counsel an open letter to Max Wilson, Chairman of the Board of Supervisors, proposing that the County Attorney's Office and Board of Supervisors enter into mediation to resolve civil litigation between them."[34] While not conceding that there was a conflict of interest in pursuing the prosecution of elected county officials, Thomas cited that this was a "gesture of goodwill to resolve these disputes."[35]

- Polk's principal contact at MCSO was Chief Deputy Hendershott (Hendershott).[36] Hendershott contacted Polk almost immediately and wanted her to hire an independent prosecutor, which Polk did not deem appropriate.[37] However, Mel Bowers (Bowers) was hired as a special prosecutor to assist with the cases.[38] Early on Hendershott requested

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[25] Letter from DOJ dated March 10, 2009.
[26] MCAO Letter to DOJ dated August 11, 2009.
[27] Munnell Memo p. 32 and Babeu Internal Investigation pgs. 612- 622.
[28] *Id.*
[29] *Id.*
[30] *Id.* at p. 33.
[31] *Id.*
[32] Wilcox 2-16-10 Hrg p. 12.
[33] MCAO News Release dated April 6, 2009.
[34] *Id.*
[35] *Id.*
[36] Wilcox 2-16-10 Hrg p. 25.
[37] *Id.* at p. 26.
[38] *Id.*

numerous subpoenas.[39] It was the opinion of Polk that MCSO was attempting to engage in a fishing expedition by using grand jury subpoenas.[40]

- In Stapley I, while a challenge to the MCAO's ability to act as counsel for the State was pending, a bar "complaint" alleging conflict of interest against Thomas was filed.[41]

- On May 1, 2009, the MCSO submitted a mail cover request to the United States Postal Service as it related to an "ongoing Fraudulent Schemes investigation involving Donald Stapley."[42] The request was approved and the MCSO received copies of the covers of the unopened mail received at Stapley's home address for thirty days. No items of evidentiary value were obtained as a result of this "investigative effort."[43]

- On May 4, 2009, independent bar counsel, retired Superior Court Judge Rebecca Albrecht, notified Thomas that she was closing the Bar File in relation to allegations of conflict of interest. However, Judge Albrecht noted while there was a clear issue of conflict of interest, Thomas "obviously recognized those conflicts" and transferred the cases to Polk so that the was no need to pursue a discipline matter against him.[44]

- On May 8, 2009, MCSO Captain James Miller wrote a letter to Yavapai County Chief Deputy McGrane (McGrane) complementing Yavapai Deputy County Attorney Bill Hughes (Hughes).[45]

- On May 21, 2009, NACo's website editor, Beverly Schlotterbeck sent an e-mail describing the need for NACo officers to campaign and that progression is not automatic.[46]

- On June 10, 2009, Judge Kenneth Fields found in Stapley I, that although there was an attorney client relationship created between Stapley and the MCAO, it was unreasonable for Stapley to expect that the MCAO would be his attorney on all matters.[47]

- On June 16, 2009, Polk, Bowers, McGrane, Hughes, MCSO Detectives Miller, Luth and Johnson met in Yavapai County to discuss the cases which involved the MCBS.[48] During the meeting, they agreed that Grand Jury Subpoenas should issue for the credit

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[39] *Id.* at p. 28.
[40] *Id.* at p. 29.
[41] Bar Complaint p. 31. The use of the word complaint is somewhat misleading as no formal "complaint" was filed within the discipline system. The State Bar opened a file and assigned State Bar #08-2289 to the matter. It was then sent to former Judge Albrecht. *See also* Separate Answer of Andrew P. Thomas to Complaint filed March 16, 2011.
[42] MCSO Supplement DR#08-226607 dated September 8, 2009, by Detective Tennyson.
[43] *Id.*
[44] Albrecht Letter to Thomas dated May 4, 2009.
[45] Letter Miller to McGrane dated May 8, 2009.
[46] Schlotterbeck NACo e-mail dated May 21, 2009.
[47] State v. Stapley CR2008-009242-001 Minute Entry of June 10, 2009.
[48] Polk Notes on GJ Subpoenas

card records for two Stapley banking accounts, the Stapley for NACo account and Elect Don Stapley Account.[49]

- Between June and July 2009, Detective Kelly requested six additional subpoenas in relation to the NACo and Mortgage Fraud case (Stapley II) which were issued.

- On August 11, 2009, Thomas sent a letter to the DOJ regarding the investigation letter DOJ sent to the MCBS dated March 18, 2009.[50] Thomas claimed that the MCBS withheld the letter from the MCAO until the previous week.[51] In the letter, Thomas describes the MCBS as an "extremely difficult client" and goes on to mention the Stapley I indictment and the criminal investigation of Wilcox.[52]

- Approximately August 14, 2009, Bowers received eleven new requests from the MCSO for Grand Jury Subpoenas on the Stapley II NACo case.[53] The requests include seven subpoenas to airlines, two to banks, one to Maricopa County and one to NACo. Polk, Bowers and McGrane discussed the requests and decided that the bulk of the subpoena requests were a fishing expedition and that they would not agree to issue those subpoenas.[54] Polk expressed an ongoing concern that Grand Jury Subpoenas were being used inappropriately "to sweep into people's lives hoping to find or uncover some evidence of criminal conduct."[55]

- On August 17, 2009, the MCSO expressed a desire for additional subpoenas for the NACo investigation and McGrane agreed to review his notes, but decides he will call Detective Johnson about the investigation instead of issuing subpoenas.[56]

- On August 24, 2009, McGrane wrote a letter to Hendershott explaining the legal standard for issuing subpoenas.[57] The letter outlines four guidelines:
    1. The function of the grand jury is to investigate criminal offenses, not the conduct of individuals.
    2. Subpoenas may only issue when there is some knowledge or information that a crime has been committed.
    3. There is no power to institute an inquiry on the chance or speculation that a crime may be discovered.
    4. The 4th Amendment provides protection against the grand jury subpoena duces tecum that is too sweeping in its terms to be regarded as reasonable.[58]

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[49] *Id.*
[50] MCAO Letter to DOJ dated August 11, 2009.
[51] *Id.*
[52] *Id.*
[53] Wilcox 2-16-10 Hrg p. 63 and Polk Notes on GJ Subpoenas.
[54] Wilcox 2-16-10 Hrg p. 63.
[55] *Id.* at p. 72, lns. 20-21.
[56] Polk Notes on GJ Subpoenas.
[57] Wilcox 2-16-10 Hrg pgs. 27-28 and Letter from McGrane to Hendershott dated August 24, 2009.
[58] *Id.*

- On August 25, 2009, Judge Fields issued an Order Dismissing all misdemeanor charges in Stapley I because the MCBS failed to comply with the statutory mandate and adopt standards of financial disclosure.[59] The Court rejected the argument that A.R.S. §38-542 was unconstitutional.[60]

- On August 27, 2009, Hendershott wrote a letter to McGrane and referenced the subpoenas in question as those "requested subpoenas necessary to complete the second round of the indictments on Stapley."[61]

- Between September 11 and September 16, 2009, Yavapai County Attorney's Office filed a Notice of Appeal on Stapley I.

- On Friday, September 18, 2009, Polk, McGrane, and Bowers, initiated a call with Arpaio and Hendershott.[62] The purpose of the call was to inform Arpaio and Hendershott of the decision by YCAO to dismiss all of the counts in the Stapley I case without prejudice because of the Court's ruling.[63] It was Polk's opinion that while Arpaio and Hendershott were not happy about the dismissal, they were mostly concerned about how it would look to the media.[64] Arpaio wanted to move quickly on Stapley II and while Polk thought that there was merit to the case, she told them that it was not ready to file.[65]

- On Monday, September 21, 2009, "Hendershott ordered the probable cause arrest of Stapley on new fraud charges related to his position as President of National Association of Counties (NACo)."[66] Munnell asserted that the MCSO had never made a probable cause arrest in any "white collar" case prior to that time and their standard procedure was to work closely with the prosecutor.[67] There was even dissent among the MCSO employees about the validity of a probable cause arrest.[68] Munnell asserted that the sole reason given for the urgency was that "there were victims who deserved justice."[69] Stapley asserted that on September 21, 2009, when he left for work there were two Sheriff's Deputies parked down the street from his home in an unmarked police car.[70] According to Stapley, the Deputies followed him to his office and then a marked Sheriff's vehicle activated its lights, followed him into his parking space and blocked his vehicle from leaving.[71] There is video footage of the area where Stapley was then arrested and brought before a judge. The hearing was recorded and broadcast over the

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[59] State v. Stapley CR20008-009242-001 Minute Entry of August 25, 2009.
[60] *Id.*
[61] Letter from Hendershott to McGrane dated August 27, 2009.
[62] Wilcox 2-16-10 Hrg p. 35.
[63] *Id.*
[64] *Id.* at p. 36.
[65] *Id.* at p. 37.
[66] Munnell Memo p. 34.
[67] *Id.*
[68] *Id.* at p. 35.
[69] *Id.*
[70] Stapley Notice of Claim dated March 19, 2009, p. 2.
[71] *Id.*

next few days on local television. The footage shows Stapley with his shoelaces, tie, and belt removed. No prosecutor came forward to file charges associated with this arrest.[72]

- On Monday, September 21, 2009, according to MCSO investigators (Johnson and Luth) Aubuchon snuck into their MCSO office. Aubuchon indicated she was attempting to hide from Bowers' paralegal as it was not public knowledge MCAO was going to take back the cases.[73] From the timing of this event in connection to Stapley's arrest and Thomas' request for return of conflict matters from Yavapai County, one can only assume Aubuchon played some role or actively supported the decision to arrest Stapley in a clearly vindictive manner.

- Needless to say, when Polk was notified that Stapley had been arrested by MCSO she was shocked.[74] As a result, Polk requested a meeting with Arpaio and Hendershott at the MCSO.[75]

- The obvious concern was that the behavior of a state actor had created an argument that the September 21, 2009 arrest was in retaliation for Stapley's attorneys in Stapley I challenging the charged statute and ultimately succeeding in getting the charges dismissed. The fact that the arrest came on the next business day after Arpaio and Hendershott were notified of the dismissal, in direct contradiction of legal advice and with no apparent legitimate urgency, gave the arrest an appearance of retaliatory conduct by a state actor.

- On Thursday, September 24, 2009, Arpaio, Hendershott, Thomas, Aubuchon, Bowers, McGrane and Polk met to discuss the events of the past week.[76] Polk was unaware that Thomas and Aubuchon would be at the meeting until she arrived.[77] During the meeting Arpaio told Polk that it was his job to arrest and her job to prosecute.[78] Arpaio stated that he was the only politician with the guts to stand up to the powerful Mr. Stapley.[79] During the meeting Polk suggested that the MCSO be removed from the case because the arrest of Stapley appeared vindictive and could create a side issue which could result in dismissal.[80] Hendershott suggested that Polk give the cases back.[81]

- Later in the day on September 24, 2009, Bowers, McGrane, Aubuchon, Thomas and Polk met to discuss who would be handling the cases.[82] They discussed Thomas' dilemma, because Thomas had publicly said that he would not have anything to do with the

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[72] It is unclear whether the Probable Cause Statement was officially submitted to any prosecutor at that time.
[73] Babeu Internal Investigation pgs. 626 – 627.
[74] Wilcox 2-16-10 Hrg p. 38.
[75] *Id.*
[76] *Id.*
[77] *Id.* at p. 39.
[78] *Id.*
[79] *Id.* at p. 42.
[80] *Id.* at p. 40.
[81] *Id.* at p. 41.
[82] *Id.* at p. 43.

ongoing criminal investigations with the MCBS.[83] However, Arpaio and Hendershott were unhappy with Polk.[84] While discussing Stapley II, Aubuchon volunteered that she had been giving direction to the MCSO detectives on Stapley II while it had been assigned to Polk.[85] The conclusion on September 24, 2009, was that Polk would keep the cases.[86]

- Also on September 24, 2009, Detective John Kelly of the MCSO sent an Internal Information Request form to the Maricopa County Manager's Office requesting a copy of video/audio surveillance of the second floor of the Maricopa County Employee's parking garage during the timeframe that Stapley was arrested inside that structure.[87] On September 25, 2009, Maricopa County Manager's Office sent a response to his request in which they agreed to allow "appropriate MCSO personnel to view the information…but no copies will be provided."[88] The letter outlined the necessity to keep parking garage security surveillance systems confidential.[89]

- Despite Thomas stating that he desired Polk to retain the cases, between September 28, 2009, and September 30, 2009, Polk learned from Wells that Thomas had made the decision to take the cases back and that he was looking for an independent prosecutor to handle them.[90]

- Even though Thomas stated that MCAO was "being penalized pretty severely for prosecuting these politicians," on October 6, 2009, Thomas called Polk and informed her that he was going to take the cases back.[91] After October 6, 2009, Polk had nothing further to do with the cases.[92]

- There were ongoing disagreements between October 2009, and January 2010, between the MCBS and the MCAO over the appointment of Special Prosecutors.[93]

- On or about November 12, 2009, Aubuchon signed over twenty (20) Grand Jury Subpoenas Duces Tecum related to the Stapley II case. These included inquiries of retail businesses, multiple airlines, hotels and bank records. Ostensibly, these included the subpoenas that Polk refused to issue as well as more.

- Prior to December 2009, Thomas acknowledged that he had formed the intent to file the RICO action.[94]

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[83] *Id.* at p. 44.
[84] *Id.*
[85] *Id.* at p. 45.
[86] *Id.* at pgs. 46-47.
[87] Letter from Det. Kelly dated September 25, 2009.
[88] *Id.*
[89] *Id.*
[90] Wilcox 2-16-10 Hrg p. 48.
[91] *Id.* at p14, p. 47 and p155 lns. 4-5.
[92] *Id.* at p. 49.
[93] Letter to Fran McCarroll from Sally Wells dated October 27, 2009, and various Responses and Replies in reference to the MCAO's Motion for Court to Approve Appointment of Special Prosecutors.

- On December 1, 2009, Aubuchon and Thomas filed a civil complaint alleging violations of the Racketeer Influenced and Corrupt Organizations (RICO) Act by the MCBS, Stapley, and others.[95] It alleged among other acts, "a scheme which coordinated efforts by all defendants to protect Donald Stapley Jr. from criminal investigation and prosecution."[96] It alleges that due to the Defendants' "concerted actions, funding the MCAO Civil Division was cut by approximately $6 million."[97] Additionally, the complaint alleged that the "Defendants conspired to deprive plaintiff Thomas and MCAO prosecutors of a cognizable property interest, namely their license to practice law in Arizona, in retaliation for investigation and prosecution of defendants actions, to deter other prosecutors from attempting to enforce the criminal laws against defendants, and for other illicit purposes."[98]

- On December 7, 2009, Stapley II, CR 2009-007891-001 was presented to the Grand Jury by Aubuchon and Stapley was indicted for Fraudulent Schemes and Artifices, Perjury, Forgery, False Swearing and Theft.

- On December 8, 2009, the MCAO provided a News Release regarding the indictments of members of the MCBS.[99] The press release outlined how Thomas attempted to appoint special prosecutors and that the MCBS "refused to approve their appointment."[100] Thomas re-iterates that there is no conflict of interest.[101] In addition, Thomas states, "any person, and particularly government employee or taxpayer-funded individual, who takes any public or private action to obstruct or intimidate investigation or prosecution of county officials or employees will be dealt with appropriately."[102]

- On December 9, 2009, Aubuchon signed a complaint against sitting Judge Gary Donahoe charging him with hindering, obstruction and bribery.[103] That same day the MCAO issued a press release describing that the complaint was served on the judge on that day, referenced the hearing Judge Donahoe was forced to vacate, and included a copy of the complaint.[104] There was no investigation and this complaint was clearly filed to force the judge to recuse himself from hearing the motion set for later the same day on appointment of special prosecutor in the Stapley matters.[105]

- On December 19, 2009, after learning of the indictments of Stapley and Wilcox, Polk called Thomas to inform him that she was going to publically criticize him for his abuse

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[94] Wilcox 2-16-10 Hrg p. 102.
[95] RICO Complaint filed December 1, 2009.
[96] *Id.* at p. 2.
[97] *Id.* at p. 3.
[98] *Id.* at p. 4.
[99] MCAO News Release dated December 8, 2009.
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] State v. Donahoe CR 2009-oo8332-001 filed December 9, 2009.
[104] MCAO Press Release dated December 9, 2009.
[105] Bar complaint pgs 62 – 65.

of power. On December 20, 2009, Polk received two voice messages left on Polk's Chief Deputy McGrane's cell phone from Hendershott.[106]
First Call:

> Dennis, this is Dave Hendershott. I've been notified by the County Attorney's Office that, uh, Sheila Polk plans to make some kind of public statement criticizing our investigation, uh, if that in fact occurs then I want to make it clear that we fully intend to let everyone know the complete dissatisfaction with your agency's handling of the case and the grave incompetence of Sheila Polk and the way this case was handled, ignored and perhaps done for the fact that she wants to be a judge. So, and that is, uh, the sad fact of the matter. So, uh, if uh, that is the case, uh and she wants to try to make this a political thing and crit-criticize a case she knows nothing about, that's fine she can do that, but I'm just telling you um, uh, it's extremely unethical for her to do that and she also uh, is, uh, I believe risking, uh, a great more than she realizes, uh, if she does that because of the unethical nature of her behavior. So, anyway, uh, I assume I won't get a call back, but I, uh, we fully intend to let everyone know that you guys sat on these investigations and were, uh, not doing anything in regards to doing them and so that will be the way that it will, that will be the way it will come out. Thank you

Second Call:

> Yeah, uh Dennis, this is Dave Hendershott again and I just want to inform you that I have formally contacted the FBI and advised of the communication of Sheila to go publically criticizing our cases. Um, and so I, I, uh, think it would be uh, uh, feel free to contact the FBI. Uh, but, uh, we have, uh, made it clear to the FBI the problems we feel existed with your office. And, uh, so, I- I felt that, uh, it appropriate to let you know the fact that we have contacted. Thank you Bye

- On December 22, 2009, the Arizona Republic printed an editorial article written by Polk outlining how she believed that Arpaio and Thomas were abusing their power.[107]

- On December 23, 2009, the Arizona Republic prints an editorial article written by James Walsh (Walsh), Pinal County Attorney. Walsh stated in his letter, "The justice system will decide the cases that they are filing....but it is the court of public opinion which will decide the future of political leaders who abuse their power and abandon their constitutional responsibilities."

- In a December 24, 2009 article Walsh told *The Republic*, "There's something very disturbing about attacking the independent judiciary,...something very disturbing about attempting to intimidate lawyers who are defending criminal charges. There is something

[106] Wilcox 2-16-10 Hrg p. 24.
[107] Arizona Republic article from December 22, 2009, "Arpaio, Thomas are abusing power" by Sheila Polk".

utterly disturbing when everybody that speaks out is the next subject of an investigation."[108]

- On December 24, 2009, the MCAO filed a motion asking the special master to conduct an extraordinary investigation into a perceived conspiracy involving other county attorneys in the State of Arizona.

> ...investigate the origin and circumstances of the campaign apparently being conducted to enlist County Attorneys outsides Maricopa County, and possibly other third parties to publicly pressure MCAO and county law-enforcement agencies not to press charges against certain influential defendants. In the past week, both the Yavapai County Attorney and the Pinal County Attorney have issued public statements about pending criminal cases and motions in Maricopa County. These actions violate the rules of professional responsibility and are affecting the jury pool in Maricopa County.
>
> Moreover, these actions appear to be a part of an orchestrated campaign to pressure law enforcement in Maricopa County to drop charges against influential criminal defendants and suspects.
>
> MCAO respectfully requests that this Court conduct an inquiry and exercise it powers to take appropriate action against these county attorneys and other persons who unlawfully and improperly seek to influence ongoing criminal matters in Maricopa County.

- On February 16, 2010, Pima County Superior Court Judge John Leonardo presided over a hearing on Mary Rose Wilcox Defendant's Motion to Dismiss Indictment and Disqualify the County Attorney. That same day the MCSO issued a statement that Polk's testimony that Hendershott had made "threats against her is untrue" and that the MCSO filed a bar complaint on Polk in response.[109]

- On February 24, 2010, Judge Leonardo issued a ruling on the February 16, 2010 Hearing. The Court found that the MCAO had conflicts of interest in prosecuting Wilcox based on "his efforts to retaliate against members of MCBS, including the defendant, for actions they allegedly carried out in concert with each other, his office and against him personally as alleged in the civil RICO complaint" and "his attempts to gain political advantage by prosecuting those who oppose him politically, including the defendant", "his political alliance with the Maricopa County Sheriff who misused the power of his office to target members of the MCBS for criminal investigations," and "his duty to provide confidential, uncompromised legal advice to members of the MCBS, including defendant, on matters forming the basis of charges in the indictment."[110]

- Also on February 24, 2010, the MCAO moved to dismiss Stapley II without prejudice.

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[108] Arizona Republic article from December 24, 2009, "Judge to referee county's infighting".
[109] "Response from Maricopa County Sheriff's Office" dated February 16, 2010.
[110] Aubuchon v. MCAO Findings of Fact dated March 16, 2011, p. 14.

- On March 8, 2010, in light of Judge Leonardo's February 24, 2010 order in the Wilcox matter, the MCAO officially relinquished the investigation and prosecution of Stapley II to the GCAO.[111]

- On March 11, 2010, the RICO case was voluntarily dismissed by Thomas and Arpaio. The Dismissal Notice stated: "Please take notice that having referred this matter to the Public Integrity Section ("PIN") of the United States Department of Justice and having received their assurances that PIN will review the matter, Plaintiffs Sherriff Joseph M. Arpaio and Andrew P. Thomas,.. hereby voluntarily dismiss…"[112]

- On March 13, 2010, the DOJ Acting Public Integrity Section Chief, Raymond N. Husler, sent a letter to Robert Driscoll, Attorney for Arpaio. The letter was in response to a request by Mr. Driscoll to provide information to the DOJ on potential federal criminal violations by Maricopa County individuals. At least part of the thousands of pages and electronic media provided to the DOJ consisted of allegations against Stapley and Wilcox was submitted to the GCAO for review. Mr. Husler stated that he was "dismayed" to learn that the "mere referral of information to the Public Integrity Section was cited and relied upon in a pleading in federal court, and then used as a platform for a press conference."[113]

- In the beginning of April 2010, Thomas resigned as the Maricopa County Attorney to run for Attorney General.

- On April 2, 2010, a FedEx package from Aubuchon was delivered to the GCAO. Aubuchon sent a sealed envelope directed to Gila County Attorney Daisy Flores (Flores) with a copy of the MCSO report in the "Bug Sweep" matter.[114] Aubuchon included a misleading memorandum with the report. Flores assumes this was an attempt to have the GCAO review the matter as a conflict without it being properly transmitted by Aubuchon's superiors. Flores immediately returned the documents and requested that Aubuchon have no contact with the GCAO.[115]

- On April 16, 2010, Rick Romley was appointed Interim County Attorney.[116] On April 19, 2010, Aubuchon was placed on Administrative leave.[117]

- It is alleged that in April 2010, Hendershott attempted to create a position within the MCSO for Aubuchon.[118]

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[111] Letter from MCAO Deputy Keith Manning to GCAO dated March 8, 2010.
[112] March 11, 2010 "Plaintiffs' Notice of Voluntary Dismissal of Action Without Prejudice" in RICO matter and Aubuchon v. MCAO Findings of Fact dated March 16, 2011, p. 17.
[113] Letter from DOJ dated March 13, 2010.
[114] Aubuchon FedEx "Bug Sweep" Memorandum and MCSO DR 09-048645 received April 2, 2010.
[115] Flores letter to MCAO dated April 5, 2010.
[116] Aubuchon v. MCAO Findings of Fact dated March 16, 2011, p. 18.
[117] *Id.*
[118] Munnell Memo p. 43.

- On August 17, 2010, Patrol Bureau Commander Deputy Chief Frank Munnell submitted a Memorandum (Munnell Memo) to Arpaio requesting a formal investigation of Hendershott.[119] As a result of the Munnell Memo, Hendershott, Director Larry Black, and Captain Joel Fox were placed on paid administrative leave pending further investigation. At Arpaio's request the investigation was conducted by Pinal County Sheriff Paul Babeu.

- On September 8, 2010, Aubuchon was put on notice of the findings of the Internal Investigation initiated by Romley, conducted by Katherine E. Baker, Green & Baker, and the MCAO Chief Deputy's intent to discipline based upon the findings in the Baker Report. In the September 8, 2010 letter Paul Ahler stated that, "the Federal RICO Complaint was nothing more than a vehicle to intimidate, retaliate and besmirch the reputations of judges, public officials and attorneys who had previously opposed positions taken by the Maricopa County Attorney's Office." Ahler alleged that Aubuchon filed the RICO complaint "that did not meet the requirements of a RICO claim and for which there was no evidence."[120]

- On September 21, 2010, Aubuchon was sent a Notice of Termination.[121]

- On November 16, 2010, the Navajo County Attorney's Office declined to pursue charges on the Corruption Investigations submitted for their review, including a Stapley "No Bid" Investigation.[122]

- On December 6, 2010, the State Bar of Arizona issued a Probable Cause Order against Aubuchon and released a Summary of Alleged Ethical Violations for both Thomas and Aubuchon.[123] Alleged Ethical Violation 4 included claims that the investigation of Stapley was personally and politically motivated.[124] The State Bar of Arizona cited "tension between Thomas and Stapley regarding the Arizona Meth Project that had been implemented through the Board and Stapley." According to Stapley, "Thomas was not happy" about a change in the Meth campaign, a change which was spearheaded by Stapley.[125] Additionally, the "Board had initiated a freeze on capital spending and Thomas and the Sheriff had refused to work with the Board on this issue."[126]

- Alleged Ethical Violation 22, asserts that Stapley II (and Mary Rose Wilcox) was brought to embarrass and burden the two supervisors. There was no independent complaint that led to the investigations of Stapley, but that personal and political animosity of Thomas and Aubuchon drove the investigation and charging.[127] The Probable Cause Order notes that "[w]hen Thomas filed charges against Stapley…in December 2009, Thomas and the

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[119] *Id.*
[120] MCAO Investigation of Aubuchon Notice of Findings dated September 8, 2010.
[121] Aubuchon Notice of Termination dated September 21, 2010.
[122] Navajo County Decline Letter dated November 16, 2010.
[123] Arizona State Bar Probable Cause Summary and Order dated December 6, 2010.
[124] Arizona State Bar Probable Cause Summary p. 1.
[125] Arizona State Bar Order dated December 6, 2010, p. 18.
[126] *Id.*
[127] Arizona State Bar Probable Cause Summary p. 4.

Board were involved in three civil lawsuits against each other: 1) the Dec Action 2) the Sweeps case; and 3) the RICO case."[128] Additionally, it states "Thomas had fought with the Board over the appointment of special prosecutors, and the hiring of Thomas Irvine. Thomas and Aubuchon had also lost their fight to investigate what they believed was a conspiracy in the Court Tower matter."[129]

- After review of thousands of pages of documents provided by the MCAO and the MCSO, the GCAO would respectfully disagree that the only purpose for bringing these charges against Stapley was to embarrass and burden him. It cannot be ignored that GCAO's conclusion is that there is evidence of criminal conduct committed by Stapley, however, the conduct that MCAO alleged in its indictment cannot be proven. We should note, it is highly likely that any person who has their personal and business life sifted through in minute detail (like Stapley's was) has likely committed some knowing or unknowing wrong-doing under some criminal statute.

- On January 14, 2011, GCAO issued its decline of the Mary Rose Wilcox Matter.[130]

- On February 2, 2011, the Arizona State Bar filed the Bar Complaint alleging Thomas and Aubuchon committed multiple ethical violations and recommended disbarment.[131]

- On March 16, 2011, the Maricopa County Employee Merit System Commission recommended that Aubuchon's termination be upheld.[132]

- On March 24, 2011, the Arizona Court of Appeals affirmed the dismissal of the misdemeanor counts in Stapley I.[133] On March 28, 2011, Polk closed Stapley I.[134]

- On April 6, 2011, the Maricopa County Merit System voted unanimously to uphold the termination of Aubuchon.[135]

- On April 11, 2011, Arizona Secretary of State Ken Bennett, whose office is responsible for maintaining the filings by legislators and public officials, stated that he plans to amend his personal disclosure statements to add the free trips he accepted from the Fiesta Bowl and other groups while acting as a state legislator.[136]

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[128] Arizona State Bar Order dated December 6, 2010, p. 59.
[129] *Id.*
[130] GCAO Decline Letter dated January 14, 2011.
[131] Bar Complaint dated February 2, 2011.
[132] Aubuchon v. MCAO Findings of Fact dated March 16, 2011, p. 35.
[133] Arizona Court of Appeals Order State v. Stapley, 1CA-CR 09-0682 dated March 24, 2011.
[134] Letter Polk to Charlton State v. Stapley, CR 2008-009242-001 DT dated March 28, 2011.
[135] Arizona Republic Article dated April 7, 2011, "Maricopa County panel upholds Aubuchon firing"
[136] Arizona Capitol Times Article dated April 11, 2011 "Ken Bennett to amend disclosure reports to account for Free Fiesta Bowl trips"

- In early May 2011, the Babeu Internal Investigation regarding the Munnell Memo was made public. Hendershott was sent a notice of termination in April and ultimately chose to resign. His resignation was accepted effective April 27, 2011.[137]

[137] Arizona Republic article dated April 28, 2010 "Hendershott, Arpaio's top aide, leaves post, amid investigation".