

1 Lawrence Koplow (019853)
2 Angelo Patane (014864)
3 KOPLOW & PATANE, PLLC
4 10214 North Tatum Boulevard
5 Suite A750
6 Phoenix, AZ 85028
7 Attorneys for Defendant

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

STATE OF ARIZONA,

Plaintiff,

vs.

[REDACTED],

Defendant.

Case No.: CR [REDACTED] DT

**MOTION TO QUASH WARRANT AND
INDICTMENT AND WAIVER OF
APPEARANCE**

(Oral Argument Requested)

Defendant [REDACTED], by and through undersigned counsel, appears herein for the purpose of challenging the indictment and related arrest warrant. Defendant moves for an order quashing the warrant and the indictment insofar as it formally charges him with crimes. Furthermore, because this motion challenges the validity of the warrant in this matter, Defendant requests that counsel be permitted to argue this motion without the Defendant presence.

It is believed that the essence of allegations by the State is (a) that [REDACTED] failed to do work for which he was paid and (b) that he was also an *accomplice* to group to others (co-defendants [REDACTED]) that committed fraud by receiving money for work that they did perform. However, [REDACTED] adamantly denies these allegations.

The basis of this motion is: (1) there is no evidence that Defendant showing [REDACTED] [REDACTED] associated with the co-defendant's [REDACTED]; (2) the State made

1 false statements to the grand jury regarding work he had performed on listed victim's
2 home. That is, that state informed the grand jury that he took money without doing any
3 work. However, the police reports plainly state work was done. Thus, Defendant was
4 denied a fair and impartial Grand Jury proceeding; and (3) the issue of accomplice
5 liability has already been resolved in favor [REDACTED] and State is collaterally estopped
6 from relitigating this issue. This Motion is made pursuant to Rules 16.6 and 12.9,
7 Ariz.R.Crim.P., and is supported by the following Memorandum of Points and
8 Authorities.

9 **I. FACTUAL BACKGROUND**

10 On [REDACTED], the [REDACTED] Grand Jury returned a thirty
11 county indictment against five individuals. As a whole, the charges relate to the
12 alleged actions of two individuals with the last name of [REDACTED] herein referred to as
13 the [REDACTED]. The State alleges that the [REDACTED] engaged in a scheme whereby they
14 approached homeowners, offered roofing services, and collected payments while
15 performing little or no actual roofing work. Indeed, the State presented to the grand
16 jury copious evidence related to the [REDACTED] involvement with over a dozen alleged
17 victims in the scam.

18 Regarding [REDACTED], the indictment has three basic allegations. The first
19 allegation concerns [REDACTED]. The basic allegation is that [REDACTED] took
20 money for a roofing work and he did not perform the work. While there is evidence
21 in the police reports plainly indicating work was done on [REDACTED] roof, the
22 State presented to the grand jury that no work was done.

23 Second, the State contends that [REDACTED] took money from [REDACTED] and
24 did not perform any work. However, [REDACTED] never took any money from [REDACTED]
25 [REDACTED]. Upon information and belief, [REDACTED] is an elderly woman who now

1 resides in an assisted living home. Officials from the Registrar of Contractors did a
2 photo line up and [REDACTED] stated [REDACTED] “looked like” a man named [REDACTED]
3 [REDACTED]. The state took this tentative likeness as a positive identification. Then
4 the State attached all of the allegations made about [REDACTED] and

5 And finally, the State attempts to link [REDACTED] to the fraud schemes alleged
6 against the [REDACTED]. Notwithstanding the strong evidence against the [REDACTED], no
7 evidence whatsoever was presented to the grand jury showing a link between the
8 [REDACTED] and [REDACTED]. To the contrary, the *sole instance* that Defendant was
9 mentioned in the evidentiary portion of the grand jury proceeding related to
10 Defendant’s clear *lack of association* with the [REDACTED]. Indeed one of the [REDACTED]
11 [REDACTED] victims indicated that [REDACTED] 1) was not with the [REDACTED], and 2)
12 warned her about the [REDACTED] conduct.

13 Defendant will show that (A) he has no association with [REDACTED], a
14 person accused of scamming [REDACTED], nor with [REDACTED] herself, and (B) that
15 the other victim ([REDACTED]) Defendant is associated with had work completed on her
16 house, even though [REDACTED] never identified Defendant at any time.

17 The above is the only basis for \$250,000.00 cash bond issued for [REDACTED].

18 **II. DEFENDANT HAS NO ASSOCIATION WITH THE [REDACTED] OR [REDACTED]**

19 [REDACTED]
20 **A. The Defendant is not [REDACTED]**

21 First, no evidence is offered that he is associated [REDACTED], one of the
22 persons he is accused of scamming, nor [REDACTED], who [REDACTED] identified as
23 someone who looks like Defendant. Defendant was not identified by [REDACTED] as
24 [REDACTED] at any time. Rather, the victim [REDACTED], identified a person
25 named [REDACTED] that looked like Defendant [REDACTED], yet stated this person

1 wasn't scamming her regardless. This is shown in the [REDACTED] Grand Jury Proceeding,
2 page 53.

3 Q. Did she also identify [REDACTED] in any photo lineups?

4 A. Well, she identified- looks like the identified [REDACTED], but said that's [REDACTED]

5 Q. So she knew him as [REDACTED], but it was a known photograph of
6 [REDACTED]?

7 A. Yes.

8 Q. That she identified as [REDACTED]?

9 A. Yes.

10 Q. Okay. And she did indicate that she actually felt that [REDACTED] maybe wasn't
11 scamming her because he did not come with the other men, he would come
12 later and tell them that they were scamming her?

13 A. Yes.

14 [REDACTED], the victim in this case, never identifies anyone who did work on
15 her roof as the Defendant. Secondly, even though Defendant is not associated with
16 [REDACTED] in any way, [REDACTED] defends whoever [REDACTED] is to the extent that she
17 believes [REDACTED] was not scamming her. *No evidence* is provided to the grand jury that
18 the Defendant is [REDACTED]. In fact, the checks made out by [REDACTED] were made
19 out to an [REDACTED], and not to Defendant.

20 In this manner, even under the State's theory

21 **B. Attorney [REDACTED] comments constitute Misconduct**

22 Deputy County Attorney [REDACTED] inappropriately vouches for
23 [REDACTED] credibility as a witness. [REDACTED], 82 at the time of the Grand Jury proceeding
24 and with a history of dementia, states that [REDACTED] looks like Defendant.
25 Attorney [REDACTED] uses this inference to tell the Grand Jury that [REDACTED] "provided four
different checks made out to [REDACTED], again, for roof work, the first check being
written on January 12, 2005." Grand Jury Transcript at pg. 53, line 23. No checks were
ever made out to Defendant [REDACTED] as [REDACTED] states; rather, the checks are

1 made out to [REDACTED], but [REDACTED] vouches for [REDACTED]'s identification
2 comparing Defendant with [REDACTED] by inappropriately vouching for [REDACTED]
3 credibility. Vouching for the credibility of a witness is misconduct. *State v. Salcido*, 140
4 Ariz. 342, 344, 681 P.2d 925, 927 (Ariz. App. 1984).

5
6 This is also a misstatement of the evidence. No checks were ever made out to
7 [REDACTED], but rather to [REDACTED]. Attorney [REDACTED] ie places a casual link in
8 the minds of the jury that the Defendant is also [REDACTED]. This comment
9 constitutes misconduct because a prosecutor should never misstate evidence, *State v.*
10 *Canon*, 148 Ariz. 72, 78, 713. P.2d 273, 279 (Ariz. 1985) and because the [REDACTED]
11 testified to matters not in evidence. *State v. Salcido*, 140 Ariz. 342, 344, 681 P.2d 925,
12 927 (Ariz. App. 1984).

13 **III. DEFENDANT WAS DEPRIVED OF A FAIR AND IMPARTIAL GRAND**
14 **JURY PROCEEDING**

15 **A. Ariz. R. Crim. P. Rule 12.9**

16 Defendant is also entitled to relief in this case pursuant to Rule 12.9, Ariz. R.
17 Crim. P. Rule 12.9 provides that Grand Jury proceedings may be challenged where the
18 “defendant was denied a substantial procedural right.” That right includes the “use of an
19 unbiased Grand Jury and a fair and impartial presentation of the evidence.” *Crimmins*
20 *v. Superior Court*, 137 Ariz. 39, 41, 668 P.2d 882 (1983). The Defendant was received
21 unfair and partial presentation of the evidence by Attorney [REDACTED]'s comments above,
22 as well as in the evidence set forth below.

23 **B. Exculpatory Evidence was withheld by the State**

24 Grand jurors have the right to hear “all relevant, non-protected evidence that
25 bears on the case.” *Maretick v. Jarrett*, 204 Ariz. 194, 197, 62 P.3d 120 (2003). Instead

1 of presenting evidence in a straightforward manner, the State offers evidence in a
2 selective and deceptive process in hopes that the Defendant may be associated with
3 the [REDACTED].

4 The State offers evidence that Defendant may have been paid to complete work
5 on [REDACTED]'s home. According to the State's theory, [REDACTED] would have
6 written Defendant a check for \$2,000. However, [REDACTED] *never identifies* Defendant
7 as the person she paid to complete the work. Even if Defendant did in fact accept
8 payment as the State suggests, the State should have allowed the grand jurors to know
9 that *some work* was actually performed on the [REDACTED] residence.

10 The State presented the testimony of [REDACTED], a roofing expert, to show
11 that there were **no signs of any recently performed roofing work**. Grand Jury
12 Transcript, pg. 47, line 8. To the contrary, [REDACTED]'s actual report indicated that
13 work had been done to the skylights on the roof. Had the Grand Jury known of the
14 actual work, and ad it known about the other evidence disproving any connection
15 between [REDACTED] and the [REDACTED], it might easily have concluded that [REDACTED], if
16 present at all, legitimately worked for [REDACTED]. [See Report of [REDACTED]
17 [REDACTED] (Discovery #266)]

18 **C. The State is estopped from relitigating the Accomplice Liability**
19 **theory**

20 The State tries again to associate Defendant [REDACTED] with the [REDACTED] in an
21 accomplice liability theory. However, this issue was litigated in a former co-defendant's
22 case (*State v. [REDACTED]*, CR [REDACTED] DT), and the State was denied its claim
23 that the indictment and Grand Jury proceeding sufficiently established accomplice
24 liability. Thus, the State is collaterally estopped from proceeding on the accomplice
25

1 liability charges in this indictment. A party is bound by the doctrine of issue preclusion
2 where three conditions are present, as follow:

- 3 1) the issue was litigated to a conclusion in the prior action,
- 4 2) the issue of fact or law was necessary to the prior judgment,
- 5 3) the party against whom preclusion is raised was a party or privy to a party in the first case.

6 *Maricopa-Stanfield v. Robertson*, 211 Ariz. 485, 492, 123 P.3d 1122 (2005).

7 Though the State attempts to implicate Defendant with the [REDACTED] in aiding the scam of
8 [REDACTED], the State neglected to mention that the [REDACTED] ggs were working on jobsites
9 in Sun City in December, 2004 when the check by [REDACTED] was written to [REDACTED].
10 [See [REDACTED] December Proposal].

11 All of the foregoing misleading testimony and omission, especially considered
12 together with the lack of any evidence connecting [REDACTED] to the [REDACTED], demands
13 the conclusion that [REDACTED] was denied his substantial procedural rights during this
14 grand jury proceeding.

15 **III. CONCLUSION**

16 The entire Grand Jury proceeding and the indictment arising therefrom violated
17 [REDACTED] rights to a fair presentation of the evidence. Furthermore, the State offers
18 no evidence that [REDACTED] was associated with the [REDACTED], or that [REDACTED] was ever
19 involved in a roofing scam. For the foregoing reasons, Defendant [REDACTED] requests this
20 court to quash the warrant and indictment accordingly.

21 Dated this 17th day of August, 2007

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

