

1 Melissa S. Ho, Esq., Az. Bar No. 023269
2 **POLSINELLI SHUGHART PC**
3 CityScape One East Washington Street, Suite 1200
4 Phoenix, Arizona 85004-2568
5 (602) 650-2028
6 mho@polsinelli.com

7 Mark W. Danis, Esq. (*pro hac vice* pending)
8 Efrain Staino, Esq. (*pro hac vice* pending)
9 Natalie E. Wheatfall, Esq. (*pro hac vice* pending)
10 Diana B. Kruze, Esq. (*pro hac vice* pending)
11 **MORRISON FOERSTER, LLP**

12 425 Market Street
13 San Francisco, CA 94105
14 (415) 268-7000
15 mdanis@mofo.com
16 estaino@mofo.com
17 nwheatfall@mofo.com
18 dkruze@mofo.com

19 Attorneys for Amicus Curiae
20 LEGAL MOMENTUM

21 **ARIZONA SUPERIOR COURT**

22 **MARICOPA COUNTY**

23 WENDI ELIZABETH ANDRIANO,
24
25 Plaintiff/Petitioner,

26 v.

27 STATE OF ARIZONA,
28
29 Defendant/Respondent.

CASE NO. CR2000-096032-A

**BRIEF OF AMICUS CURIAE
LEGAL MOMENTUM IN
SUPPORT OF PETITION FOR
POST-CONVICTION RELIEF**

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
STATEMENT OF INTEREST	2
CASE BACKGROUND	3
ARGUMENT	5
I. THE STATE OF ARIZONA'S PUBLIC POLICY AGAINST GENDER BIAS IN THE COURTS WEIGHS IN FAVOR OF GRANTING WENDI'S PETITION FOR POST-CONVICTION RELIEF	6
A. Gender Bias is Pervasive in the Legal System, Putting Female Litigants at a Severe Disadvantage in the Proper Administration of Justice	6
B. The Arizona State Legislature, Courts, and Bar Association Have Attempted to Combat Gender Bias By Adopting Laws and Rules Barring Questioning About a Female Witness' Prior Sexual Activities	10
II. THE PROSECUTOR'S REPEATED REFERENCES TO WENDI'S SEXUAL ACTIVITIES PLAYED INTO GENDER STEREOTYPES, WAS UNDULY PREJUDICIAL, AND VIOLATED HER CONSTITUTIONAL RIGHT TO DUE PROCESS	12
A. The Prosecutor's Statements Were Highly Prejudicial and Had Little Relevance	13
B. The Jury Was Negatively Influenced by the Prosecutor's Statements	18
III. DEFENSE COUNSEL'S ALLOWING PERVASIVE REFERENCES TO WENDI'S SEXUAL ACTIVITIES VIOLATED HER SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL	19
CONCLUSION	22

TABLE OF AUTHORITIES

Page(s)

CASES

<i>Camm v. State</i> , 812 N.E.2d 1127 (Ind. Ct. App. 2004).....	16, 17
<i>Catchpole v. Brannon</i> , 36 Cal. App. 4th 237 (Cal. Ct. App. 1995), <i>rev. denied</i> , 1995 Cal. LEXIS 5807 (Cal. Sept. 14, 1995).....	7
<i>Duff v. Lineberger</i> , No. COA04-335, 2005 N.C. App. LEXIS 1444, at *12-13 (N.C. Ct. App. Aug. 2, 2005)	17
<i>Henson v. State</i> , 530 N.E.2d 768 (Ind. Ct. App. 1988).....	13, 14
<i>In re Offenhartz</i> , 173 Ariz. 382 (1992)	20
<i>Lesley v. State</i> , 606 So. 2d 1084 (Miss. 1992)	17
<i>Pool v. Superior Court</i> , 139 Ariz. 98 (Ariz. 1984)	13
<i>State ex rel. Montgomery v. Duncan</i> , 228 Ariz. 514 (Ariz. Ct. App. 2011)	10
<i>State ex rel. Pope v. Superior Court</i> , 113 Ariz. 22 (Ariz. 1976)	10
<i>State v. Andriano</i> , 215 Ariz. 497 (Ariz. 2007)	3, 15, 16, 19
<i>State v. Bocharski</i> , 218 Ariz. 476 (2008)	12
<i>State v. Gilfillan</i> , 196 Ariz. 396 (Ariz. Ct. App. 2000)	11
<i>State v. Herrera</i> , 226 Ariz. 59 (Ariz. Ct. App. 2010)	10

1		
2	<i>State v. Hughes</i> ,	
3	193 Ariz. 72 (1998)	12, 19
4	<i>State v. McKnight</i> ,	
5	107 Ohio St. 3d 101 (2005)	15
6	<i>State v. Woodward</i> ,	
7	21 Ariz. App. 133 (1973)	13
8	<i>Strickland v. Washington</i> ,	
9	466 U.S. 668 (1984)	20
10	<i>Sullivan v. State</i> ,	
11	47 Ariz. 224 (1936)	13, 17-18
12	STATUTES & RULES	
13	A.R.S. § 13-1421	6, 10, 11
14	Arizona Code of Judicial Conduct, Rule 2.3	3, 6, 11, 12
15	Arizona Rules of Professional Conduct, Rule 8.4(d)	6, 11, 12
16	OTHER AUTHORITIES	
17	S.B. 1141, 43rd Leg., 2d Reg. Sess. (Ariz. 1998).....	11
18	Barbara Allen Babcock, <i>Introduction: Gender Bias in the Courts and Civic and</i>	
19	<i>Legal Education</i> , 45 STAN. L. REV. 2143 (1992-1993)	6
20	Charalee Graydon, <i>Habilitation: Sentencing of Female Offenders</i> , 5 CAN. J. L. &	
21	JURISPRUDENCE, 121, 124 (1992)	9
22	ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING 152-54	
23	(2000)	8
24	Elizabeth M. Schneider, <i>Equal Rights to Trial for Women: Sex Bias in the Law of</i>	
25	<i>Self Defense</i> , 15 HARV. C.R.-C.L. L. REV. 623, 629, 645 (1980).....	14
26	Final Report of the Pennsylvania Supreme Court Committee on Racial and Gender	
27	Bias in the Justice System (2003) at 14, <i>available at</i>	
28	http://www.courts.state.pa.us/Index/Supreme/biasreport.htm	7
	GARY LAFREE, RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF	
	CRIMINAL ASSAULT 73-76 (1989)	14

1		
2	Holly Maguigan, <i>Battered Women and Self-Defense: Myths and Misconceptions in</i>	
3	<i>Current Reform Proposals</i> , 140 U. PA. L. REV. 379, 387 (1991)	9
4	Hon. Sandra Day O'Connor, <i>The Quality of Justice</i> ,	
5	67 S. CAL. L. REV. 759, 760 (1993-1994)	8-9
6	<i>In the Matter of the Endorsement of the State Bar of Arizona Task Force on</i>	
7	<i>Gender Bias</i> , Administrative Order 92-17(1992), available at	
8	http://www.azcourts.gov/portals/22/admorder/orders94/pdf92/9217.pdf	7
9	Karen Czapanskiy, <i>Domestic Violence, the Family, and the Lawyering Process:</i>	
10	<i>Lessons from Studies on Gender Bias in the Courts</i> , 27 FAM. L.Q. 247, 253 &	
11	n.18 (1993-1994)	9
12	Karen Czapanskiy, <i>Gender Bias in the Courts: Social Change Strategies</i> ,	
13	4 GEO. J. LEGAL ETHICS 1, 4 (1990-1991)	8
14	Lawyers on Strike, <i>This is a Tough Business</i> , (May 27, 2011), available at	
15	http://strikelawyer.wordpress.com/2011/05/27/this-is-a-tough-business	15
16	Lynn Hecht Schafran, <i>Gender Bias in the Courts: An Emerging Focus for Judicial</i>	
17	<i>Reform</i> , 21 ARIZ. ST. L. J. 237 (1989)	2, 7
18	Lynn Hecht Schafran, <i>Documenting Gender Bias in the Courts: The Task Force</i>	
19	<i>Approach</i> , 70 JUDICATURE 280 (1986-1987)	2
20	Lynn Hecht Schafran, <i>Gender Equality in the Courts: Still on the Judicial Agenda</i> ,	
21	77 JUDICATURE 110 (1993-1994)	2
22	Lynn Hecht Schafran, <i>The Obligation to Intervene: New Direction from the</i>	
23	<i>American Bar Association Code of Judicial Conduct</i> , 4 GEO. J. LEGAL ETHICS	
24	53 (1990-1991)	passim
25	Lynn Hecht Schafran, <i>Overwhelming Evidence: Reports on Gender Bias in the</i>	
26	<i>Courts</i> , TRIAL, Feb. 1990, at 28	7
27	LYNN HECHT SCHAFRAN & ELIZABETH J. VRATO, <i>GENDER, JUSTICE AND LAW:</i>	
28	<i>FROM ASYLUM TO ZYGOTES</i> 16 (2003)	8
	Lynn Hecht Schafran, <i>Credibility in the Courts Why is There a Gender Gap?</i> , 34	
	JUDGES J. 5 (1995)	9
	Lynn Hecht Schafran, <i>Eve, Mary, Superwoman: How Stereotypes About Women</i>	
	<i>Influence Judges</i> , 24 JUDGES J. 12 (1985)	9
	MARGARET GATES, <i>WOMEN IN THE COURTS: VICTIMS OF RAPE AND WIDE ABUSE</i>	
	184 (1978)	8

1		
2	Michelle J. Anderson, <i>From Chastity Requirement to Sexuality License: Sexual</i>	
3	<i>Consent and a New Rape Shield Law</i> , 70 GEO. WASH. L. REV. 51, 75, 98 (2002).....	14
4	Michelle J. Anderson, <i>Diminishing the Legal Impact of Negative Social Attitudes</i>	
5	<i>Toward Acquaintance Rape Victims</i> , 13 NEW CRIM. L. REV. 645, 657 (2010).....	8, 11
6	Minnesota Supreme Court Task Force for Gender Fairness in the Courts Final	
7	Report, 15 WM. MITCHELL L. REV. 825, 827, 840 (1989).....	9
8	Pamela Jenkins & Barbara Davidson, <i>Battered Women in the Criminal Justice</i>	
9	<i>System: An Analysis of Gender Stereotypes</i> ,	
10	8 BEHAVIORAL SCIENCES AND THE LAW, 161, 166-167 (1990)	9, 14
11	RENAE FRANIUK ET AL., PREVALENCE AND EFFECTS OF RAPE MYTHS	
12	IN PRINT JOURNALISM (2008).....	8
13	<i>Report of the Florida Supreme Court Gender Bias Study Commission</i> ,	
14	42 FLA. L. REV. 803, 849 (1990).....	15
15	<i>Report of the Missouri Task Force on Gender and Justice</i> ,	
16	58 MO. L. REV. 485 (1993)	7
17	TERESA SCALZO, PROSECUTING ALCOHOL-FACILITATED SEXUAL ASSAULT 19	
18	(Aug. 2007)	8
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

INTRODUCTION

Gender bias plays a significant role in undermining the fair administration of justice in our nation's court systems. To counter this invidious form of discrimination, Arizona has adopted specific laws and rules that bar lawyers from manifesting bias based on sex. The prosecutor in Wendi Andriano's trial violated these protections by improperly focusing on Wendi's entire sexual history in a blatant effort to benefit from stereotypes about unchaste women as unworthy of respect or belief.

Within the opening minutes of the prosecutor's examination of his first witness, the prosecutor elicited totally irrelevant testimony that Wendi was flirtatious, kissing and touching men when she was out with her friends. (9/8 Tr. Vol. 2 at 8-9, 44.)¹ Thereafter, and during every phase of the trial, the prosecutor discussed Wendi's sexual experiences with different men *ad nauseam*. Everything from dance floor encounters to an alleged flirtation with the investigating detective was paraded in front of the jury, allowing stereotypical assumptions about gender roles to override the real issues in the case. The prosecutor even questioned multiple witnesses about Wendi's sexual history before she married Joe Andriano — information that had nothing to do with the charges against her.

The prosecutor's incessant focus on Wendi's pre- and post-marital sexual activities was designed to be prejudicial, made it much less likely for a jury to believe her self-defense and domestic violence claims, and destroyed any chance of leniency during sentencing. There is no doubt that the prosecutor's misconduct resulted in actual prejudice, as the jurors' multiple questions posed directly to Wendi and other witnesses pressed for wholly irrelevant details of her personal life, such as who initiated an intimate relationship, how long she dated her high school boyfriend and whether she asked someone out to breakfast or he asked her.

¹ Cites to the trial transcript are given as ("[Date of Proceeding] Tr. at [Page].")

1 The prosecutor's misconduct was compounded by defense counsel's woefully
2 ineffective assistance at trial. Wendi's attorney sat idly by, failing to object when the
3 prosecutor elicited prejudicial evidence regarding Wendi's sexual history.

4 As acknowledged by the Arizona Code of Judicial Conduct Rule 2.3, courts have
5 an active duty to identify and correct discrimination based on sex in the administration of
6 justice. Permitting stereotypical assumptions about gender roles to play into the
7 determination of a criminal defendant's guilt or innocence and punishment is directly
8 contrary to this state's public policy. This Court should uphold Arizona's policy against
9 gender bias by reversing Wendi's conviction and granting her a new trial.

10 STATEMENT OF INTEREST

11 Amicus curiae Legal Momentum, the Women's Legal Defense and Education
12 Fund, is a leading national non-profit civil rights organization that has used the power of
13 the law to define and defend women's rights for over forty years. Through its project, the
14 National Judicial Education Program (NJEP), established in 1980, Legal Momentum has
15 been the national leader in the effort to identify and eliminate gender bias in the courts.
16 The work of this project was the catalyst for the establishment of state and federal task
17 forces on gender bias in the courts throughout the country, to which NJEP was a
18 consultant. NJEP's Director has written frequently on this issue. *See, e.g.,* Lynn Hecht
19 Schafran, *Gender Bias in the Courts: An Emerging Focus for Judicial Reform* ("Gender
20 *Bias in the Courts*"), 21 ARIZ. ST. L. J. 237 (1989); Lynn Hecht Schafran, *Documenting*
21 *Gender Bias in the Courts: The Task Force Approach*, 70 JUDICATURE 280 (1986-1987);
22 Lynn Hecht Schafran, *Gender Equality in the Courts: Still on the Judicial Agenda*, 77
23 JUDICATURE 110 (1993-1994).

24 NJEP was instrumental in the American Bar Association's decision to amend the
25 section of its Model Code of Judicial Conduct dealing with the courtroom to require that
26 judges and lawyers not manifest bias or prejudice based on sex. Lynn Hecht Schafran,
27 *The Obligation to Intervene: New Direction from the American Bar Association Code of*
28 *Judicial Conduct* ("The Obligation to Intervene"), 4 GEO. J. LEGAL ETHICS 53 (1990-

1 1991). This is the model for Arizona Code of Judicial Conduct Rule 2.3, which is at issue
2 in this case. Legal Momentum also has submitted briefs on many aspects of gender bias
3 in the courts to state and federal courts, including the U.S. Supreme Court.

4 CASE BACKGROUND

5 In 2004, Wendi was tried and convicted of murdering her husband, Joe Andriano
6 (“Joe”). The jury sentenced her to death on December 22, 2004. *State v. Andriano*
7 (*“Andriano”*), 215 Ariz. 497, 500 (Ariz. 2007) (affirming the conviction and sentence).

8 During her trial, the prosecutor improperly used Wendi’s past sexual relationships
9 with others to distract jurors from the true matters at hand: whether Wendi was guilty and,
10 if so, whether the death penalty should be imposed. From the very first witness at trial,
11 the prosecutor was quick to paint Wendi as a promiscuous adulteress, playing heavily on
12 gender stereotypes. (9/8 Tr. Vol. 2 at 8-9, 44.) In his opening statement alone, the
13 prosecutor discussed Wendi’s sexual activities with three different men: her husband,
14 Rick Freeland (a neighbor) and Travis Black (a man she met at a bar). (9/7 Tr. at 25, 29,
15 31, 55.) During the remainder of the trial, the prosecutor also questioned witnesses about
16 Wendi’s relationships with six other men (Shawn King, Pete Munoz, Jonathan
17 Householder, Didos Gamez, Chris Barnes, and Vernon Barnes).² The prosecutor
18 discussed these relationships in an overt attempt to label her as promiscuous and therefore
19 deserving of punishment.

20 The prosecutor also repeatedly characterized Wendi as a sexually assertive and
21 pushy woman, desperately craving male attention. For example, in referring to an
22 extramarital affair, the prosecutor depicted Wendi as “the pursuer” and claimed she “was
23

24 ² Wendi had an intimate relationship with Rick Freeland and Travis Black during
25 her marriage. Wendi’s relationships with Shawn King, Didos Gamez, and Vernon Barnes
26 all occurred prior to her marriage. (10/25 Tr. at 43, 46-47.) Despite the prosecutor’s
27 inappropriate and unsupported references thereto, Wendi denied having any romantic
28 relationship whatsoever with Pete Munoz, Jonathan Householder, or Chris Barnes. (10/28
Tr. at 76-77; 11/1 Tr. at 90.) The prosecutor did not offer any evidence to counter
Wendi’s denial, and the Court did not allow the State to call these men as witnesses.
(11/8 Tr. at 7.)

1 doing just about anything she could to get this individual.” (9/7 Tr. at 25:7-10.) As
2 another example, the prosecutor claimed that Wendi would frequently haunt bars on the
3 “look[out] for the young bucks . . . on the dance floor” to take home and have sex with.
4 (11/16 Tr. at 101:23-24; *see also* 9/7 Tr. at 55:3-5 (“[a]nd now she needs a new
5 individual, even though she’s still interested in, as you have seen, Rick Freeland, and
6 asking for a drink”).)

7 Much of the testimony the prosecutor elicited was unmistakably gender biased.
8 The terminology and phrases he used to describe Wendi would never be used to describe a
9 male defendant. For example, the prosecutor referred to Wendi as a “little lotus blossom,”
10 a condescending and diminutive term. (11/16 Tr. at 88:2.) On several other occasions he
11 focused on whether Wendi had been flirting with men, trying to paint the stereotypical
12 image of a manipulative woman out to deceive and take advantage of vulnerable men.
13 (*See, e.g.*, 10/28 Tr. at 99-100 (questioning defendant regarding whether she had been
14 flirting with a man and suggesting that in doing so Wendi “was just being a girl”); 11/17
15 Tr. at 5 (claiming that Wendi may have been flirting with a detective); 12/8 Tr. at 95-96;
16 12/15 Tr. at 108:9-12 (claiming that Wendi was flirting with a police officer and
17 “laugh[ing] coquettishly with him” in an attempt to manipulate him); 12/15 Tr. at 108
18 (focusing on whether Wendi flirted with a psychologist during a clinical interview in jail
19 as a way to manipulate him).) The prosecutor also made several inappropriate references
20 to what Wendi looked like or wore, such as telling the jury, “[y]ou’ve seen what she
21 looked like back then all sassed up in her pink little outfit.” (11/16 Tr. at 63:17-18; *see*
22 *also* 10/5 Tr. at 155:5-7 (claiming that Wendi was “caught in a compromising activity in
23 skimpy clothing with a Hispanic male”).)

24 Moreover, the prosecutor went out of his way to give the jury as much voyeuristic
25 detail as possible about Wendi’s sexual conduct, such as the following examples:

- 26 1. Whether Wendi used lubricant with her sexual partners — including in her
27 relationships before she even met Joe (11/16 Tr. at 75:18-22 (“[E]very time that
28 the defendant has sex with Mr. Andriano, she had to use a lubricant. I wonder if
she had to use a lubricant with Didos Gamez. I wonder if she had to use a
lubricant with Vernon Barnes.”));

2. Whether sexual intercourse took place outside under a bridge or in a truck in a parking lot (11/01 Tr. at 53:5-7 (“Q. You never had sexual intercourse with him under bridge near golf course? A. No.”); 11/1 Tr. at 90:16-91:7 (“You weren’t in a parking lot in a truck at 4:00 the morning on July of 1996? A. No, I was not.”); and even
3. Comparisons between the deceased and Wendi’s sexual partners. (11/16 Tr. at 76:11-17 (“Certainly [Joe] wasn’t like Travis Black who has arms the size of legs that she met one night and had a one-night stand.”).)

In all, the prosecutor repeated details about Wendi’s sexual behavior, attire, or flirtatiousness more than 100 times during all phases of her trial, creating a literal side-show of irrelevant, prejudicial evidence. Exhibit 2 to the Memorandum in Support of Defendant’s Petition for Post-Conviction Relief (“Petition”) quotes these excerpts from the trial transcript. Amicus curiae incorporates Exhibit 2 herein by reference and further adopts the Statement of the Case and Facts appearing in Wendi’s Petition.

The prosecutor’s misconduct resulted in actual prejudice, as evidenced by the jury’s improper focus on irrelevant details of Wendi’s sex life. When given the opportunity to directly question Wendi and other witnesses, the jury posed the following questions:

1. “Did Rick Freeland know you were married before the affair?” (11/8 Tr. at 35:23-24.)
2. “Who initiated sexual intercourse with Rick Freeland?” (11/8 Tr. at 44:3-4.)
3. “Why did you keep a friendly relationship with the defendant knowing how she would come and hang out on your door for long periods of time?” (9/13 Tr. at 70:23-25.)
4. “Did you invite [Wendi] to breakfast or did the defendant ask you to breakfast?” (9/16 Tr. at 110:2-3.)
5. “Did you do any fooling around in the car?” (9/16 Tr. at 109:14.)
6. “Would you have continued to give Wendi money if you would have known she spent money at bars with friends, boyfriends, twice a week? Is it okay to have affairs in your religion? Was Wendi brought up as such?” (10/5 Tr. at 188:5-9.)

ARGUMENT

Amicus presents three independent grounds on which to grant Wendi’s Petition for Post-Conviction Relief. First, the Arizona state legislature, courts, and bar all have

1 expressed a strong public policy towards correcting the impact of gender bias in the
2 administration of justice. This Court should uphold that policy by reversing Wendi's
3 conviction. Second, the State injected countless irrelevant and inflammatory details about
4 Wendi's sexual history, which constituted prosecutorial misconduct that deprived the
5 defendant of a fair trial. Finally, defense counsel's inexplicable failure to object to such
6 prejudicial material amounted to ineffective assistance of counsel.

7 **I. THE STATE OF ARIZONA'S PUBLIC POLICY AGAINST GENDER BIAS**
8 **IN THE COURTS WEIGHS IN FAVOR OF GRANTING WENDI'S**
9 **PETITION FOR POST-CONVICTION RELIEF.**

10 Arizona's strong public policy against gender bias in legal proceedings supports
11 Wendi's Petition for Post-Conviction Relief. Studies throughout the United States,
12 including those conducted in Arizona, have shown that women are subject to widespread,
13 systemic discrimination in all types of proceedings. To counter this bias, the Arizona state
14 legislature, courts and bar association have enacted laws and rules to prevent just the sort
15 of prejudicial conduct seen in Wendi's trial. For instance, Arizona enacted its rape shield
16 statute to limit use of evidence of a victim's prior sexual conduct as character evidence in
17 order to avoid the prejudice inherent in detailing a woman's sex life. A.R.S. § 13-1421.
18 Similarly, the Arizona courts have adopted rules of conduct for court proceedings, which
19 prohibit bias or prejudice based on sex. Arizona Code of Judicial Conduct Rule 2.3; *see*
20 *also* Arizona Rules of Professional Conduct, Rule 8.4(d). The prosecutor's improper
21 focus on Wendi's irrelevant sexual conduct flies in the face of Arizona's public policy
22 against bias, and is an independent ground for reversal of her conviction.

23 **A. Gender Bias is Pervasive in the Legal System, Putting Female Litigants**
24 **at a Severe Disadvantage in the Proper Administration of Justice.**

25 For nearly three decades, state and federal courts have engaged in various studies
26 to identify and eliminate gender bias in court proceedings. *See* Barbara Allen Babcock,
27 *Introduction: Gender Bias in the Courts and Civic and Legal Education*, 45 STAN. L.
28 *REV.* 2143 (1992-1993). Among other things, forty-five states have established gender
bias task forces comprised of judges, lawyers and court administrators to conduct

1 thorough examinations of their local court systems and propose recommendations to end
2 this pernicious form of discrimination. *See* Schafran, *supra*, *Gender Bias in Courts*, at
3 237. In 1991, the Arizona Bar Association Board of Governors commissioned such a task
4 force in Arizona. *See* Hon. Susan A. Ehrlich et al., *Gender Bias Task Force Judicial*
5 *Performance Review Subcommittee Proposal* (“Arizona Gender Bias Report”), attached
6 hereto as Exhibit A.

7 These task forces’ studies consistently present evidence that gender bias remains
8 alive and well in the legal system. *See* Lynn Hecht Schafran, *Overwhelming Evidence:*
9 *Reports on Gender Bias in the Courts*, TRIAL, Feb. 1990, at 28; *see also* Final Report of
10 the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice
11 System (2003) at 14, *available at*
12 <http://www.courts.state.pa.us/Index/Supreme/biasreport.htm>. In Arizona, for example, a
13 study in Pima County revealed multiple instances of discrimination based on sex, ranging
14 from “reports of overt bias by judges” to “subtle, attitudinal misconceptions.” *See* Ex. A,
15 Arizona Gender Bias Report at 1. The Arizona Supreme Court similarly wrote in 1992
16 that “there are continuing reports of gender bias existing within the Arizona judiciary and
17 bar.” *In the Matter of the Endorsement of the State Bar of Arizona Task Force on Gender*
18 *Bias*, Administrative Order 92-17 (1992), *available at*
19 <http://www.azcourts.gov/portals/22/admorder/orders94/pdf92/9217.pdf>.

20 Gender bias takes many forms and can infect every aspect of court proceedings.
21 As one state’s task force explained, gender bias encompasses “decisions . . . made or
22 actions taken because of weight given to preconceived notions of sexual roles, rather than
23 upon a fair and unswayed appraisal of merit as to each person or situation.” *See, e.g.,*
24 *Report of the Missouri Task Force on Gender and Justice*, 58 MO. L. REV. 485 (1993).
25 Gender bias can include “stereotypical attitudes about the nature and roles of women and
26 men.” *Catchpole v. Brannon*, 36 Cal. App. 4th 237, 244 n.2 (Cal. Ct. App. 1995), *rev.*
27 *denied*, 1995 Cal. LEXIS 5807 (Cal. Sept. 14, 1995) (*quoting* Judicial Council of Cal.
28

1 Achieving Equal Justice for Women and Men in the Courts: The Draft Rep. of the Judicial
2 Council Advisory Committee on Gender Bias in the Courts (1990) at p. 2).

3 The task forces' investigations and many other studies have determined that
4 expectations about appropriate roles and behaviors for women operate to seriously
5 disadvantage women in several substantive areas of the law, from asylum cases to
6 domestic violence proceedings. *See generally* LYNN HECHT SCHAFFRAN & ELIZABETH J.
7 VRATO, GENDER, JUSTICE AND LAW: FROM ASYLUM TO ZYGOTES 16 (2003). As one
8 example, studies in several states found that mothers lost custody solely or primarily
9 because they had sexual relations with another man after separating from their husbands –
10 a double standard not applied to men. Karen Czapanskiy, *Gender Bias in the Courts:*
11 *Social Change Strategies*, 4 GEO. J. LEGAL ETHICS 1, 4 (1990-1991) (collecting task force
12 findings); *see also* ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST
13 LAWMAKING 152-54 (2000). As another example, empirical evidence has shown that
14 juries are less likely to convict when a rape complainant is perceived as promiscuous, is
15 the mother of a non-marital child, or has been married several times. Michelle J.
16 Anderson, *Diminishing the Legal Impact of Negative Social Attitudes Toward*
17 *Acquaintance Rape Victims* ("Diminishing the Legal Impact"), 13 NEW CRIM. L. REV.
18 645, 657 (2010); *see also* MARGARET GATES, WOMEN IN THE COURTS: VICTIMS OF RAPE
19 AND WIDE ABUSE 184 (1978); TERESA SCALZO, PROSECUTING ALCOHOL-FACILITATED
20 SEXUAL ASSAULT 19 (Aug. 2007); RENAE FRANIUK ET AL., PREVALENCE AND EFFECTS OF
21 RAPE MYTHS IN PRINT JOURNALISM 2-3, 15 (2008).

22 Gender bias also operates to decrease our court system's legitimacy. As Justice
23 Sandra Day O'Connor observed in her commentary on the Final Report of the Ninth
24 Circuit Gender Bias Task Force,³ "[w]hen people perceive gender bias in a legal system,
25 whether they suffer from it or not, they lose respect for that system, as well as for the
26

27 ³ *The Effects of Gender in the Federal Court: The Final Report of the Ninth Circuit*
28 *Gender Bias Task Force*, 67 S. CAL. L. REV. 731 (1991).

1 law.” Hon. Sandra Day O’Connor, *The Quality of Justice*, 67 S. CAL. L. REV. 759, 760
2 (1993-1994).

3 Nowhere, however, is gender discrimination more insidious than in our criminal
4 justice system, where women’s very lives, such as Wendi’s, depend on fairness. *See, e.g.*,
5 Minnesota Supreme Court Task Force for Gender Fairness in the Courts Final Report, 15
6 WM. MITCHELL L. REV. 825, 827, 840 (1989) (noting that gender bias “must be addressed
7 in order to insure fairness in our judicial system”). Research documents that jurors have
8 serious misconceptions about female defendants such as Wendi being tried for victim-
9 precipitated self-defense. *See* Pamela Jenkins & Barbara Davidson, *Battered Women in*
10 *the Criminal Justice System: An Analysis of Gender Stereotypes (“Battered Women”)*, 8
11 BEHAVIORAL SCIENCES AND THE LAW, 161, 166-167 (1990); Charalee Graydon,
12 *Habilitation: Sentencing of Female Offenders*, 5 CAN. J. L. & JURISPRUDENCE, 121, 124
13 (1992).

14 Specifically, a female defendant’s sexual activities can be one of the major
15 obstacles to juror receptivity to a successful self-defense claim. Holly Maguigan,
16 *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform*
17 *Proposals*, 140 U. PA. L. REV. 379, 387 (1991). Anything that interferes with the societal
18 notion that “innocent” female defendants are expected to be sorrowful and subservient can
19 be very damaging. This is exacerbated by the fact that the “credibility accorded women
20 litigants is [already generally] less than that accorded men litigants.” *See* Karen
21 Czapanskiy, *Domestic Violence, the Family, and the Lawyering Process: Lessons from*
22 *Studies on Gender Bias in the Courts*, 27 FAM. L.Q. 247, 253 & n.18 (1993-1994); Lynn
23 Hecht Schafran, *Credibility in the Courts Why is There a Gender Gap?*, 34 JUDGES J. 5
24 (1995); Lynn Hecht Schafran, *Eve, Mary, Superwoman: How Stereotypes About Women*
25 *Influence Judges*, 24 JUDGES J. 12 (1985).

1 **B. The Arizona State Legislature, Courts, and Bar Association Have**
2 **Attempted to Combat Gender Bias By Adopting Laws and Rules**
3 **Barring Questioning About a Female Witness' Prior Sexual Activities.**

4 The Arizona state legislature, courts, and bar association have responded to the
5 rampant problem of gender bias by adopting laws and rules to protect female litigants
6 from discrimination.

7 For example, in *State ex rel. Pope v. Superior Court*, 113 Ariz. 22 (Ariz. 1976), the
8 Arizona Supreme Court held that evidence of a victim's alleged unchastity is inadmissible
9 to impeach that witness' credibility. In *Pope*, a defendant charged with kidnapping and
10 sexual assault argued that he should be allowed to present evidence that the victim had
11 bad moral character as shown by her previous sexual activities. The Arizona Supreme
12 Court rejected this contention, holding that "[r]eference to prior unchaste acts of the
13 complaining witness injects collateral issues into the case which divert the jury's attention
14 from the real issues, the guilt or innocence of the accused." *Id.* at 28 (internal quotations
15 omitted). The court explained that "[t]he law does not and should not recognize any
16 necessary connection between a witness' veracity and her sexual immorality." *Id.* at 26.
17 Following this rule, Arizona appellate courts have reversed when a trial court mistakenly
18 admitted irrelevant evidence about a victim's sexual history. *See, e.g., State ex rel.*
19 *Montgomery v. Duncan*, 228 Ariz. 514 (Ariz. Ct. App. 2011) (trial court erred by
20 admitting evidence of the victim's alleged statement to defendant that she had engaged in
21 oral sex with two other individuals); *see also State v. Herrera*, 226 Ariz. 59 (Ariz. Ct.
22 App. 2010) (trial court correctly precluded defendant from introducing evidence of the
23 victim's sexual history).

24 The Arizona legislature codified portions of the *Pope* decision in 1998. Arizona
25 Revised Statute section 13-1421 provides that "[e]vidence relating to a victim's reputation
26 for chastity and opinion evidence relating to a victim's chastity are not admissible in any
27 prosecution for any offense in this chapter." If a defendant wishes to introduce evidence
28 of specific instances of the victim's prior sexual conduct, the defendant must show by
29 clear and convincing evidence that: (1) the evidence is relevant and is material to a fact in

1 issue; (2) that the inflammatory or prejudicial nature of the evidence does not outweigh its
2 probative value; and (3) the evidence falls within a narrow set of exceptions outlined in
3 the statute, such as evidence of the victim's past sexual conduct with the defendant
4 specifically.⁴ A.R.S. § 13-1421. In support of this bill, one commentator declared during
5 the senate floor discussion that "it was absurd to put a victim's sexual history on trial."
6 S.B. 1141, 43rd Leg., 2d Reg. Sess. (Ariz. 1998).

7 The principles underlying adoption of Arizona's rape shield law apply with equal
8 force to Wendi's case. Just as there is a connection between the prejudices against
9 sexually active female rape victims and unfair trial outcomes, so too there is a connection
10 between prejudices against female defendants' "immoral" lifestyles and unfair trial
11 outcomes. In both cases, the woman's prior sexual history has little if any relevance to
12 what the jury is tasked with deciding – ultimate guilt for the crime charged against the
13 defendant. In both cases, such evidence operates solely to cause the female party undue
14 embarrassment and to undermine her credibility, making it less likely for a jury to credit
15 her narrative of the relevant events. Anderson, *supra*, *Diminishing the Legal Impact* at
16 657.

17 The Arizona Bar Association also has adopted rules to protect female actors from
18 prejudice in the court system. Rule 8.4(d) of the Arizona Rules of Professional Conduct,
19 for instance, provides that it is professional misconduct for a lawyer to engage in activity
20 that "is prejudicial to the administration of justice." The comments to the rules state that
21 "[a] lawyer who in the course of representing a client, knowingly manifests by words or
22

23 ⁴ The Arizona Court of Appeals subsequently upheld the constitutionality of A.R.S.
24 § 13-1421. In *State v. Gilfillan*, 196 Ariz. 396 (Ariz. Ct. App. 2000), the defendant moved
25 to admit evidence that the victim had previously falsely accused a 13-year-old boy of
26 attempted rape. After conducting a preliminary hearing, the trial court determined that the
27 defendant had not presented clear and convincing evidence that the victim had made any
28 false accusation. *Id.* at 400. On appeal, the defendant argued that A.R.S. § 13-1421
unconstitutionally infringed his rights to due process and confrontation. *Id.* at 402. In
upholding the constitutionality of Arizona's rape shield law, the Court of Appeals
specifically noted "the specious connection between a witness' veracity and her sexual
immorality." *Id.* at n.3.

1 conduct, bias or prejudice based upon . . . sex . . . violates paragraph (d).” *See* Arizona
2 Rules of Professional Conduct, Rule 8.4(d), comment [3]. Likewise, Arizona Code of
3 Judicial Conduct Rule 2.3, which directs that judges not manifest bias based on sex or
4 other irrelevant personal characteristics, provides that lawyers may only “mak[e]
5 legitimate reference to the listed factors, or similar factors, when they are relevant to an
6 issue in the proceeding.” The prosecutor’s incessant, voyeuristic references to her sexual
7 history, reaching back to her high school boyfriend, were deliberately intended to
8 prejudice the jury against her and violated Rule 2.3 and Rule 8.4(d).

9 **II. THE PROSECUTOR’S REPEATED REFERENCES TO WENDI’S SEXUAL**
10 **ACTIVITIES PLAYED INTO GENDER STEREOTYPES, WAS UNDULY**
11 **PREJUDICIAL, AND VIOLATED HER CONSTITUTIONAL RIGHT TO**
12 **DUE PROCESS.**

13 Even assuming arguendo that it was legitimate for the prosecutor in this case to
14 elicit evidence of Wendi’s extra-marital relationships with Rick Freeland and Travis
15 Black, there can be no question that he went far beyond any “legitimate” reference to her
16 sex life. The prosecutor’s misconduct rose to such a level of unfairness as to constitute a
17 denial of due process, meriting a new trial.

18 “To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate
19 that the prosecutor’s misconduct ‘so infected the trial with unfairness as to make the
20 resulting conviction a denial of due process.’” *State v. Hughes* (“*Hughes*”), 193 Ariz. 72,
21 79, ¶ 26 (1998) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). “Even if
22 the alleged acts of misconduct do not individually warrant reversal, we must determine
23 whether the acts contribute to a finding of persistent and pervasive misconduct.” *State v.*
24 *Bocharski* (“*Bocharski*”), 218 Ariz. 476, 491-92, ¶ 74 (2008) (citation omitted); *see also*
25 *Hughes*, 193 Ariz. at 79, ¶ 25 (reiterating that “the general rule that several non-errors and
26 harmless errors cannot add up to one reversible error . . . does not apply when the court is
27 evaluating a claim that prosecutorial misconduct deprived defendant of a fair trial”). A
28 court should “reverse a conviction because of prosecutorial misconduct if the cumulative
effect of the alleged acts of misconduct shows that the prosecutor intentionally engaged in

1 improper conduct and did so with indifference, if not a specific intent, to prejudice the
2 defendant.” *Bocharski*, 218 Ariz. at 492, ¶ 74 (citation omitted); *see also Hughes*, 193
3 Ariz. at 79, ¶ 27 (quoting *State v. Woodward* (“*Woodward*”), 21 Ariz. App. 133, 135
4 (1973)) (“Any one of the improper statements taken alone might not have warranted a
5 mistrial, but the cumulative effect was highly prejudicial with a strong probability that the
6 statements influenced the jury verdict.”).

7 Determining whether a prosecutor committed misconduct depends “on the
8 circumstances of the particular case,” and includes improper statements or questioning,
9 injecting one’s personal opinion, commenting upon matters not in evidence, and violating
10 ethical rules. *Woodward*, 21 Ariz. App. at 134; *Pool v. Superior Court* (“*Pool*”),
11 139 Ariz. 98, 102-103 (Ariz. 1984). Questions “designed to raise prejudice in jurors” can
12 constitute misconduct. *Pool*, 139 Ariz. at 102-103.

13 The Arizona Supreme Court has held that “the best rule for determining whether
14 remarks made by counsel in criminal cases are so objectionable as to cause a reversal of
15 the case” involves a two-pronged approach. *Sullivan v. State* (“*Sullivan*”), 47 Ariz. 224,
16 238 (1936); *see also Woodward*, 21 Ariz. App. at 135. First, a court should determine
17 whether “the remarks call to the attention of the jurors matters which they would not be
18 justified in considering in determining their verdict.” *Sullivan*, 47 Ariz. at 224. Second,
19 the court should evaluate whether, “under the circumstances of the particular case,” the
20 jury was “probably influenced by those remarks.” *Id.*

21 **A. The Prosecutor’s Statements Were Highly Prejudicial and Had Little**
22 **Relevance.**

23 In Wendi’s case, the prosecutor’s obsession with her sexual history was “designed
24 to raise prejudice in jurors” and had little, if any, relevance. *Pool*, 139 Ariz. at 102; *see*
25 *also Henson v. State* (“*Henson*”), 530 N.E.2d 768, 770 (Ind. Ct. App. 1988) (evidence
26 regarding female defendant’s extramarital affairs “had no relevance to [the defendant]’s
27 guilt or innocence,” and had no purpose other than to prejudice the jury against [the
28 defendant].”).

1 First, on a broad level, the prosecution's repeated references to Wendi's sex life
2 were intended as an attack on her character. Unfortunately, there is a pervasive belief in
3 society that a sexually "loose" woman cannot be trusted. See GARY LAFREE, RAPE AND
4 CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF CRIMINAL ASSAULT ("RAPE AND
5 CRIMINAL JUSTICE") 73-76 (1989). Some lawyers take advantage of this bias: a "gender-
6 biased [litigation] tactic" often used against female witnesses is "to destroy their
7 credibility by making them appear promiscuous." See Schafran, *supra*, *The Obligation to*
8 *Intervene*.

9 While this tactic is used in both criminal and civil cases, it is most well-
10 documented in sexual assault trials. For example, one nationwide study with over ten
11 years of data found that jurors were less likely to believe a rape had been committed if the
12 female victim had been sexually active outside or marriage. See LAFREE, *supra*, RAPE
13 AND CRIMINAL JUSTICE at 223; see also Michelle J. Anderson, *From Chastity*
14 *Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO.
15 WASH. L. REV. 51, 75, 98 (2002). In another study involving a poll on whether "defense
16 attorneys appeal to gender stereotypes (for example, 'women say no when they mean yes,'
17 'provocative dress is an invitation') in order to discredit the victim in criminal sexual
18 conduct cases," more than 70% of the attorney respondents answered that this occurred
19 "sometimes," "often" or "always." See Schafran, *supra*, *The Obligation to Intervene* at
20 61. Similarly here, the prosecutor's obsession with Wendi's pre- and post-marital sexual
21 partners, as well as his demeaning comments about her appearance and dress, served to
22 discredit Wendi before the jury. See, e.g., *Henson*, 530 N.E.2d at 770 (trial court erred by
23 admitting evidence of extramarital affairs).

24 Second and more specifically, the prosecutor's painting of Wendi as sexually
25 assertive undermined her claim of self-defense. See Elizabeth M. Schneider, *Equal Rights*
26 *to Trial for Women: Sex Bias in the Law of Self Defense*, 15 HARV. C.R.-C.L. L. REV. 623,
27 629, 645 (1980). Female "innocent" defendants are expected to be weak, tearful, and
28 subservient. Jenkins & Davidson, *supra*, *Battered Women* at 166-167. Relying on this

1 age-old bias, it may have been difficult for some jurors to square Wendi's self-defense
2 claim with the prosecutor's depiction of her as a sex-crazed woman who prowled bars late
3 at night, groping men in public. The prosecutor also implied to the jury that because
4 Wendi was unfaithful she was the aggressor against her husband, not the victim of
5 domestic violence.

6 Third, the prosecutor also took advantage of a gender-biased misconception that
7 battered women provoke any abuse they may have suffered. Studies from court systems
8 across the country found that "[t]he legal system often reinforces [this] tendency to blame
9 the victim [of domestic violence] for the violence she has suffered." *See, e.g., Report of*
10 *the Florida Supreme Court Gender Bias Study Commission*, 42 FLA. L. REV. 803, 849
11 (1990). The prosecutor's repeated comments on Wendi's extra-marital relations implied
12 that Joe was justified in committing any violence that occurred.

13 Fourth, the disclosure of Wendi's relationships before and during her marriage was
14 designed to portray her as an unsympathetic character during sentencing. *State v.*
15 *McKnight*, 107 Ohio St. 3d 101, 152 (2005) (finding that extramarital affairs should have
16 been excluded from murder trial because of the scorn a jury was likely to feel toward the
17 adulterer). As several commentators have noted, there is no surer way for a jury to deny
18 clemency to a female defendant than to paint her as promiscuous. *See, e.g., Lawyers on*
19 *Strike, This is a Tough Business*, (May 27, 2011), available at [http://strikelawyer.](http://strikelawyer.wordpress.com/2011/05/27/this-is-a-tough-business)
20 [wordpress.com/2011/05/27/this-is-a-tough-business](http://strikelawyer.wordpress.com/2011/05/27/this-is-a-tough-business) (noting that male and female jurors
21 alike are hostile towards promiscuous female defendants); Schafran, *supra*, *The*
22 *Obligation to Intervene* at 53.

23 In response, the State may contend that Wendi's sexual activities were properly
24 before the jury as relevant: 1) to "prove both her motive for killing Joe;" and 2) to "rebut
25 her claim that she 'was a domestic violence victim who lived in fear of her abusive
26 husband, whom she bludgeoned to death in self-defense.'"⁵ (*See Response to Petition for*

27 ⁵ While the Supreme Court found that evidence relating to Wendi's extramarital
28 (Footnote continues on next page.)

1 Post-Conviction Relief (“Response”), dated July 23, 2012, at 63.) Neither argument has
2 merit. With respect to motive, the prosecutor admitted during the trial that Wendi’s
3 relationships were not and could not have been the reason for killing Joe. During closing
4 statements, for example, the prosecutor stated unequivocally that Wendi’s relationships
5 with other men “really couldn’t be the motive” for killing Joe. (12/1 Tr. at 10:18-22.)
6 Rather, “the real reason” behind the alleged murder, the prosecutor argued, was money.⁶
7 (12/1 Tr. at 11:7-8.) Similarly, during his opening statement in the aggravation phase, the
8 prosecutor again stated:

9 And the only reason that she’s doing all of this is because she
10 wants the money. That’s why she did all this. She did it in
11 expectation of pecuniary gain. . . .There is no other motive in
12 this case other than that.

13 (11/30 Tr. at 20:9-22.) As such, the prosecutor’s focus on Wendi’s sexual activities
14 cannot be excused as relevant to motive.

15 Moreover, even assuming *arguendo* that evidence of an affair was relevant to
16 motive, this in no way justifies the state’s repeated references to Wendi’s *pre-marital*
17 sexual activities. In one case involving a male defendant, the court recognized that a
18 relationship not temporally related to the crime was irrelevant. *See Camm v. State*
19 (“*Camm*”), 812 N.E.2d 1127, 1133 (Ind. Ct. App. 2004) (evidence regarding affairs only
20 relevant to motive where defendant was involved in the affair “at the time of the
21 completed or contemplated homicide.”). For example, whether or not Wendi was intimate

22 (Footnote continued from previous page.)

23 affairs with Freeland and Black were relevant “to prove motive and to rebut the defense
24 theory that Andriano was a domestic violence victim,” the Court specifically noted that
25 Wendi did not allege, and hence it did not consider, a claim of prosecutorial misconduct.
26 *Andriano*, 215 Ariz. at 503 n.3.

27 ⁶ Prior to the trial, the prosecutor opposed a motion-in-limine to exclude evidence
28 regarding Wendi’s affair with Rick Freeland by theorizing that Wendi killed Joe so that
“she could be free to enjoy the company of other men.” (*See State’s Response to Motion-*
in-Limine, dated 4/9/2003 at 5; *see also* 2/27 Tr. at 16-17.) The court accepted the
prosecutor’s argument at face value and denied the motion-in-limine. (9/7 Tr. at 13-14.)
At the outset of the trial itself, however, the prosecutor abandoned this theory, instead
contending that Wendi killed her husband for the money. Given that tactical change in
course, it was clear misconduct for the prosecutor to unleash a smear campaign of
irrelevant sexual history evidence that was untethered to any theory of his case.

1 with Didos Gamez or Shawn King before meeting Joe was not pertinent to whether she
2 wanted to end her marriage.

3 The Supreme Court of Mississippi addressed a similar issue in *Lesley v. State*,
4 606 So. 2d 1084, 1090 (Miss. 1992). There, the court reversed a female defendant's
5 conviction for conspiracy to commit murder, finding that the trial court erred in allowing a
6 witness to testify with respect to two affairs that had allegedly occurred years before the
7 attempted murder. *Id.* at 1089. The court found that these affairs were "not part of any
8 chain of events leading to the planned murder" and were "too remote" to be relevant to
9 motive. *Id.* at 1089, 1090. "The only effect of such testimony," rather, "was to show the
10 jury that she was a 'bad woman.'" *Id.* at 1090, 1091. Similarly here, Wendi's
11 relationships with several of the men the prosecutor discussed occurred prior to her
12 meeting Joe, and hence were too far removed to be pertinent to motive. *See Camm*,
13 812 N.E.2d at 1134 (reversing conviction where "extramarital sexual escapades" were
14 "introduced to establish that [defendant] was a person of poor character," not motive).

15 Nor was the substantive evidence associated with these prejudicial statements
16 relevant as rebuttal evidence to the issue of domestic violence. *See, e.g., Duff v.*
17 *Lineberger*, No. COA04-335, 2005 N.C. App. LEXIS 1444, at *12-13 (N.C. Ct. App.
18 Aug. 2, 2005) (affirming protective order and noting that "[w]hether or not plaintiff
19 committed adultery is not relevant to whether defendant committed an act of domestic
20 violence"). For example, the prosecutor's characterization of Wendi as a "demure little
21 lotus blossom" and inappropriate references to her attire had no bearing on whether
22 Wendi suffered abuse at the hands of her husband. Similarly, the State cannot seriously
23 contend that Wendi's relationships with men before she even met Joe, including an
24 unsupported allegation by the prosecutor that "the reason that [a high school ex-boyfriend]
25 actually broke up with [Wendi] was because . . . he caught her in front of the television in
26 [a] state of undress with another male," somehow makes it less likely that she was a
27 victim of domestic violence during her marriage. (10/12 Tr. Vol. 2 at 49:20-51:8.) In
28 sum, the prosecutor's remarks "call[ed] to the attention of the jurors matters which they

1 would not be justified in considering in determining their verdict.” *Sullivan*, 47 Ariz. at
2 224. (See also Petition, Declaration of Larry Hammond (“Hammond Decl.”), dated
3 February 16, 2012 at ¶¶ 30, 32 (opining that the prosecutor engaged in misconduct by
4 improperly focusing on Wendi’s alleged sexual promiscuity).)

5 **B. The Jury Was Negatively Influenced by the Prosecutor’s Statements.**

6 The trial transcript itself reveals that the jury was “probably influenced” by the
7 prosecutor’s remarks. *Sullivan*, 47 Ariz. at 224. When given the opportunity to question
8 the witnesses directly, the jury repeatedly inquired about irrelevant details of Wendi’s pre-
9 marital and extramarital affairs. For example, the *very first question* the jurors posed to
10 Wendi was “[d]id Rick Freeland know you were married before the affair?” — a topic not
11 even remotely relevant to whether or not Wendi was guilty of murder. (11/8 Tr. at 35:23-
12 24.)

13 Similarly, the jury seemed to care about whether Wendi was “sexually aggressive”
14 just as much as the prosecutor did. For example, the jury asked whether Wendi or Rick
15 Freeland initiated the sexual conduct between them. (11/8 Tr. at 44:3-4 (“Next question
16 reads as follows: Who initiated sexual intercourse with Rick Freeland?”). Along the
17 same lines, the jury was interested to know whether it was Wendi or Rick who eventually
18 broke off the relationship. (10/14 Tr. at 119.) The jury also asked Travis Black, a man
19 Wendi had met in a bar, whether they did “any fooling around in the car,” and who invited
20 whom out to breakfast. (9/16 Tr. at 109:13-14, 111:9-10.)

21 The jury’s preconceived judgment about Wendi’s promiscuity was self-evident in
22 many of their questions. For example, the jury asked Wendi’s mother if “it [is] okay to
23 have affairs in your religion? Was Wendi brought up as such?” (10/5 Tr. at 188:7-9.) The
24 jury’s questions likewise revealed the biased effect that the prosecutor’s misconduct had
25 on Wendi’s domestic violence defense. The jury asked, for example, “is it typical for
26 victims of domestic violence to go out or be allowed to go out with friends socially on a
27 weekly or more frequent basis?,” and “[i]s it common for women who are victims of
28

1 domestic violence to have affairs even though they are fearful of their abuser?" (10/14 Tr.
2 at 115:18-20; 117:5-7.)

3 In its Response to Wendi's Petition, the State incorrectly relies upon the Arizona
4 Supreme Court's finding that the prosecutor's opening and closing arguments were not
5 "evidence." (Response at 63); *see also Andriano*, 215 Ariz. at 503, ¶ 28. The State's
6 argument is misplaced because prosecutorial misconduct, which was not raised in the
7 appeal and, therefore, not discussed by the Arizona Supreme Court, is not limited to
8 evidence but encompasses any misconduct by the prosecutor. *See, e.g., Hughes*, 193 Ariz.
9 at 83-85, ¶¶ 50-56 (citing numerous examples of misconduct during rebuttal arguments).
10 Thus, whether the prosecutor's comments were evidence or not is immaterial. What
11 matters is that the prejudicial, gender-biased, and irrelevant comments "so infected the
12 trial with unfairness as to make the resulting conviction a denial of due process." *Hughes*,
13 193 Ariz. at 79, ¶ 26. Because the prosecutor's misconduct rose to that level, Amicus
14 respectfully requests that the Court grant Wendi's Petition.

15 **III. DEFENSE COUNSEL'S ALLOWING PERVASIVE REFERENCES TO**
16 **WENDI'S SEXUAL ACTIVITIES VIOLATED HER SIXTH AMENDMENT**
RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

17 Not only did the prosecutor's misconduct severely prejudice Wendi, but her own
18 counsel proved to be deficient, violating Wendi's Sixth Amendment right to effective
19 assistance of counsel. Wendi's counsel inexplicably failed to object numerous times to
20 the prosecutor's gratuitous gender-biased references. Moreover, in a few instances,
21 Wendi's counsel actually opened the door to the prosecution's highly prejudicial line of
22 questioning, exposing his client to unnecessary embarrassment and damaging her
23 domestic violence defense.⁷

24
25
26 ⁷ The Supreme Court did not consider or address whether Wendi's Sixth
27 Amendment right to effective assistance of counsel was violated by her trial counsel's
28 failure to object to the prosecutor's repeated reference to her sexual history. *Andriano*,
215 Ariz. at 497.

1 Under *Strickland v. Washington*, a person accused of a crime has a Sixth
2 Amendment right to effective assistance of counsel. 466 U.S. 668, 685-86 (1984). In
3 order to prove this right has been violated, a claimant must show that (1) “counsel’s
4 performance was deficient” and that (2) “the deficient performance prejudiced the
5 defense.” *Id.* at 687. In determining whether counsel’s representation was deficient, a
6 claimant must show that “counsel’s representation fell below an objective standard of
7 reasonableness . . . under prevailing professional norms.” *Id.* at 688. To prove that the
8 deficient representation prejudiced the claimant’s defense, she must show that “there is a
9 reasonable probability that, but for counsel’s unprofessional errors, the result of the
10 proceeding would have been different.” *Id.* at 694.

11 By not objecting to the prosecutor’s barrage of gender-biased comments, Wendi’s
12 trial counsel proved to be ineffective. The Arizona Supreme Court has recognized that the
13 failure to object can result in inadequate representation in and of itself. *In re Offenhartz*,
14 173 Ariz. 382, 384 (1992) (disciplining a lawyer for ineffective assistance of counsel for
15 failing to object to the testimony of two witnesses).

16 Wendi’s counsel failed to raise objections to many of the prosecution’s references
17 to Wendi’s pre-marital sexual history or extra-marital relationships, even where the
18 prosecutor’s information appeared to be totally unfounded. (*See* Hammond Decl. at
19 ¶¶ 30, 32 (opining that defense counsel’s failure to object to the State’s irrelevant
20 arguments about Wendi’s alleged sexual promiscuity constituted ineffective assistance of
21 counsel under *Strickland*).) For example, Wendi denied having relationships with Pete
22 Munoz and Jonathan Householder. Some of her other relationships – such as those with
23 Didos Gamez and Vernon Barnes – indisputably took place before she married Joe.
24 Notwithstanding these facts, defense counsel allowed the prosecutor to question Wendi
25 and other witnesses at length about these relationships. (*See, e.g.*, 10/28 Tr. at 75:13-
26 77:23 (questioning Wendi regarding her sexual history with Gamez, V. Barnes, Munoz,
27 Householder, and C. Barnes with no objection from defense counsel).)

1 Nor did Wendi's counsel make any attempt to prevent the prosecutor from using
2 gender-biased terms that damaged Wendi's credibility. For example, Wendi's attorney
3 failed to object when the prosecutor described her as a "demure little lotus blossom,"
4 "coquettish[.]" or "all sassed up." (*See, e.g.*, Tr. 11/16 at 63:17-19, 87:13-88:3, 152:7-12;
5 12/15 Tr. at 108:9-12.) Defense counsel also was completely silent when the prosecutor
6 asked Wendi if "sitting between [Chris Barnes'] legs and sort of flirting" with him "was
7 just you being a girl, right?" (10/28 Tr. at 99:21-100:13; *see also* 11/16 Tr. at 85:1-7
8 ("Just because you have a drink with somebody, just because a man is nice to you, you
9 better be careful you're not a tease. But if you are, then you can have intercourse with him
10 It really isn't your fault because that's not . . . the way women should act.").) In
11 several other instances, defense counsel sat idly by while the prosecutor improperly
12 implied that Wendi was promiscuous because "she didn't want to be a tease." (*See, e.g.*,
13 Tr. 11/16 at 84:16-85:9; Tr. 11/17 at 4:2-7.)

14 All of these statements were highly prejudicial and a reasonable attorney would
15 have objected in order to protect the defendant from this prejudice. Because defense
16 counsel did not attempt to object to these excessive and gender-biased references to
17 Wendi's sexual relationships, his representation was deficient.

18 Worse still, Wendi's counsel arguably opened the door to some of the irrelevant
19 material relating to defendant's sexual history that the prosecutor dwelled upon. For
20 example, Wendi's own attorney elicited testimony about the loss of her virginity and
21 sexual relationships with men prior to her marriage. (*See, e.g.*, 10/25 Tr. at 45-48.) A
22 reasonable attorney under similar circumstances would have been aware of the negative
23 consequences of opening the door to discussion of a defendant's irrelevant sexual history
24 and the potential of this information to prejudice the jury.

25 That the jury was tainted by the prosecutor's inflammatory statements is
26 undeniable, as a number of the specific questions posed by the jurors to Wendi and other
27 witnesses dealt solely with her alleged extramarital affairs. (*See infra* at pp. 19-20.)
28 Given the effect on the jury, there is a reasonable probability that, but for Wendi's

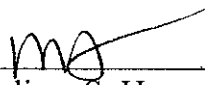
1 counsel's errors, the result of the proceeding would have been different. As such, Wendi
2 was deprived of effective assistance of counsel under *Strickland*, affording the Court
3 another reason to reverse her conviction.

4 **CONCLUSION**

5 For the foregoing reasons, Amicus Curiae respectfully requests that the Court grant
6 Defendant Wendi Andriano's Petition for Post-Conviction Relief.

7 DATED this 28th day of September, 2012.

8
9 POLSINELLI SHUGHART PC

10
11 By: 
12 Melissa S. Ho
13 Attorneys for Amicus Curiae
14 LEGAL MOMENTUM

15 and

16 MORRISON FOERSTER, LLP
17 Mark W. Danis
18 Efrain Staino
19 Natalie E. Wheatfall
20 Diana B. Kruze
21 (*Pro Hac Vice* Admissions Pending)
22 Attorneys for Amicus Curiae
23 LEGAL MOMENTUM
24
25
26
27
28

1 ORIGINAL filed this 28th day of
2 September, 2012, with the
3 Clerk of the Maricopa County Superior Court.

4 COPY of the foregoing hand delivered
5 this 28th day of September, 2012 to:

6 Honorable Brian K. Ishikawa
7 Maricopa County Superior Court
8 Southeast Facility, Suite 1114
9 222 E. Javelina Avenue
Mesa, AZ 85210

10 COPY of the foregoing mailed
11 And emailed this 28th day of
12 September, 2012, to:

13 Ms. Lacey Stover Gard
14 Office of the Attorney General
15 400 W. Congress, Suite S-315
Tucson, AZ 85701-1367
Attorney for the State of Arizona

16 
17
18
19
20
21
22
23
24
25
26
27
28

Exhibit A

STATE BAR COMMITTEE ON MINORITIES AND WOMEN IN THE LAW

GENDER BIAS TASK FORCE PROPOSAL

Pursuant to the request of the Board of Governors at its January 18, 1991 meeting, the Committee on Minorities and Women in the Law submits the following proposal to establish and fund a Gender Bias Task Force.

I. TASK FORCE MISSION

The Board of Governors of the Arizona State Bar and the Arizona Supreme Court acknowledge that responsibility for the effective administration of justice, and conduct of attorneys and judges, is a joint responsibility. Studies in Pima County, like similar studies throughout the country, have demonstrated that gender bias exists in Arizona. Examples of gender bias in the Arizona judicial system range from reports of overt bias by judges (such as sexual harassment) to subtle, attitudinal misconceptions. Behavior or decision-making that is based on stereotypical attitudes and cultural perceptions can range from simple ill will to intentional bias. Manifestations of gender bias are emerging due to rapid social changes, and judges and court personnel have not yet been sensitized to realize the full extent of the problems. The Pima County Task Force found some evidence of trivializing domestic violence issues. Education is key to resolving many of these issues.

The Board of Governors, in conjunction with the Supreme Court, hereby establishes the Gender Bias Task Force to develop specific recommendations designed to address and eliminate gender bias in Arizona. The work of the Task Force shall include the development of educational proposals designed to ferret out existing bias and monitor the progress and implementation of the proposals.

AGENDA ITEM 2.c. Minorities & Women

II. AGENDA

Below is a tentative agenda that may be revised as certain tasks are accomplished.

<u>Action</u>	<u>Date</u>
Obtain endorsement of Bar Board of Governors and the Supreme Court.	June 1991
Identify Task Force membership and make appointments.	August 1991
Hold first meeting.	September 1991
Complete review of other task force reports and preliminarily identify recommendations the Task Force should adopt.	November 1991
Contact agencies and committees who may already be dealing with issues of gender bias to determine appropriate role of various organizations and agencies in relation to the Task Force. Contacts include but are not limited to Arizona Women Lawyers Association; Arizona's law schools; agencies dealing with the problems of domestic violence, custody disputes, payment of child support; public defenders and prosecutors; probation officers; and juvenile court professionals; law firm administrators dealing with such issues of private practice gender bias as part-time policies, partnership criteria and specialization.	December 1991
Complete review of laws and codes of ethics for attorneys and judges to determine possible need for reform.	February 1992
Develop recommendations for education and other means of systematically eliminating gender bias.	April 1992
Develop reporting system to resolve problems of gender bias.	June 1992
Issue preliminary report and solicit recommendations.	Fall 1992
Issue final report.	Spring 1993

III. BUDGET

The budget for 1991 will not exceed \$5,000. Specific items necessary will include educational materials, copying, postage and travel. A very rough budget includes the following:

<u>Expense</u>	<u>Amount</u>
Travel (including reimbursements for rural county representatives)	\$ 1,200.00
Postage	1,000.00
Copying	350.00
Background materials	1,000.00
Long distance telephone calls	250.00
Meeting costs	<u>1,200.00</u>
TOTAL	\$ 5,000.00

IV. MEMBERSHIP

The Committee recommends that the co-chair should be one each from Maricopa and Pima Counties. The Committee also recommends the following as permanent members of the Task Force:

1. State Bar staff (Cindy Zwick and/or Bruce Hamilton or their designee).
2. Two superior court judges or pro tem judges, one from a rural county and one from Pima or Maricopa (if at all possible one of these should also be a member of the Judicial Ethics Committee).
3. A lower court judge.

4. A member from the Board of Governors.
5. A designee from the Arizona Women Lawyers Association.
6. A member of the Arizona Supreme Court.
7. Two county bar board members, one from an urban county and one from a rural county.
8. Two to three sociologists or other non-lawyer professionals.
- ~~9.~~ A designee from the Committee on Judicial Education (Karen Waldrup, Nancy Sheffel or Bill McDonald who would have information regarding judicial education).
10. One community member who was active on the Commission on the Courts.
11. Two to three members of the Committee on Minorities and Women in the Law.

EXHIBIT A

Some issues of gender bias that the Task Force may consider the following:

a. **Domestic relations -**

Child custody - whether fathers receive equal consideration in custody disputes.

Spousal Maintenance - Are awards adequate? Are men and women treated appropriately?

b. **Juvenile treatment -**

Pima County Task Force has documented problems with runaway girls who have left abusive home situations. Judges have committed these girls to the Department of Corrections instead of foster care or other more supportive environments.

c. **Interaction in the courtrooms -**

Pima County's attorney survey documented improper interactions in the court between lawyers and judges, judges, lawyers and women victims, etc.

d. **Women in the legal profession -**

The Task Force may look at representation of women in Bar organizations and on the bench, whether women are receiving fee-generating appointments and employment of women by the Courts (hiring and promotions for women in the court system).

e. **Criminal sentencing -**

Whether women are treated differently in sentencing? Either lesser sentences or greater?

f. **Law school problems -**

Other states have documented employment and promotion problems within the law schools.

g. **Prostitution -**

Determine whether in Arizona, as in many other states, men receive unequal treatment in the prosecution and sentencing of this crime.