

ANDREW P. THOMAS  
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**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
IN AND FOR THE COUNTY OF MARICOPA**

|                           |   |  |
|---------------------------|---|--|
| ANDREW THOMAS, Petitioner | ) | Case No. CV <del>LC 2010-000090-001 DT</del> |
|                           | ) |  |
| Petitioner,               | ) |  |
|                           | ) | <b>SUMMONS</b>                               |
| vs.                       | ) |  |
| MARICOPA COUNTY BOARD OF  | ) | (Petition for Special Action)                |
| SUPERVISORS, Respondent.  | ) |  |
|                           | ) |  |
|                           | ) |  |
|                           | ) |  |
|                           | ) |  |

**WARNING: This is an official document from the court that affects your rights. Read this carefully. If you do not understand it, contact a lawyer for help**

**STATE OF ARIZONA TO:**

**MARICOPA COUNTY BOARD OF SUPERVISORS**

1. A lawsuit has been filed against you. A copy of the lawsuit and other court papers are served on you with this "Summons".
2. If you do not want a judgment or order taken against you without your input, you must file an answer "Answer" or a "Response" in writing with the court, and pay the filing fee. If you do not file an answer "Answer" or "Response" the other party may be given the relief requested in his/her Petition or Complaint. To file your "Answer" or "Response" take, or send, the "Answer" or "Response" to the Office of the Clerk of the Superior Court, 201 West Jefferson Street, Phoenix, AZ 85003-2205 or the Office of the Clerk of the Superior Court, 222 East Javelina Drive, Mesa, AZ 85210-6201 or Office of the Clerk of Superior Court, 14264 W. Tierra Buena Lane, Surprise, AZ 85374. Mail a copy of your "Response or "Answer" to the other party at the address listed on the top of this Summons.

3. If this "Summons" and the other court papers were served on you by a registered process server or the Sheriff, within the State of Arizona, your "Response" or "Answer" must be filed within **TWENTY (20) CALENDAR DAYS** from the date you were served, not counting the day you were served. If this "Summons" and the other papers were served on you by a registered process server or the Sheriff outside the State of Arizona, your Response must be filed within **THIRTY (30) CALENDAR DAYS** from the date you were served, not counting the day you were served. Service by a registered process server or the Sheriff is complete when made. Service by Publication is complete thirty (30) days after the date of the first publication.
4. Requests for reasonable accommodation for persons with disabilities must be made to the office of the judge or commissioner assigned to the case, at least five (5) days before your scheduled court date.

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**SIGNED AND SEALED this date:** \_\_\_\_\_ **JAN 29 2010**



MICHAEL K. JEANES, CLERK  
M. VEJAR  
DEPUTY CLERK

**CLERK OF THE COURT**

**By:** \_\_\_\_\_  
**Deputy Clerk**

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COUNTY BAR ASSOCIATION

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**COPY**

JAN 29 2010



MICHAEL K. JEANES, CLERK  
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DEPUTY CLERK

**IN THE SUPERIOR COURT OF STATE OF ARIZONA  
MARICOPA COUNTY**

ANDREW P. THOMAS,  
Maricopa County Attorney,

Petitioner,

v.

MARICOPA COUNTY BOARD  
OF SUPERVISORS,

Respondent.

CV LC 2010 - 0 0 0 0 9 0 - 0 0 1 DT

PETITION FOR SPECIAL  
ACTION-WRIT OF  
MANDAMUS

(Expedited Oral Argument  
and Ruling Requested)

The Maricopa County Attorney's Office hereby files this Petition for Special Action seeking a Writ of Mandamus pursuant to Rule 1 et seq., Rules of Procedure for Special Actions, A.R.S. §12-123, and Arizona Constitution Article 6, §18.

Petitioner Andrew P. Thomas is the duly elected Maricopa County Attorney. Respondent Maricopa County Board of Supervisors (hereinafter "Board") has a ministerial duty to approve appointments of special deputy county attorneys pursuant to A.R.S. §11-403.

**I. This Court has jurisdiction to direct the Maricopa County Board of Supervisors to appoint special prosecutors via Writ of Mandamus.**

This Court has personal jurisdiction under the laws of Arizona. Venue is proper in Maricopa County pursuant to A.R.S. § 12-401. A Petition for a Writ of Mandamus is appropriately filed pursuant to the Arizona Rules of Special Action. Rule 3, Rules of Special Action allows an action that raises a claim that the respondent has failed to exercise discretion which it has a duty to exercise or to perform a duty required by law as to which has no discretion; or if a determination was arbitrary and capricious or an abuse of discretion.

Relief previously obtained against a body, officer, or person by writs of certiorari, mandamus, or prohibition in the trial or appellate courts shall be obtained in an action under this Rule, and any reference in any statute or rule to any of these writs, unless excepted in the next subsection, shall be deemed to refer to the special action authorized under this Rule. Special forms and proceedings for these writs are replaced by the special action provided by this Rule, and designation of the proceedings as certiorari, mandamus, or prohibition is neither necessary nor proper. Except as authorized by statute, the special action shall not be available where there is an equally plain, speedy, and adequate remedy by appeal; and nothing in

these rules shall be construed as enlarging the scope of the relief traditionally granted under the writs of certiorari, mandamus, and prohibition.

Rule 1, Arizona Rules of Procedure, Special Action.

A writ of mandamus may be issued by the supreme or superior court to any person, inferior tribunal, corporation or board, though the governor or other state officer is a member thereof, on the verified complaint of the party beneficially interested, to compel, when there is not a plain, adequate and speedy remedy at law, performance of an act which the law specially imposes as a duty resulting from an office, trust or station, or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled and from which he is unlawfully precluded by such inferior tribunal, corporation, board or person.

A.R.S. § 12-2021.

Under Arizona Rule of Procedure for Special Actions 1(a), special actions may be brought to seek relief traditionally provided for by writs of certiorari, mandamus, or prohibition. These non-statutory special actions are often simply referred to as “special actions.” *Circle K Convenience Stores, Inc. v. City of Phoenix*, 178 Ariz. 102, 103, 870 P.2d 1198, 1199 (App. 1993).

Mandamus is an extraordinary remedy issued by a court to compel a public officer to perform an act which the law specifically imposes as a duty.” *Sears v. Hull*, 192 Ariz. 65, 68, ¶ 11, 961 P.2d 1013, 1016 (1998) (quoting *Bd. of Educ. v. Scottsdale Educ. Ass’n*, 109 Ariz. 342, 344, 509 P.2d 612, 614 (1973)); see also A.R.S. § 12-2021 (2003). “Mandamus ‘does

not lie if the public officer is not specifically required by law to perform the act.” *Sears*, 192 Ariz. at 68, ¶ 11, 961 P.2d at 1016 (quoting *Bd. of Educ.*, 109 Ariz. at 344, 509 P.2d at 614). “Because a mandamus action is designed to compel performance of an act the law requires, ‘[t]he general rule is that if the action of a public officer is discretionary that discretion may not be controlled by mandamus.” *Id.* (quoting *Collins v. Krucker*, 56 Ariz. 6, 13, 104 P.2d 176, 179 (1940)). “When an official has discretion about how to perform a function, mandamus is available ‘to require him to act properly,’ only if the official abuses that discretion.” *Yes on Prop 200 v. Napolitano*, 215 Ariz. 458, 465, ¶ 12, 160 P.3d 1216, 1223 (App. 2007) (quoting *Bd. of County Supervisors v. Rio Rico Volunteer Fire Dist.*, 119 Ariz. 361, 364, 580 P.2d 1215, 1218 (App. 1978)).

*Sensing v. Harris*, 217 Ariz. 261, 262, 172 P.3d 856, 857 (App. 2007).

“When an official has discretion about how to perform a function, mandamus is available ‘to require him to act properly,’ only if the official abuses that discretion.” *Yes on Prop 200 v. Napolitano*, 215 Ariz. 458, 465, ¶ 12, 160 P.3d 1216, 1223 (App. 2007) (quoting *Bd. of County Supervisors v. Rio Rico Volunteer Fire Dist.*, 119 Ariz. 361, 364, 580 P.2d 1215, 1218 (App. 1978)).

## **II. Material Facts**

On December 2, 2008, Donald Stapley Jr., an elected member of defendant Board, was served with a 118-count criminal indictment related to alleged public corruption. Immediately after service of the indictment, the Board, its employees and attorneys working at its direction took

retaliatory actions against the Maricopa County Attorney's Office (MCAO). This included stripping \$6 million in funding from the Civil Division of MCAO and hiring its own counsel in violation of law.

Defense counsel for Stapley also filed pleadings challenging the prosecution because MCAO allegedly had a conflict of interest. Stapley's counsel alleged, contrary to statute and case law, that the Maricopa County Attorney could not provide civil legal advice to the Board and still criminally prosecute one of its members. *But see State v. Brooks*, 126 Ariz. 395, 616 P.2d 70 (Ariz. App. 1980)(Maricopa County Attorney may provide civil legal advice to county agencies and also prosecute one of its elected members for violations of the criminal law).

Although there was no conflict of interest, and a Maricopa County Superior Court judge subsequently found none, MCAO agreed, in an effort to address these concerns, to refer the Stapley prosecution and other investigations related to the Board to the Yavapai County Attorney's Office (YCAO). MCAO also offered to enter into mediation related to the civil litigation. The Board rejected the proposal for mediation.

Subsequently, following an adverse ruling in the Maricopa County Superior Court, YCAO was forced to dismiss without prejudice the first Stapley case and appeal it to the Arizona Court of Appeals. After MCAO's

“olive branch” to the Board proved unsuccessful, YCAO returned the remaining investigations of Board members and their employees and associates to MCAO.

The Maricopa County Attorney then appointed three special prosecutors to handle these matters. These were Joseph diGenova, Victoria Toensing and James Rizer. They are experienced, highly qualified and independent prosecutors. The Maricopa County Attorney did not know any of the three prior to selecting them. Pursuant to A.R.S. § 11-403, MCAO asked the Board to perform its ministerial duty and approve the appointments.

On October 21, 2009, in an unprecedented act, defendant Board refused. In a memorandum written by the Board’s subordinates, the Board offered specious reasons for not approving the appointments.

On December 7, 2009, the Maricopa County grand jury returned indictments of Stapley and a second Maricopa County Supervisor, Mary Rose Wilcox. Both indictments alleged corruption related to the misuse of their public offices for personal gain. Because the Board had refused the special prosecutor appointments, MCAO handled these prosecutions itself.

Predictably, the Board, its employees and spokespeople, and defense counsel for the indicted Supervisors immediately commenced a

public-relations campaign designed to question the motives of MCAO in securing these indictments. This time, the Yavapai County Attorney joined in the chorus, denouncing the prosecutions and attendant investigations. She made these claims even though YCAO had accepted and fully prosecuted the first Stapley case, dropping only 1 of the 118 counts in the original indictment obtained by MCAO; still remains counsel of record for the first Stapley case and another matter, which are currently on appeal by YCAO; and her handpicked special prosecutor, former Navajo County Attorney Mel Bowers, had requested that she issue subpoenas related to the investigations forwarded by MCAO, requests she uniformly refused to honor.

Faced with this situation, MCAO again sought appointment of the special prosecutors. On December 23, 2009, the Arizona Supreme Court appointed retired Chief Justice Ruth McGregor as Special Master for the Maricopa County Superior Court. On December 24, 2009, MCAO filed a Motion to Approve Appointment of Special Prosecutors with Justice McGregor. In doing so, MCAO relied upon language in the Supreme Court's Administrative Order which granted Justice McGregor authority to, *inter alia*, "take such other actions as may be necessary or appropriate in

these matters to ensure the swift, fair, and impartial administration of justice.”

In its pleadings before Justice McGregor, MCAO noted that the Board and its indicted members were misusing their governmental powers and offices to prevent any prosecutor from effectively prosecuting them. The Board had employed a “vicious circle” strategy. When indicted, the Supervisors would claim the Maricopa County Attorney had a conflict of interest in prosecuting them. However, when the Maricopa County Attorney sought to appoint special prosecutors to eliminate this claim, the Board came up with objections never before used in all previous special-prosecutor cases to block their appointment. Moreover, these objections and actions contradicted the Board’s claim, made in federal court when it served the Board’s interests, that their appointment of special prosecutors was a “ministerial” power only. Finally, the Board now was insisting that only the Yavapai County Attorney could prosecute them—even after she had become a public spokesperson for them and otherwise made clear she was unwilling and unavailable to serve as prosecutor.

The Board’s Response to MCAO’s Motion confirmed this strategy. They objected to the appointment of the special prosecutors. The Response recited the reasoning originally proffered in the memorandum

written by the Board's subordinates. This reasoning contradicted the Board's claims in federal court that this power was "ministerial" only, and made clear they intended to continue to misuse their offices to prevent any prosecutor from effectively prosecuting them.

On January 27, 2010, Justice McGregor ruled she lacked the authority to approve the appointment of the special prosecutors. In its pleadings, MCAO had requested guidance from her as to how to proceed if she concluded she could not rule upon the matter. In her Minute Entry, Justice McGregor specified that to secure appointment of the special prosecutors, MCAO should file an action seeking a writ of mandamus which would require the Board to approve the appointments.

Accordingly, MCAO has filed this pleading. MCAO also has asked for an expedited ruling given the pendency of three existing criminal cases that the defendants are seeking to place in legal limbo, and the need for special prosecutors to handle the remaining investigations and potential prosecutions in this situation.

**III. Petitioner seeks in the form of Writ of Mandamus for this Court to direct the Maricopa County Board of Supervisors to appoint the special prosecutors.**

**A. The Board of Supervisors arbitrarily and capriciously refused to approve the Maricopa County Attorney's request for special prosecutors.**

The appointment of special prosecutors is concededly a ministerial duty on the part of the Board. The Board had a duty to approve unless they could clearly show that the County Attorney acted unreasonably, arbitrarily, and capriciously in making the appointment. See *Royalston v. Pima County*, 106 Ariz. 249, 475 P.2d 233 (1970); see also *Mann v. County of Maricopa*, 104 Ariz. 561, 456 P.2d 931 (1969)(the Board acting in a ministerial capacity cannot fail to approve a position sought by the court, in this case the executive, based on separation of powers). “The Board of Supervisors had the ministerial duty of approving the requests, unless there is a clear showing that the judges [in this case, the County Attorney] “acted unreasonably, arbitrarily, or capriciously in making the request.” *Mann*, 104 Ariz. at 566, 475 P.2d at 936.

The County Attorney has multiple duties under the Arizona constitution and statutes. See generally A.R.S. § 11-532. The County Attorney may prosecute county officials individually for criminal behavior even if his or her office provides civil legal advice to a county agency. *State v. Brooks, supra*. In addition, the County Attorney may sue county supervisors for misconduct. *County of Cochise v. Good*, 9 Ariz.App. 448, 453 P.2d 544 (Ariz. App. 1969); A.R.S. § 12-2041; *City of Scottsdale v. McDowell Mountain Irr. and Drainage Dist.*, 107 Ariz. 117, 120, 483 P.2d

532, 535 (1971) (county attorney has standing to sue quo warranto a member of the board of supervisors for authorizing creation of a political subdivision).

The Board's disingenuousness is clear. They have set up one obstacle after another to prevent the appointment of suitable special prosecutors. For example, the County Attorney previously proposed mediation to the Board to resolve his lawsuit regarding MCAO's Civil Division. The Board refused to enter into mediation.

Yet a few months later, on the same day they blocked the appointment of the special prosecutors, the Board adopted a rule that allegedly requires county officers to enter into mediation before they may sue them. This combination of actions, which clearly conflicts with state statutes, was designed to (1) delay and forestall the appointment of special prosecutors and (2) allow indicted Board members to level "conflict of interest" and other claims against the County Attorney afterwards.

Similarly, the other reasons offered for the Board's action are without merit and have never before been asserted by this Board or any other.

The Board is acting arbitrarily and capriciously by not performing its self-described ministerial duty, and doing so for the worst of self-interested reasons. In an analogous case, the Superior Court of Maricopa County

appointed a deputy probation officer whose appointment the Board of Supervisors denied. The court stated in *Broomfield v. Maricopa County*, 112 Ariz. 565, 567-68, 544 P.2d 1080, 1083-84 (1975), that the Board was required by law as a “ministerial duty” to approve the position. The Court found the Board was acting as a legislative arm of the county. *Id.* *Broomfield* specifically stated that if the Board of Supervisors wished to contest the action of the presiding judge, in this case the County Attorney, the Board “had the duty to seek relief from this court by the filing of a special action. Pursuant to Rule 4(e) of the Rules of Procedure for special actions...”

Here, the Board had a duty to approve the special action as a ministerial duty or, in the alternative, file a special action stating why they refused. *See id.* The Board did neither.

**B. The Board abused its discretion by not appointing a special prosecutor.**

Even if this court were to conclude that the Board was acting in its discretion, the Board may not act arbitrarily or unjustly in denying the request for special prosecutors involving the Board members’ own conduct.

For example:

The general rule is that if the action of a public officer is discretionary that discretion may not be controlled by mandamus. This rule, however, is qualified by the provision that

if it clearly appears that the officer has acted arbitrarily and unjustly and the in the abuse of discretion, the action may still be brought.

*Collins v. Krucker*, 56 Ariz. 6, 13, 104 P.O.2d 176, 179 (1940).

There can be no greater abuse of discretion than to attempt to cover up one's crimes and avoid prosecution for them. The Board refuses to comply with any reasonable request for a qualified special prosecutor because if no suitable prosecutor were appointed, then the Board is truly above the law.


## **V. Conclusion**

Members of the Board of Supervisors who are under indictment and investigation are openly using their governmental offices and power of the purse to prevent the effective prosecution of themselves. These actions cannot be permitted to stand. Nobody is above the law in the United States.

For the foregoing reasons, and pursuant to statute and reasoning in case law cited *supra* and in *Villalpando v. Reagan*, 211 Ariz. 305, 121 P.3d 172 (App. 2006), MCAO respectfully requests that this Court order the Respondent to approve the appointment of special prosecutors Joseph diGenova, Victoria Toensing and James Rizer

Submitted January 29, 2010.

ANDREW P. THOMAS  
MARICOPA COUNTY ATTORNEY

BY   
\_\_\_\_\_  
Lisa M. Aubuchon  
Deputy County Attorney

Copy of the foregoing  
Delivered/emailed this  
29th day of January, 2010,  
to:

Honorable Ruth McGregor, Special Master

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Attorneys for Maricopa County Board of Supervisors

BY   
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