Sheila Sullivan Polk
Yavapai County Attorney

Jack H. Fields, SBN 012470
Benjamin D. Kreutzberg, SBN 027984
Deputy County Attorneys

255 East Gurley Street
Prescott, Arizona, 86301
(928) 771-3344
YCAO@yavapai.us

Office of the Yavapai County Attorney
255 E. Gurley Street, Suite 300
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

ARIZONA OFFICE OF ADMINISTRATIVE HEARINGS

IN THE MATTER OF TOM HORNE, individually; Tom Horne for Attorney General Committee (SOS Filer 2010 00003); KATHLEEN WINN, individually; Business Leaders for Arizona (SOS Filer 2010 00375).	No. 14F-001-AAG **YAVAPAI COUNTY ATTORNEY'S RESPONSE TO CROSS EXAMINATION OBJECTIONS AND REQUEST FOR SPECIFIC RULINGS** **(The Honorable Tammy Eigenheer)**

The Yavapai County Attorney's Office ("YCAO") hereby responds to Appellants' Memorandum re Winn and Horne's Cross Examination Objections and Request for Specific Rulings ("the Memorandum"). YCAO respectfully requests that this tribunal overrule all of the objections and find that Ms. Winn and Mr. Horne's due process rights were not violated.

I. Agent Grehoski's Testimony

The Memorandum makes sweeping claims that YCAO planned to "thwart[] cross-examination" and that YCAO in fact "manipulated cross-examination."

Office of the Yavapai County Attorney
255 E. Gurley Street, Suite 300
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

(Memorandum pages 2-3). However, the Memorandum omits one crucial detail: after his initial refusals, FBI Special Agent Brian Grehoski (hereafter "Agent Grehoski") was willing to answer the questions initially posed on cross-examination. (Hearing Transcript 285:7–286:8). The tribunal gave Mr. Horne and Ms. Winn's counsel the opportunity to ask such questions, but their counsel did not do so. (Hearing Transcript 335:16–336:8).

Agent Grehoski was the first witness called, and testified through the entire day of February 10, 2014. That afternoon and into the morning of February 11, 2014, he did refuse to answer certain questions that he believed were beyond the scope of his authorization to testify. (*E.g.* Hearing Transcript 169:14–22, 187:3–191:16, 236:20–21, 239:1–7, 250:9–10, 278:4–10). However, during a break during the morning of February 11, Agent Grehoski consulted his attorney, who advised that he could testify more broadly than he originally understood:

> Q [Mr. Debus]. Okay. So if I understand you correctly, you're willing to be cross-examined on anything that's been brought out, any of this discovery, anything that's been brought out in this case right here before the administrative law judge; is that correct?
>
> A [Agent Grehoski]. So long as it doesn't reveal confidential sources, methodologies, jeopardize existing investigations or the other caveats to the Touhy authorization.

(Hearing Transcript 284:14–22). Agent Grehoski later explained further:

> A [Agent Grehoski]. Yes, a little bit, after conferring, I was -- I conferred with our attorney and she explained some of the differences

Office of the Yavapai County Attorney
255 E. Gurley Street, Suite 300
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

> in my understanding and what I was permitted to do.
>
> Yesterday I was operating under the notion that anything not pertinent to the campaign finance issue at hand was off limits because it was unrelated to the campaign finance issue.
>
> And our counsel just advised me if there was information in the case file that has been turned over to the County Attorney's Office, either Yavapai or Maricopa, that because it's in the case file I can talk about it, which is why I'm now willing to discuss with you, sir, the surveillance that we did. I can discuss the hit and run, because that was part of the case file.
>
> My erroneous understanding of what my authorization was yesterday, prohibited me from talking about things not related to campaign finance issues, so . . .

(Hearing Transcript 285:14–286:8).

II. Agent Grehoski's Responses Did Not Violate Due Process

As described above, Agent Grehoski was willing to answer most or all of the questions which he originally refused to answer. That ultimate reversal fully cures any issues arising from the initial refusals. Nevertheless, the Memorandum apparently argues that the various initial refusals constituted violations of Appellants' due process rights.

Under that theory, if a witness ever erroneously refuses to answer a question, that witness has forever tainted his testimony and no remediation or cure is ever possible. Presumably, even if this tribunal were to order the hearing to be started over from the beginning, Agent Grehoski could not testify because he has now had time to consider his answers. (Hearing Transcript 286:9–25, 334:17–336:8). The

Office of the Yavapai County Attorney
255 E. Gurley Street, Suite 300
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

due process right to cross-examination does not extend so far.

The cases cited in the Memorandum all stand for the proposition that cross-examination is a fundamental right that applies in administrative hearings. *E.g. Obersteiner v. Indus. Comm'n of Arizona*, 161 Ariz. 547, 549, 779 P.2d 1286, 1288 (App. 1989). YCAO does not disagree with that proposition. However, none of those cases hold that a refusal to answer a question creates an incurable violation even after the witness later agrees to answer the previously-refused questions.

Agent Grehoski was willing to answer all or most of the questions that he had previously refused to answer. (Hearing Transcript 285:14–286:8). The tribunal offered appellants the opportunity to ask those questions again. (Hearing Transcript 335:16–336:8). There was no violation of the right to cross-examine Agent Grehoski.

In addition and alternatively, none of Agent Grehoski's refusals to answer related to core questions of this case. His refusals were limited issues beyond the scope of the present campaign finance case. (*E.g.* Hearing Transcript 187:3–4 239:1–244:13). As the tribunal ruled at the time, those questions were not relevant.[1] (*E.g.* Hearing Transcript 191:22–196:22, 244:8–13; 268:25–270:24). Appellants cite no authority for the proposition that a witness's refusal to answer

[1] In addition, some of the refusals were resolved via general questions that established that the inquiries would not lead to relevant information. (Hearing Transcript 176:17–177:12). At least once, appellants accepted that those questions would not lead to relevant information. (Hearing Transcript 177:10).

Office of the Yavapai County Attorney
255 E. Gurley Street, Suite 300
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

irrelevant questions on cross-examination violates their due process rights, and none exists. *See, e.g. State v. Riggs*, 189 Ariz. 327, 333, 942 P.2d 1159, 1165 (1997) (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)) ("Furthermore, trial judges may reasonably limit cross-examination if concerned that the examination is only 'marginally relevant.'"). The Memorandum also does not cite to any *particular refusals* that would have potentially led to relevant inquiries.[2]

Fundamentally, Appellants had the opportunity to cross-examine Agent Grehoski. His refusal to answer questions that have nothing to do with the present case does not rise to the level of a due process violation. To the extent the tribunal believes any un-answered questions may have shown something relevant to this case, the tribunal can apply that belief to the weight given to Agent Grehoski's testimony. The tribunal, not a jury, is weighing the evidence in this case. The tribunal can put Agent Grehoski's testimony in the proper perspective and give it the appropriate weight.

III. The Use of Hearsay Evidence Does not Violate Due Process

The first two specific rulings requested (numbers 1 and 2) request that this tribunal find that the use of verbal and documentary hearsay violated appellants'

[2] The Memorandum's footnotes cite to dozens of transcript pages where Appellants objected and moved to strike. Memorandum footnotes 13 and 14. However, many of those objections and motions to strike are not based upon the same grounds as the five requested rulings in the Memorandum. The Memorandum's requested relief must be limited to the five specific rulings asked for, not virtually every objection Appellants raised during Agent Grehoski's testimony.

Office of the Yavapai County Attorney
255 E. Gurley Street, Suite 300
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

due process rights to effective cross examination.[3] The use of hearsay in this case, however, does not rise to the level of a due process violation. A.R.S. § 41-1092.07 (F)(1) provides:

> A hearing may be conducted in an informal manner and without adherence to the rules of evidence required in judicial proceedings. Neither the manner of conducting the hearing nor the failure to adhere to the rules of evidence required in judicial proceedings is grounds for reversing any administrative decision or order if the evidence supporting the decision or order is substantial, reliable and probative.

See also Brown v. Arizona Dep't of Real Estate, 181 Ariz. 320, 328, 890 P.2d 615, 623 (App. 1995) (interpreting predecessor to A.R.S. § 41-1092.07 to allow hearsay evidence at administrative hearings). "In some circumstances, hearsay may even be the sole support of an administrative decision." *Id.* (citing *Begay v. Arizona Dep't of Economic Security*, 128 Ariz. 407, 409–10, 626 P.2d 137, 139–40 (App.1981)).

Accordingly, there is no basis for the proposition that the use of hearsay evidence constitutes a violation of the due-process right to cross-examination. Appellants have advanced no additional authorities to support that argument, and it is unclear exactly how they are asserting their due process rights were violated via the admission of hearsay evidence.

The Memorandum may be arguing that Horne and Winn were denied their due process right to cross examination because the various people who made the

[3] These hearsay-based objections do not appear to be among the original rulings requested by Mr. Debus. (Hearing Transcript 259:2–263:15).

Office of the Yavapai County Attorney
255 E. Gurley Street, Suite 300
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

underlying statements were not present in the courtroom and subject to cross-examination. However, there is no violation of constitutional rights when a hearsay declarant is not present and the party had the opportunity to secure the declarant's presence. *Wieseler v. Prins*, 167 Ariz. 223, 227, 805 P.2d 1044, 1048 (App. 1990) (rejecting argument that petitioner was denied opportunity to cross examine two officers whose hearsay statements were admitted and who were not present because petitioner had the opportunity to subpoena them but did not do so).

This is not a case where the tribunal refused to allow Appellants to call the witnesses who could have been cross-examined. *Cf. Scheytt v. Indus. Comm'n of Ariz.*, 134 Ariz. 25, 28, 653 P.2d 375, 378 (App. 1982) (reversing administrative decision where judge refused to issue subpoenas for co-authors of admitted medical report). Nothing prevented Appellants from requesting subpoenas for additional witnesses they wished to cross-examine.

Fundamentally, one of the reasons that the rules of evidence are relaxed and hearsay is allowed at administrative hearings is because of "the absence of a jury." *See, e.g. Price v. Zoning Bd. of Appeals of City & Cnty. of Honolulu*, 77 Haw. 168, 176 n.8, 883 P.2d 629, 637 n.8 (1994) (citation omitted). The tribunal can assign the appropriate weight to the hearsay evidence in this case. There is no due process violation.

IV. Conclusion

Agent Grehoski was ultimately willing to answer all of the cross-examination questions that were asked. Further, all of the questions that he originally refused to answer were peripheral to the present case. Under those circumstances, his responses cannot be characterized as a due process violation. Further, the use of hearsay evidence in this case was consistent with due process rights.

YCAO respectfully requests that this tribunal find that none of the five specific issues identified resulted in the violation of due process rights.

RESPECTFULLY SUBMITTED this 7th day of March, 2014.

Sheila Sullivan Polk
YAVAPAI COUNTY ATTORNEY

By: /s/ Benjamin Kreutzberg
Jack Fields
Benjamin Kreutzberg
Deputy County Attorneys

Office of the Yavapai County Attorney
255 E. Gurley Street, Suite 300
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

Office of the Yavapai County Attorney
255 E. Gurley Street, Suite 300
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

ORIGINAL OF THE foregoing was E-FILED to the Office of Administrative Hearings this 7th day of March, 2014 and electronically submitted to registered parties of record:

Michael Kimerer, Esq.
Kimerer & Derrick
1313 East Osborn Road, Suite 100
Phoenix, AZ 85014
MDK@kimerer.com
Counsel for Tom Horne and Horne for Attorney General

Timothy A. La Sota, Esq.
Tiffany & Bosco, P.A.
Camelback Esplanade II, Third Floor
2525 East Camelback Road
Phoenix, AZ 85016
tal@tblaw.com
Counsel for Kathleen Winn and BLA

M.E. "Buddy" Rake, Jr., Esq.
Daniel T. Benchoff
Rake Law Group
2701 E. Camelback Road, Suite 160
Phoenix, AZ 85016
brake@aztriallaw.com
dbenchoff@aztriallaw.com
Counsel for Tome Horne and Horne for Attorney General

Larry L. Debus, Esq.
Debus, Kazan & Westerhausen, Ltd.
335 East Palm Lane
Phoenix, AZ 85004
lld@dkwlawyers.com
Counsel for Kathleen Winn and BLA

By: /s/ Benjamin Kreutzberg