

**THE WASHINGTON STATE GOVERNOR'S OFFICE
UNIFORM JUDICIAL EVALUATION QUESTIONNAIRE¹**

Position Sought (Court/Division/District): Spokane Municipal Court, Pos. 1

By Appointment: By Election:

Personal Information

1.

<u>Staab</u> Last Name	<u>Tracy</u> First Name	<u>Arlene</u> Middle Name	<u>23321</u> WSBA Bar Number
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2. Business Address: Spokane Municipal Court
Business Name
1100 W Mallon
Street or P.O. Box

<u>Spokane</u> City	<u>WA</u> State	<u>99260</u> Zip
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Business Phone No. 509-622-5867 After-hours/direct dial: 622-5853
Work e-mail address: Tstaab@SpokaneCity.org
3. Home Address:
Street or P.O. Box _____
City _____ State WA Zip _____
Home Phone No. _____ Mobile Phone No.: _____
Home e-mail address: _____
4. Date of Birth: _____ 5. Social Security Number:² _____
6. City/State/Place of Birth: _____

Prior Evaluation / Application History

7. Please state the date of all other judicial evaluations you sought, bar polls you participated in, and appointment applications you submitted. Please specify whether you sought appointment or election for each, from whom the evaluation was sought, the position sought, and the outcome.

In December 2008, I submitted an application for appointment as a judge to the Spokane Municipal Court. As part of the process, I submitted my materials to the Spokane County Bar Assoc., but the Bar was unable to conduct an evaluation of the candidates. I did go through an interview process with the Mayor, two judges, and two attorneys, and was selected as one of Spokane's Municipal Court Judges.

¹ The Governor's Office uses this questionnaire exclusively for candidates seeking judicial appointment. The Washington State Bar Association and other state bar associations noted on the last page also accept this questionnaire in their judicial evaluation process. The Governor's Office reserves the right to update this questionnaire and will post updated versions of the questionnaire on the Governor's webpage. Please direct all questions about the questionnaire to the Governor's Office of General Counsel.

² Only include your social security number on the copy of the questionnaire forwarded to the Governor's Office.

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Professional History

8. Year admitted to practice law in Washington: 1993
9. Employment History (in reverse chronological order):

a. Start Date: 1/2/2009 End Date: N/A
Organization: Spokane Municipal Court
Address: 1100 W Mallon, Spokane, WA 99260
Phone No.: 509-622-5867
Position/Title: Spokane Municipal Court Judge
Supervisor: Spokane City Voters.
Nature of Practice (including frequency of court appearances):

Municipal Court Judge. One of three municipal court judges appointed by the Mayor and confirmed by the City Council in January, 2009.

Currently, I preside over the domestic violence docket, primarily consisting of misdemeanor assaults, violations of protection and no-contact orders, malicious mischief, and harassment cases. On a full docket, more than 100 cases will come before the court in a single day and half way through the year more than 850 domestic violence cases have been filed in municipal court.

I am also one of three judges that sets and administers policy for the court. After listening carefully to the input from the attorneys, court staff, and probation officers who work in our courts, we have implemented new programs and procedures designed to increase efficiency, reduce costs and provide better service to the community. As a result of our early case resolution, more than one half of the cases filed in court are resolved at the arraignment hearing, without compromising constitutional rights, including the right to counsel. We have agreed to consider several alternatives to jail including community service, DOC community reparations, and day/night reporting service through probation. These alternatives provide public safety and hold offenders accountable while helping them reinvest in the community at significant savings to the tax payers.

Although we have accomplished everything on our initial checklist, our work is not done. One of my goals is to improve efficiency by moving the court toward a paperless system. Currently, we are still using hand-written forms in court. These carbon forms are not only expensive, but filling them out in court slows the process down significantly. I am also in the process of rewriting our local rules to conform to the requirements of the Supreme Court. I look forward to accomplishing these goals and continuing to provide outstanding service to the City.

Reason for leaving: Not Applicable.

b. Start Date: 10/31/2005 End Date: 1/1/2009
Organization: Federal Defenders of Eastern Washinton & Idaho
Address: 10 N Post St., Ste 700, Spokane, WA 99201
Phone No.: 509-624-7606
Position/Title: Research and Writing Attorney
Supervisor: Roger Peven and Steve Hormel
Nature of Practice (including frequency of court appearances):

Federal Criminal Defense. One of two appellate attorneys for the office. Lead counsel on

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over 80 appeals to the Ninth Circuit Court of Appeals, and counsel of record on dozens of petitions to the United States Supreme Court. In addition to my appellate work, I assisted the trial attorneys with pre-trial and trial motions, occasionally appearing as counsel during first appearances.

In order to maintain the highest level of advocacy, the office organized and participated in regular CLEs and training sessions, including monthly trial training sessions. In addition, I was responsible for organizing and conducting "Third Thursday CLEs," a monthly lunch CLE on relevant topics in federal court.

I was also the editor of our office's yearly publication, "My Little Red Rules Book," covering rules of evidence and criminal procedure, and a frequent CLE speaker.

Finally, I was a founding member of the STEP team, an innovative federal drug court program run by Senior Judge Wm. Fremming Nielsen, United States District Court for the Eastern District of Washington.

Reason for leaving: Appointed to the Bench.

c. Start Date: September, 2003 End Date: October 30, 2005
Organization: City of Spokane Public Defender Office
Address: 824 N Monroe St., Spokane, WA 99201
Phone No.: 509-835-5955
Position/Title: Attorney
Supervisor: Kathy Knox
Nature of Practice (including frequency of court appearances):

Primarily an appellate attorney, argued 26 RALJ Appeals in Superior Court and five cases before the Washington State Court of Appeals. I also handled a full to partial case load in municipal court at various times, and appeared in municipal court on a weekly basis.

Reason for leaving: Offered job at Federal Defenders Office.

d. Start Date: January 2001 End Date: December 2001
Organization: North Idaho College
Address: Coeur d'Alene, Idaho
Phone No.: 208-769-7719
Position/Title: Adjunct Instructor for Legal Environment of Business
Supervisor: _____
Nature of Practice (including frequency of court appearances):

Instructor of business law for two semesters. Reviewed textbook, prepared syllabus; outlined lesson plan; lectured on subjects pertaining to business law including contracts, negotiable instruments, secured transactions, administrative law and criminal law; prepared and graded tests; answered questions from students during office hours.

Reason for leaving: Time commitment and expense of teaching the class in Idaho was too much.

e. Start Date: July, 1999 End Date: August 30, 2003
Organization: Washington State Court of Appeal, Division III

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Address: 500 N Cedar St., Spokane, WA 99201
Phone No.: 509-456-3082
Position/Title: Judicial Law Clerk
Supervisor: Honorable Stephen M. Brown
Nature of Practice (including frequency of court appearances):

Drafted over 70 bench memorandums for Judge Brown covering every legal topic that is appealed to the state court of appeals including criminal, family law, class actions, contracts, property, civil and criminal procedure, evidence and water rights. Sat in on monthly arguments before the panel.

Reason for leaving: State budget cuts forced the Court to lay off several law clerks, including myself.

f. Start Date: June 1995 End Date: July 1999
Organization: Law Office of Tracy Fisher Staab
Address: 701 N Pine St., Ellensburg, WA 98926
Phone No.: (509) 925-9256 (disconnected)
Position/Title: Sole Proprietor
Supervisor: None.
Nature of Practice (including frequency of court appearances):

Worked for two years as a contract public defender and then two years as the contract prosecutor for the City of Ellensburg, prosecuting all misdemeanor cases on behalf of the City including RALJ appeals before Superior Court. Prosecution work required frequent communication with the City Police Department and officer training on developing areas of the law. I also worked closely with the city attorney, the district court, and the defense bar to lower costs through alternatives to incarceration and fast-track case dispositions at arraignments.

In my private practice, I represented then Chief of Police, Anne Kirkpatrick, in drug forfeiture cases. I represented other clients in matters including bankruptcy, family law, business formation, contracts, and personal injury.

Administratively, I was responsible for the operations of a business including supervision of a full-time employee, preparing tax returns, establishing budgets and implementing a marketing plan.

Reason for leaving: Family moved to Spokane and I was offered a job at the Court of Appeals.

g. Start Date: June 1991 End Date: June 1995
Organization: Ferrer Law Offices
Address: 999 Third Ave., Ste 3210, Seattle, WA
Phone No.: (disconnected)
Position/Title: Intern and Associate
Supervisor: R. George Ferrer (retired)
Nature of Practice (including frequency of court appearances):

Boutique law firm with a prominent clientele of real estate developers and business owners. Transactional work included drafting contracts for clients related to the purchase and sale of properties and businesses. Litigation ranged from breach of contract, eminent domain, employment discrimination in federal court, medical malpractice, and personal injury.

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Reason for leaving: Moved to Ellensburg and opened practice.

Please continue, if necessary, on a separate piece of paper in the above format as needed.

10. Please list all other courts and jurisdictions in which you have been admitted to practice law and the dates of admission. Please provide the same information for administrative bodies having special admission requirements.

- Washington State (1993);
- United States District Court for the Western District of Washington (1994);
- United States District Court for the Eastern District of Washington (1997);
- Ninth Circuit Court of Appeals (2005);
- United States Supreme Court (2007).

11. Please list all bar associations and professional societies of which you are a member and give the titles and dates of any offices that you have held in such groups.

- Washington State Bar Association (1993-Present);
- Washington Association of Criminal Defense Lawyers (WACDL) (2004-2008);
- National Association of Criminal Defense Lawyers (NACDL) (2005-2008)
- Washington Appellate Lawyers Association (WALA) (2007-2008).
- Washington Women Lawyers, (2009)
- Washington State District and Municipal Court Judges Association (2009).

12. Are you in good standing in every bar association of which you are a member? Yes. If you answered "no", please explain.

N/A

13. If you have ever been a judge, please identify any court committees on which you have served or administrative positions you have held. Please state the dates of service for each.

I am the municipal court representative for the CARB meetings with Corrections Officers and Jail staff. I have applied to be one of the district/municipal court representatives for the Washington State Model Jury Instructions Committee and I am currently in charge of updating our local rules to conform to Supreme Court requirements. Finally, I am Acting Presiding and fulfill the duties of Presiding Judge when Judge Mary Logan is not available.

14. Please list up to five of your most significant professional accomplishments. (If applicable, please provide the case and court name and the citation if a case was reported (and copy of the opinion).

1. The most significant professional accomplishment to date has been my appointment to the Spokane Municipal Court bench. In one month, the second largest municipal court in the state was created, staffed, and fully functional. We were interviewed and selected over Christmas and provided two days of crash-course training. We were sworn in and confirmed as judges the day after New Years, handed a cup of coffee and immediately took the bench with dockets overflowing from continuances by district court and winter storm closures. It was one of the most intense initiations I have ever been through. As a court we not only made it through, but we excelled. The credit for our success goes to our phenomenal court staff as well as the energy and support we received from the prosecutors, public defenders, and the probation

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department.

2. I have been lead attorney on over 100 appeals, 80 of those before the Ninth Circuit Court of Appeals, two cases before the Washington State Supreme Court, and half-a-dozen cases before the State Court of Appeals. In addition, I have been lead counsel on 34 RALJ appeals from municipal and district court decisions as both a prosecutor and defense attorney. I have filed dozens of petitions with the United States Supreme Court and while I have never had a case accepted, I have had the Court ask for a response in a handful of cases which means at least one Justice decided the petition was worth further consideration.
3. For three years I was the editor of "My Little Red Rules Book," a courtroom handbook on the rules of evidence and criminal procedure.
4. I have been lead counsel for approximately 30 jury trials in district and/or municipal court and I have presided over four jury trials since my appointment to the bench in January.
5. I am one of the founding administrators of STEP (Sobriety, Treatment and Education Program), an innovative and unique federal program that provides intensive re-entry supervision for persons who have been released from federal prison and struggle with chemical dependency. The original STEP team also included Senior Judge Wm. Fremming Nielsen, Jill Bolton, an Assistant United States Attorney, and Matt Thompson, a federal probation officer. Treatment providers from New Horizons work closely with the team as well.

This is a non-adversarial program and I did not represent participants. Instead, the team members meet twice a month to review and discuss the progress and set-backs of each participant. We would then collaborate and agree upon appropriate commendations or sanctions.

Participants volunteer for the one-year program and agree to waive numerous rights as a condition of participation. Upon graduation, they receive one year off of their term of supervision. The program began in June 2007, and has had several successful graduates. It is one of only a handful of federal post-conviction programs in the nation, and is currently being used as a model by several other jurisdictions interested in helping convicted felons reintegrate into society and become successful members of the community.

15. Please summarize up to eight of the most significant matters that you participated in as an advocate. Please include the dates of your participation and the reason each was significant to you. Please provide the citation if a case was reported. If you have been a judge, please include some cases that have been tried before you.
 1. United States v. Gonzales, 506 F.3d 940 (9th Cir. 2007) (en banc).
This was the very first case I argued before a Ninth Circuit panel (three judges). In a rare move, the panel suggested *en banc* review before publishing a decision. I then had the privilege of arguing the case before 15 judges of the Ninth Circuit Court of Appeals in San Francisco. Ultimately, we prevailed and the court reversed an earlier panel decision on an issue concerning sentencing and the use of prior convictions to calculate a defendant's criminal history score under the federal sentencing guidelines.

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2. United States v. Fanning, CR-06-130-N-EJL, June 2008.
The client was convicted of misdemeanor assault following a jury trial in United States District Court. I represented the client on appeal and submitted a brief to the Ninth Circuit Court of Appeals arguing that the district court lacked subject matter jurisdiction and the conviction was therefore void. The Assistant United States Attorney agreed with my brief and the case was remanded by stipulation. Ultimately, the district court vacated the conviction and dismissed the charges with prejudice.
3. United States v. Soto, 519 F.3d 927 (9th Cir. 2008).
Client was represented by private counsel through trial. After I was appointed for the appeal, the former attorney advised me that there were "no issues for appeal." In reviewing the record, I discovered that the trial court had refused to give a no-adverse-inference jury instruction as required by the Supreme Court's decision in *Carter v. Kentucky*. The original three-judge panel found no error according to Ninth Circuit precedent in a case called *U.S. v. Castenada*. My subsequent Petition for Rehearing was granted, and the three-judge panel issued three separate opinions. Ultimately the panel agreed that any error was harmless and confirmed the conviction. The writing sample I provide is part of the Petition for Certiorari to the U.S. Supreme Court on this case.
4. State v. Kronich, 160 Wn.2d 893, 161 P.2d 982 (2007).
Client was convicted of driving while license suspended following a jury trial in which the sole evidence of the defendant's driving status was a certificate from the Department of Licensing. The State Supreme Court granted review to determine whether the certificate was "testimonial" and therefore prohibited in light of the U.S. Supreme Court decision in *Crawford v. Washington*, 541 U.S. 36 (2004). Ultimately, the State Supreme Court held that the certificate was non-testimonial, and could be admitted without violating the defendant's Sixth Amendment right to confrontation. Brian O'Brien was opposing counsel.
5. City of Spokane v. County of Spokane, 158 Wn.2d 661 (2006).
As a member of former Mayor West's team, assembled to create an independent municipal court, I worked with Salvatore (Sam) Faggiano from city legal in drafting the initial pleadings, the motion on summary judgment, and motion for direct review. The Supreme Court accepted direct review and Milt Rowland argued for the City. The Court ruled in favor of the City and held that the termination agreement required by RCW 3.46.150 only required the City to pay costs that were actually incurred by the County as a result of terminating the interlocal contract for court services. Since there would be no such costs, the Court held that the agreement reached between the City and County satisfied the statutory requirements. Jim Kaufman and Carl Hueber were opposing counsel.
6. Delaney v. Board of Spokane County Commissioners, 161 Wn.2d 249 (2007).
The issue was whether the State Constitution and Chapter 3.34 RCW required Spokane County to have ten district court judges as opposed to nine. I worked as part of a team with several attorneys to develop the issue and draft the writ of mandamus documents. Following denial of the writ, the Supreme Court, acting *sua sponte*, granted direct review and I argued the case. Ultimately, the Court denied the writ. Dan Catt was opposing counsel.
7. City of Spokane v. Beck, 130 Wn. App. 481 (2005).
Defendant was originally represented by John Nollette and convicted following a jury trial of being in physical control of a vehicle while under the influence of alcohol. On RALJ appeal, the Superior Court dismissed, finding the evidence insufficient because the evidence was undisputed that the defendant was parked in a parking lot with no intention of leaving. I was

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appointed after the Court of Appeals granted the City's Petition for Discretionary Review. The Court of Appeals affirmed the Superior Court and vacated the conviction. The case was significant because it established that a judge could rule as a matter of law that a defendant had proven the affirmative defense of being safely off the roadway. Shelley Szambelan was opposing counsel.

8. *City of Spokane v. Marr*, 129 Wn. App. 890 (2005).
Following a bench trial, the client was acquitted of aggressive solicitation, but convicted of pedestrian interference for begging. I was appointed after the Court of Appeals granted discretionary review. Ultimately, the Court vacated the conviction, and established precedent in holding that begging was protected activity under the First Amendment. Since the city ordinance specifically exempted constitutionally protected activity from proscribed behavior, the evidence was insufficient to support the conviction. Shelley Szambelan was opposing counsel.

Educational Background

16. Please list all undergraduate and graduate (non-law school) colleges and universities attended, years of attendance, degree awarded and reason for leaving if no degree was awarded.

<u>Highline Comm. College</u>	<u>Jan 1987-June 1989</u>	<u>AS Paralegal</u>
College/University	Dates of Attendance	Degree
<u>Western Washington Univ.</u>	<u>09/86 & 6/89 to 08/90</u>	<u>BA in Paralegal Studies</u>
College/University	Dates of Attendance	Degree

17. Please list all law schools attended, years of attendance, degree awarded and reason for leaving if no degree was awarded.

<u>Univ. of Puget Sound (Seattle Univ)</u>	<u>Sept. 1990-May 1993</u>	<u>Juris Doctorate</u>
Law School	Dates of Attendance	Degree
<u>Law School</u>	<u>Dates of Attendance</u>	<u>Degree</u>

Cum laude, Class rank: 27 out of 290 graduates.

Professional Experience

18. Please summarize, briefly, the general nature of your current law practice.

Not Applicable.

19. If you are in practice, please describe your typical clients and any areas of special emphasis within your practice.

Not Applicable.

20. If your present law practice is different from any previous practice, please describe the earlier practice, including the nature of your typical clients and any area of special emphasis within your practice.

Prior practice with the Federal Defenders and City of Spokane focused primarily on appellate

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criminal defense. While in private practice in Ellensburg my practice and clientele were more diverse with one-half of my cases pertaining to municipal criminal work and the rest pertaining to civil work, both transactional and litigation.

21. Within the last 5 years, did you appear in trial court:

Regularly Occasionally Infrequently

22. Within the last 5 years, did you prepare appellate briefs and appear before appellate courts:

Regularly Occasionally Infrequently

23. Within the last five years, how often did you appear in the court for which you are applying:

Regularly Occasionally Infrequently

24. Career Experience

(a) What percentage of your appearances in the last five years was in:

(1) Federal appellate courts	45	%
(2) Federal trial courts	5	%
(3) State appellate courts	5	%
(4) State trial courts	_____	%
(5) Municipal courts	43	%
(6) District courts	2	%
(7) Administrative tribunals	_____	%
(8) Tribal courts	_____	%
(9) Other	_____	%
TOTAL	100	%

(b) What percentage of your practice in the last five years was:

(1) Civil litigation (excl. family law)	5	%
(2) Criminal litigation	95	%
(3) Family law litigation	_____	%
(4) Non-litigation	_____	%
TOTAL	100	%

(c) What percentage of your trials in the last five years were:

(1) Jury trials	25	%
(2) Non-jury trials	75	%
TOTAL	100	%

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- (d) State the number of cases during your total career that you have tried to verdict or judgment (rather than settled) in the following courts, and indicate for each court the following percentages: trials in which you were sole counsel or chief counsel, jury trials, and trials where you were the arbiter/decision maker.

<u>Number</u>	<u>Court</u>	<u>% as Sole / Chief Counsel</u>	<u>% Jury</u>	<u>% as the Arbiter</u>
<u>~24</u>	Municipal	<u>(combined with St Dist.)</u>	<u>23</u>	<u>100%***</u>
<u>~50</u>	State Dist.	<u>100%</u>	<u>60</u>	
<u>13</u>	State Superior	<u>20%</u>	<u>0</u>	
<u>5</u>	Federal Dist.	<u>0%</u>	<u>100</u>	
	Administrative			
	Tribal Courts			
	Other			

*** As a municipal court judge, I have presided over four jury trials. As a judge pro tem for Spokane District/Municipal Court Judge in 2003, I presided over approximately 20 bench trials. As a prosecutor and defense attorney, I have litigated approximately 50 trials in district and municipal court, 60 percent of which were jury trials.

- (e) State the number of appellate cases during your total career where you appeared as counsel of record in the following courts, and indicate for each court the following percentages: cases where you were sole counsel or chief counsel, and cases where you were the arbiter/decision maker (if applicable).

<u>Number</u>	<u>Court</u>	<u>% as Sole / Chief Counsel</u>	<u>% as the Arbiter</u>
<u>34</u>	State Superior Court	<u>100%</u>	
<u>1</u>	WA. Div. I COA	<u>100%</u>	
	WA. Div. II COA		
<u>6</u>	WA. Div. III COA	<u>84%</u>	
<u>2</u>	WA. Supreme Court	<u>50%</u>	
<u>81</u>	Fed. Cir. COA	<u>100%</u>	
<u>~50</u>	U.S. Supreme Court	<u>100% (Pet for Writ of Cert)</u>	

- (f) Briefly describe no more than five significant litigation matters that you directly handled as the sole counsel. For each, please provide the name and telephone number of opposing counsel, the name of the judge or other judicial officer, and the citation (if applicable).

In answering this question, I assume that "litigation" is distinguished from appeals. In my previous position as an appellate attorney, I rarely worked on litigation matters as the sole attorney. Instead, I work closely with trial counsel to write motions, jury instructions, and sentencing memorandums. With this preface in mind, the cases listed below meet the literal criteria of this question:

1. Most recently, I have represented approximately 25 persons previously convicted of offenses pertaining to cocaine base (crack cocaine), who are eligible, or hope to be eligible for the retroactive amendment to the United States Sentencing Guidelines, an amendment that reduced the guideline range for sentences pertaining to crack cocaine offenses. Bud Ellis, Assistant United States Attorney, has been opposing counsel for most of these cases. 509-353-2767.

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Each case is decided by the original sentencing judge. However, several of the contested matters have been heard by Senior Judge Wm. Fremming Nielsen including U.S. v. Sims, CR-01-96-WFN and U.S. v. Wesson, CR-01-6001-WFN.

2. City of Spokane v. Zubarev (2004).
Client was a young immigrant, though he had lived in the United States most of his life. He was charged with obstructing justice in municipal court, and a conviction may have resulted in his permanent deportation. I was appointed to represent him and the case went to jury trial. The jury returned with a not-guilty verdict.
Opposing counsel was Paul Masiello from the City Prosecutor's office, 509-835-5988.
The judge was Honorable Patricia Walker, Spokane County District Court.
 3. State v. McMullen (2004)
This was a state case that our office handled as a conflict matter. Client was originally charged with 64 counts of various animal cruelty charges related to hoarding cats and dogs on her property. By the time of trial, the number was reduced to about 37 charges. The case was considerably complex in light of the number of charges, the number of witnesses, and the amount and nature of the evidence. The jury trial lasted approximately one week and resulted in guilty verdicts on 13 counts and not guilty verdict on 23 counts. The convictions were affirmed on appeal by the Superior Court.
Opposing counsel was at first Jim Kaufman and then Steven Kinn (who took over for trial) from the Spokane County Prosecutor's Office. 509-477-3662.
The judge was Honorable Sara Derr, Spokane County District Court.
 4. Various Cases as City of Ellensburg Prosecutor (1997-1999)
As the city prosecutor, I took approximately 15 cases to jury trial against defense attorney, Ken Beckley. 509-925-4128. At the time, I was also renting space from Mr. Beckley and my office was located on the second floor of his building, right above his office. This made things interesting, to say the least. The judge was always the Honorable Thomas Haven, Kittitas County District Court.
- (g) State in detail your experience in adversary proceedings before administrative boards or commissions during the last five years.

None.

25. Please briefly describe any legal non-litigation experience that you feel enhances your qualifications to serve as a judge.
 - I am certified through Westlaw® in Advanced Legal Research.
 - I am proficient in the electronic filing requirements for both U.S. District Court and the Ninth Circuit Court of Appeals. These courts have developed efficient means of filing court documents that provide instant electronic access for the parties and judges while dramatically reducing paperwork and the cost of administration.

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26. If you are now an officer or director of any business organization or otherwise engaged in the management of any business enterprises, please provide the following: the name of the enterprise, the nature of the business, the title of your position, the nature of your duties, and the term of your service. If you are appointed and do not intend to resign such position(s), please state this below along with your reasons for not resigning.

None.

27. Please list all chairmanships of major committees in bar associations and professional societies and memberships on any committees that you have held and believe to be of particular significance.

2004 – Member of Spokane Mayor's Executive Committee established to research and review the feasibility of creating an independent Spokane Municipal Court.

Judicial Interest and Experience

28. In 50 words or less, please describe why you should be appointed / elected and are seeking a judicial position.

I am passionate about Spokane's Municipal Court and ensuring an impartial court where everyone is treated fairly, basic rights are protected, and justice is advanced. As a policy maker, I am part of a collaborative team making great changes with the Court to improve efficiency, responsiveness, and public safety.

29. In 50 words or less, please describe your judicial philosophy.

Judges are umpires not litigants. They must follow the law without bias or prejudice. Factual findings are based upon credibility and burden of proof. Conclusions of law are based on the law and precedent. A judge must lead by example and everyone in the courtroom should be treated with respect.

30. Have you ever held a judicial office or have you ever been a candidate for such office?
Yes. If you answered "yes", please provide details, including the courts involved, whether elected or appointed, and the periods of your service.

Spokane Municipal Court Judge, appointed by the Mayor and confirmed by the City Council on January 2, 2009.

31. Have you ever held public office other than a judicial office, or have you ever been a candidate for such an office? No. If you answered "yes", please provide details, including the offices involved, whether elected or appointed, and the length of your service.

32. Please briefly identify all of your experience as a neutral decision-maker (e.g. judge (permanent or pro tem) in any jurisdiction, administrative law judge, arbitrator, hearing officer, etc.). Give courts, approximate dates, and attorneys who appeared before you.

- Most recently as a Spokane Municipal Court Judge sitting on the domestic violence docket. The attorneys who regularly appear in court before me include Lynden Smithson and Marriya Wright from the prosecutor's office, and Tony Tompkins, Michiko Fjeld, Bridget Condon, Andy Hess, and Francis Adewale from the public defender's office. In addition, I often see

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private counsel including Peter March, Scott Hill, Tracy Collins, and John Clark.

- While working with the Federal Defenders, I gained experience as a neutral decision maker as part of the STEP team from June 2007 to December 2008. Although I provided a defense perspective, I did not represent the participants. The original team consisted of Senior U.S. District Court Judge Wm. Fremming Nielsen, Assistant U.S. Attorney Jill Bolten, myself as the defense bar representative, and Federal Probation Officer Matt Thompson. We met twice a month to review each participant's file and agree on commendations or sanctions, which are then handed out during a regularly scheduled STEP hearing the same afternoon. This is a collaborative effort in a unique program that has received national attention for its ability to reduce recidivism while successfully reintegrating convicted felons into the community.
- In 2003 I regularly sat as a judge *pro tem* for Spokane District Court. I was trained and qualified to sit on various dockets as needed. I assembled my own quick-reference notebook to assist with the various dockets. During the course of the year, I sat numerous times as a judge *pro tem* on various dockets including arraignments, first-appearance dockets, civil anti-harassment and domestic violence restraining orders, infractions, mental health, small claims court, and pre-trial hearings. By the end of the year, I could quickly sit on almost any docket with little notice. I discontinued my *pro tem* work when I became a full-time employee for the City Public Defender's Office. Although I do not recall all of the attorneys who appeared before me, I remember Frank Grigaliunas and Jim Bledsoe at contested accident infractions.
- From 1999 to 2003 I was a judicial law clerk for the Honorable Stephen M. Brown at the Washington State Court of Appeals, Division III. As a law clerk, I was responsible for going through the entire record, reviewing the briefs, researching all the cases, and preparing an independent research memo which would then be used by the panel and specifically Judge Brown to write an appellate opinion on the case. Although I was not the ultimate decision-maker, Judge Brown insisted that his law clerks reach their own conclusions. This was my first experience as a neutral decision-maker and I found it to be invaluable. I thoroughly enjoyed working on a case without an agenda or goal and reaching a conclusion driven only by the law and facts as found by the trial court.

Community and Civic Activities

33. Please list your community and civic activities, including dates and leadership roles held, over the last 10 years.
- 2004-2007 Executive Officer for the Cliff/Cannon Neighborhood Committee.
 - 2001 to Present, Member and regular volunteer at Life Center Foursquare Church
 - 2003 Volunteer for Habitat for Humanity.
 - 2005-2007 Volunteer for 2nd Harvest Holiday food drive.
 - 2009 Member of Women in Rotary.

Discipline and Disputes

34. Have you ever been held, arrested, charged or convicted by federal, state, or other law enforcement authorities for violation of any federal law, state law, county or municipal law, regulation or ordinance? Yes. If you answered "yes", please provide details. (Do not include traffic violations for which a fine of \$150.00 or less was imposed.) Please feel free to provide your view of how it bears on your present fitness for judicial office.

When I was 19(?) I was charged with reckless driving. The charge was later reduced to

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negligent driving. No jail time was imposed and I believe the fine amount was \$200. When I was in college, my roommates and I each received a noise violation under the Bellingham City Ordinance. The case was deferred for one year and I believe it was eventually dismissed.

35. Has a client ever made a claim or suit against you for malpractice? No. If you answered "yes", please provide details and the current status of the claim and/or suit.

36. Please describe your direct experience, if any, with domestic violence and sexual harassment.

I am currently the municipal court judge assigned to the domestic violence docket. This year alone, more than 850 domestic violence cases have been filed in municipal court. Prior to becoming a judge, I have prosecuted and defended persons accused of domestic violence. I have never worked on a sexual harassment case as an attorney, but I did work on such cases as a judicial law clerk.

37. Have you been a party in interest, witness, or consultant in any legal proceeding? Yes. If you answered "yes", please provide details. Do not list proceedings in which you were merely a guardian ad litem or stakeholder.

When I was in law school (1993), I had to sue my landlord in small claims court to get my rental deposit returned.

38. Have you ever been the subject of a complaint to any bar association, disciplinary committee, court, administrative agency or other professional group? Yes. If you answered "yes", please provide details.

The landlord I sued for my rent deposit in 1993 filed a bar complaint against me. The bar association dismissed the complaint without asking for a response.

39. Have you ever been disciplined or cited for breach of ethics or unprofessional conduct? No. If you answered "yes", please provide details.

40. If you have served as a judge, commissioner, or in any judicial capacity, has a complaint for misconduct in that capacity ever been made against you? No. If you answered "yes", please provide details.

Miscellaneous

41. Are you aware of anything that may affect your ability to perform the duties of a judge? No. If you answered "yes", please provide details.

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42. Have you published any books or articles in the field of law? If so, please list them, giving the citations and dates. Also, please give the dates and forums of any Continuing Legal Education presentations that you have made.
- Editor (2006 - 2008) "My Little Red Rules Book," a yearly publication from the Federal Defenders of Eastern Washington and Idaho on the rules of evidence and criminal procedure.
 - 2008 -- Co-editor of the internet blog for the Federal Defenders of Eastern Washington and Idaho (<http://www.fdewi.org/wordpress/>)
 - 2008 Speaker at the Wash. Assoc. of Criminal Defense Lawyer's Annual Conference on "Federal Consequences of State Convictions."
 - 2007 Speaker at CLE Appealing Tidbits on "Federal Appeals."
 - 2007 Speaker at CLE Issues in Public Defense Practice on "Preserving the Record for Appeal."
 - 2004 Speaker at CLE Impact of Blakely & Crawford on "Blakely & Crawford for Misdemeanors."
 - 2003 Speaker at CLE Appellate Court Update on "Legal Research on the Internet."
43. Please list any honors, prizes, awards or other forms of recognition that you have received and whether they were professional or civic in nature.
- Recognized as one of "Spokane's Top Lawyers" in 2008 Spokane/Coeur d'Alene Living Magazine.
44. Are you aware of anything in your background or any event you anticipate in the future that might be considered to conflict with the Code of Judicial Conduct? No. If you answered "yes", please explain.
45. Please provide a writing sample of your work (between 5 and 10 pages long), written and edited solely by you, within the last 4 years. (See attached)

Access to Justice

46. Please describe activities that you have engaged in to eliminate bias or improve access to the judicial system for indigent populations and ethnic, racial and sexual minorities. As a member of the bench, what, if any, role do you believe a judge has to enhance equal access to justice?

Prior to becoming a judge, I was a public defender at the city and federal level for five years. On several occasions I have represented appellate clients on a *pro bono* basis, beyond my work as a public defender, to ensure that indigent clients received effective assistance of counsel and important issues were presented to the court. In Washington state, indigent defendants are only entitled to a court-appointed attorney for the first or direct appeal. Any appeal following the direct appeal is considered "discretionary" and the client is not entitled to counsel unless the court of appeals appoints counsel.

In 2006, I represented Kyle Kronich, *pro bono*, on his appeal to the Supreme Court, logging over 60 hours on the weekends and evenings writing briefs and spending my own funds (and a vacation day) to travel to Olympia for the argument.

In 2003, while working with the City Public Defender's Office, the city prosecutor objected to my representation of clients beyond the direct appeal so I arranged to have the cases assigned to the Center for Justice, and then volunteered for the Center to do the discretionary appeals on my own time and with my own resources. The Court of Appeals granted discretionary review on several of these cases and decided them in my client's favor.

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I am a strong advocate and financial supporter for the Access to Justice program for low and moderate income individuals and families.

Judges play a vital role in enhancing access to justice by speaking out about the issues, being vigilant in protecting the right to counsel, and contributing financially, all of which I do. As a judge I am always aware that for many people municipal court is the only court they may experience. A judge, like any other elected official, answers to the citizens and has an obligation to make sure that all persons in the court are treated with respect. Matters should be decided on the substantive merits, not on technicalities. Access to justice also means that indigent criminal defendants are provided with quick and effective access to appointed counsel and interpreters when necessary.

47. Please describe the frequency, time commitment and substantive nature of your direct participation of free legal services to indigent populations, and ethnic, racial and sexual minorities.

See (46) above.

Diversity in the Legal Profession

48. Please briefly describe your understanding of the issue of "diversity within the legal profession."

A diverse legal profession recognizes and embraces the contributions and perspective of all lawyers including women and minority bar members. A commitment to diversity means acknowledging where women and minorities are under-represented in the legal profession, recognizing the reasons for the under-representation, and taking steps to enhance opportunities for promotion.

References

It is useful for evaluators to speak with attorneys and non-attorneys who are familiar with you. One or more participants in the evaluation process may contact each of your references. All telephone numbers should be current and legible. If a reference is unreachable, your rating/evaluation may be delayed. **Please use a separate piece of paper for each list.** You may contact references in advance if you so desire. Individuals not listed by you as a reference may be contacted to obtain information about you.

49. If you have been in practice within the past fifteen years, list the names and phone numbers of ten opposing counsels who know you best, including at least three opposing counsels on cases that went to trial.
50. If you have been a judge or otherwise have served as a neutral decision-maker within the past fifteen years, please list the names and phone numbers of the last ten attorneys who have appeared before you.
51. List the names and phone numbers of up to six non-attorney references whose opinions or observations – particularly with respect to your commitment to improving access to the judicial system for indigent populations, people of color, and disenfranchised communities – would assist in the consideration of your application.
52. For the last five trials in which you participated (whether as trial lawyer or decision-maker), list as appropriate the following for each: case name, subject matter, court, judge (w/ phone number), and opposing counsel or counsel appearing before you (w/ phone number).

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53. List the names and phone numbers of ten additional attorneys familiar with your professional qualifications, skills, experience or attributes.

NOTE: The Governor's Office requires individuals seeking judicial appointment to utilize, to the fullest extent possible, the ratings processes from state, county, and minority bar organizations. Contact information for the minority bar associations can be found on the Washington State Bar Association's website at (<http://www.wsba.org/public/links/minoritybars.htm>). It is the applicant's responsibility, however, to obtain these evaluations in a timely manner, and to forward evaluations received to the Governor's Office. To that end, all applicants are strongly encouraged to commence the evaluation process with the various bar associations as soon as possible. To facilitate the process, the following organizations have agreed to accept this questionnaire as the principal application in their evaluation process and may also require candidates to complete an additional supplement questionnaire:

State Bar Association

- Washington State Bar Association (WSBA) (appellate court evaluations only)

County Bar Associations

- King County Bar Association (KCBA)
 Spokane County Bar Association (SCBA)
 Tacoma-Pierce County Bar Association (TPCBA)

Minority Bar Associations

- Latina/o Bar Association of Washington (LBAW)
 Loren Miller Bar Association (LMBA)
 The Joint Asian Judicial Evaluations Committee of Washington³
 Pierce County Minority Bar Association (PCMBA)
 Q-Law / GLBT (Gay Lesbian Bisexual Transgender) Bar Association
 Washington Women Lawyers⁴ (WWL)

As of the date of your certification below and submission of this questionnaire to the Governor's Office, please check beside each of the above organizations you have contacted to evaluate you for the position for which you seek.

Certification

54.

By signing below, I declare under penalty of perjury under the laws of the State of Washington that the information provided by me in responding to this questionnaire is true and correct to the best of my knowledge.

Date: 6/28/2009

Signature: /s _____

³ A joint committee of the Asian, Korean, South Asian and Vietnamese American Bar Associations of Washington.

⁴ Washington Women Lawyers has approved the use of the Governor's Uniform Judicial Evaluation Questionnaire for its statewide and all county chapters.

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Supplement:

49. If you have been in practice within the past fifteen years, list the names and phone numbers of ten opposing counsels who know you best, including at least three opposing counsels on cases that went to trial.
1. Michelle D. Szambelan, former appellate attorney for the City of Spokane, currently a Spokane Municipal Court Judge. 509-622-5867.
 2. Howard Delaney, former City of Spokane Prosecutor, current Spokane City Attorney. 509-625-6225.
 3. Bud Ellis, Assistant United States Attorney, 509-353-2767.
 4. Carl Hueber, Winston Cashatt, 509-838-6131.
 5. Dan Catt, Spokane County Prosecutor's Office, 509-477-2816.
 6. Brian O'Brien, Spokane County Prosecutor's Office, 509-477-3662.
 7. Ken Beckley, Ellensburg Criminal Defense Attorney, 509-925-4128.
 8. Paul Masiello, City of Spokane Prosecutor's Office, 509-835-5988.
 9. Steven Kinn, Spokane County Prosecutor's Office, 509-477-3662.
 10. Jill Bolton, Assistant United States Attorney, 509-353-2767.

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50. If you have been a judge or otherwise have served as a neutral decision-maker within the past fifteen years, please list the names and phone numbers of the last ten attorneys who have appeared before you.
1. Lynden Smithson, Spokane City Prosecutor's Office, 509-835-4556.
 2. Marriya Wright, Spokane County Prosecutor's Office, 509-835-4530.
 3. W. Michael Reinken, Spokane City Prosecutor's Office, 509-835-4526.
 4. Justin Bingham, Spokane City Prosecutor's Office, 509-835-4534.
 5. Tony Tompkins, Spokane City Public Defenders Office, 509-835-5975.
 6. Michiko Fjeld, Spokane City Public Defender's Office, 509-835-5957.
 7. Bridget Condon, Spokane City Public Defender's Office, 509-835-5979.
 8. Andrew Hess, Spokane City Public Defender's Office, 509-835-5978.
 9. Francis Adewale, Spokane City Public Defender's Office, 509-835-5977.
 10. Mark Lorenz, Spokane County Public Defender's Office. 509-477-4246.

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51. List the names and phone numbers of up to six non-attorney references whose opinions or observations – particularly with respect to your commitment to improving access to the judicial system for indigent populations, people of color, and disenfranchised communities – would assist in the consideration of your application.
1. Mary Verner, Mayor, City of Spokane, 509-625-6250.
 2. Anne Kirkpatrick, City of Spokane Chief of Police. 509-625-4063.
 3. Matt Thompson, U.S. Probation Officer. 509-742-6300.
 4. Donna McBride, Chief Probation Officer, City of Spokane. 509-622-5800.
 5. Dorothy Webster, City Administrator, 509-625-6281.
 6. Art Garcia, treatment counselor, New Horizons Care Center, 509-327-2121.

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52. For the last five trials in which you participated (whether as trial lawyer or decision-maker), list as appropriate the following for each: case name, subject matter, court, judge (w/ phone number), and opposing counsel or counsel appearing before you (w/ phone number).

1. City of Spokane v. Hornbuckle
Criminal
Spokane Municipal Court
Honorable Tracy Staab
Prosecutor: Marriya Wright, 509-835-4530
Defense Counsel: Andrew Hess, 509-835-5978
2. City of Spokane v. Goldsmith
Criminal
Spokane Municipal Court
Honorable Tracy Staab
Prosecutor: Marriya Wright, 509-835-4530
Defense Counsel: Senit Lutgen, 509-323-0420
3. City of Spokane v. Keen
Criminal
Spokane Municipal Court
Honorable Tracy Staab
Prosecutor: Marriya Wright, 509-835-4530
Defense Counsel: Francis Adewale, 509-835-5977
4. City of Spokane v. Reynolds
Criminal
Spokane Municipal Court
Honorable Tracy Staab
Prosecutor: Michael Reinken, 509-835-4500
Defense Counsel: Michiko Fjeld, 509- 835-5957
5. City of Spokane v. Zubarev
Criminal
Spokane County District Court, Municipal Dept.
Honorable Patricia Connolly Walker 509-477-2971
Opposing Counsel: Paul Masiello, 509-835-5988

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53. List the names and phone numbers of ten additional attorneys familiar with your professional qualifications, skills, experience or attributes.
1. Honorable Stephen M. Brown, Washington State Court of Appeals, Division III. 509-456-3082.
 2. Honorable John A. Schultheis, Washington State Court of Appeals, Division III. 509-456-3944.
 3. Honorable Mary Logan, Spokane Municipal Court, 509-622-5867.
 4. Roger Peven, Executive Director, Federal Defenders of Eastern Washington & Idaho. 509-624-7606.
 5. Breean Beggs, Center for Justice, 509-835-5211.
 6. Kathy Knox, Director, City of Spokane Public Defender's Office. 509-835-5955.
 7. Milt Rowland, Foster Pepper, PLLC, 509-777-1610.
 8. John R. Clark, 509-926-4900.
 9. Rebecca Pennel, Research and Writing Attorney, Federal Defenders of Eastern Washington and Idaho (Yakima Office), 509-248-8920.
 10. John Nollette, Attorney at Law, 509-701-0566.

No. _____

IN THE
Supreme Court of the United States

JOSE MARTIN SOTO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
to the Ninth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

Tracy Arlene Staab
Federal Defenders of
Eastern Washington and Idaho
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Spokane, Washington 99201
(509) 624-7606
Tracy_Staab@fd.org
Attorneys for Petitioner

QUESTIONS PRESENTED

In *Carter v. Kentucky*, 450 U.S. 288 (1981), this Court held that when requested, the trial court must instruct the jury not to draw an adverse inference from a defendant's failure to testify. In this case, the district court denied Mr. Soto's request for a no-adverse-inference instruction.

1. Certiorari should be granted to resolve a circuit split on whether jury instructions defining reasonable doubt and the presumption of innocence are sufficient to admonish the jury that it cannot draw an adverse inference from a defendant's failure to testify as required by *Carter*.
2. Whether the failure to give a *Carter* instruction is structural error because it is difficult if not impossible to assess the effect of this constitutional violation.
3. In the event that a *Carter* error is not structural, whether the harmless error standard requires a reviewing court to consider the error's effect on the verdict or simply determine that the uncontradicted evidence of guilt was overwhelming.

PETITION FOR A WRIT OF CERTIORARI

[Selected portions of this brief were deleted for purposes of this writing sample.]

STATEMENT OF THE CASE

The Petitioner, Jose Martin Soto, was charged with distribution of a controlled substance and possession of a controlled substance with intent to distribute in violation of 21 U.S.C. § 841(a). Both charges stemmed from events occurring inside Mr. Soto's home. The indictment alleged that Mr. Soto distributed drugs to a government informant inside his home, and that additional drugs were discovered in the home two days later. At trial, Mr. Soto's attorney argued that the government's informant set him up and planted the drugs in his home. The government's evidence could not disprove this theory.

Instead, the only two people who knew what actually happened in Mr. Soto's home were Mr. Soto and the informant. The informant testified at trial; Mr. Soto did not. Although he requested that the jury be instructed that it could not draw an adverse inference from Mr. Soto's failure to testify, the district court refused, indicating that the request was untimely and the jury instructions on the presumption of

innocence and the government's burden of proof were sufficient. The jury did not reach a verdict on the delivery charge, but convicted Mr. Soto of possessing the drugs found in his home.

A. Statement of Facts

[Deleted for purposes of this writing sample.]

B. Proceedings in District Court

[Deleted for purposes of this writing sample.]

C. Ninth Circuit Proceedings

Mr. Soto appealed to the Ninth Circuit. His case was assigned to a three-judge panel including Judges Canby, Graber, and Gould.

During oral argument the panel questioned whether there was any material distinction between the jury instructions given in Mr. Soto's case, and the jury instructions upheld in *United States v. Castaneda*, 94 F.3d 592 (9th Cir. 1996). Judge Gould suggested that *Castaneda* was "not the greatest decision ... because it would be better I think if those instructions were routinely given when asked, when requested, and because [*Castaneda*] is ambiguous ..." *United States v. Soto*, No. 07-30011, Audio Recording of Oral Argument, Nov. 7, 2007, at 8:05 to

8:20.¹ Ultimately however, the panel issued a memorandum decision finding no error because the jury instructions given in Mr. Soto's case were indistinguishable from the jury instructions approved by the Ninth Circuit in *Casteneda*. [App. 12-14.]

Mr. Soto filed a Petition for Rehearing, arguing that *Casteneda* should be overruled by an en banc panel. The panel granted rehearing and issued a per curiam decision containing three different opinions. Unlike the first memorandum decision, the published decision did not decide whether the failure to give a Carter instruction was error. Instead, the Court determined that any error was harmless. *United States v. Soto*, 519 F.3d 927 (9th Cir. March 19, 2008). The Ninth Circuit determined that the error was harmless because the evidence of possession was "uncontradicted" and overwhelming. The Court did not consider whether the error may have affected the verdict. *Id.* at 931.

Judge Graber filed a concurring opinion, suggesting that there was no error because Mr. Soto's request for a Carter instruction was untimely. *Id.* at 933 (Graber, J., concurring). Judge Gould also filed a

¹ Available on the Ninth Circuit website at <http://www.ca9.uscourts.gov/ca9/media.nsf/Media%20Search?OpenForm&Seq=2>

concurring opinion. But unlike Judge Graber, Judge Gould specifically found instructional error and suggested that the Ninth Circuit's decision in *Castaneda* was "wrongly decided" and should be revisited by a *en banc* panel. *Id.* at 936 (Gould, J., concurring). Ultimately however, Judge Gould concurred in the decision affirming Mr. Soto's conviction, believing that any error was harmless. *Id.*

REASONS FOR GRANTING THE WRIT

Mr. Soto's Petition for Certiorari raises three important questions of law that are ripe for consideration by this Court. As the facts in this case demonstrate, the need for accurate instructions on the law are "perhaps nowhere more important than in the context of the Fifth Amendment privilege against compulsory self-incrimination" *Carter v. Kentucky*, 450 U.S. 288, 302 (1981). The first issue presented is whether jury instructions defining reasonable doubt and the presumptions of innocence are sufficient to clearly and affirmatively instruct the jury that it may not draw an adverse inference from Mr. Soto's failure to testify. On this issue there is a clear and distinct split among the circuits, with the Ninth Circuit standing alone as the only circuit to find such instructions sufficient under *Carter*.

[Portions of the brief were deleted.]

- A. Certiorari should be granted to resolve a circuit split on whether jury instructions defining reasonable doubt and the presumption of innocence are sufficient to admonish the jury to not draw an adverse inference from a defendant's failure to testify.

The Fifth Amendment to the United States Constitution provides in part that no person "shall be compelled in any criminal case to be a witness against himself." In an effort to ensure that a defendant will not be penalized for exercising this right, a trial court must, when requested, instruct the jury not to consider, or adversely infer, a defendant's decision not to testify. *Carter*, 450 U.S. at 300. This instruction is commonly referred to as the "no-adverse-inference" instruction.

While the *Carter* decision did not dictate specific language for such an instruction, the Court rejected the state's argument that other instructions given at trial were sufficient. The state had argued that instructing the jury to determine guilt "from the evidence alone" was sufficient because the defendant's failure to testify was not "evidence." The Court rejected this instruction because it did not clearly and affirmatively instruct the jury to refrain from drawing an adverse

inference from the defendant's failure to testify. "Jurors are not lawyers; they do not know the technical meaning of "evidence." They can be expected to notice a defendant's failure to testify, and, without limiting instruction, to speculate about incriminating inferences from a defendant's silence." *Id.* at 303-04.

The Court also rejected the state's argument that instructions on the presumption of innocence were sufficient to protect the privilege against self-incrimination. While acknowledging that the Fifth Amendment privilege and presumption of innocence were "closely aligned," the Court also recognized that they served different functions. As a result, a no-adverse-inference instruction would provide "significant additional guidance." *Id.* at 304 (quoting *Taylor v. Kentucky*, 436 U.S. 478, 484 (1978)).

1. Certiorari should be granted because the Ninth Circuit precedent established in *Castaneda* conflicts with this Court's decision in *Carter*.

Contrary to the Supreme Court's mandate for a clear and affirmative no-adverse-inference instruction, the Ninth Circuit has held that pattern instructions on the burden of proof and presumption of innocence are sufficient to meet the requirements of *Carter*. In *United*

States v. Castaneda, 94 F.3d 592, 596 (9th Cir. 1996), the Ninth Circuit found sufficient two instructions stating that “it is the government’s burden to prove a defendant’s guilt beyond a reasonable doubt and that [t]he defendant is presumed to be innocent and does not have to testify or present any evidence to prove innocence.” While recognizing that an instruction with the specific words “no inference” is preferable, the Castaneda opinion reasoned that the instruction given “sufficiently covered the substance of Castaneda’s proposed instruction; the defendant’s failure to testify does not lessen the government’s burden to prove its case.” *Id.*

Castaneda was wrongly decided because these instructions are legally indistinguishable from the instructions rejected by this Court in Carter. The Castaneda decision essentially adopted the argument rejected in Carter – that the jury could infer from the given instructions that it should not consider the defendant’s silence because “the defendant’s failure to testify does not lessen the government’s burden to prove its case.” Castaneda, 94 F.3d at 596. This reasoning ignores the reality recognized in Carter – that jurors are not lawyers and can be expected to speculate on the defendant’s silence unless specifically

instructed otherwise. While the Castaneda instruction tells the jury that the defendant does not have to testify, it fails to clearly and affirmatively instruct the jury to refrain from considering or speculating on the defendant's failure to testify. Consequently, the instructions given in Castaneda, and the indistinguishable instructions given in Mr. Soto's case, fail to meet the requirements of Carter.

In Mr. Soto's case, Judge Gould agreed. In his concurring opinion, Judge Gould recognized that "[w]hile purporting to acknowledge [Carter], our opinion in Castaneda effectively ignored it ..." Soto, 519 F.3d at 936 (Gould, J., concurring). Judge Gould went on to argue that Castaneda should be reconsidered. "Following the Supreme Court's advice in Carter will ensure fairness to those accused of crimes and help to attain a superior criminal procedure." *Id.*

2. Certiorari should be granted because the Ninth Circuit decision in Castaneda directly conflicts with decisions from the First, Fifth and Eleventh Circuits, and is not supported by decisions from any other circuit.

The Ninth Circuit precedent established in Castaneda creates a circuit split. The Ninth Circuit is the only circuit to hold that instructions on the burden of proof and presumption of innocence are sufficient to meet the requirements of Carter. Contrary to Castaneda,

the First, Fifth, and Eleventh Circuits have specifically rejected similar instructions as insufficient under Carter.

In *United States v. Brand*, 80 F.3d 560 (1st Cir. 1996), the jury was instructed that the defendants were presumed innocent and did not have to testify or present evidence because the government had the burden of proving every element beyond a reasonable doubt. *Id.* at 566. The First Circuit recognized that a jury may “well think that a defendant’s right not to testify means merely that he cannot be called as a witness, leaving it to draw such conclusions from his silence as it felt warranted.” *Id.* at 567. This is different from an instruction specifically cautioning the jury not to make this inference. *Id.* “*Carter v. Kentucky* makes clear that, once request for a no-adverse-presumption instruction has been made, the ‘full and free exercise’ of the constitutionally guaranteed privilege against self-incrimination requires more than instruction on the right not to testify and to be presumed innocent until proven guilty.” *Id.* See also, *United States v. Medina-Martinez*, 396 F.3d 1, 9 (1st Cir. 2005) (“Presumption of innocence and burden of proof instructions are not akin to a no-adverse-presumption instruction.”).

The Fifth Circuit has reached a similar result. In *United States v. Eiland*, 741 F.2d 738, 743 (5th Cir. 1984), the district court refused to give a separate no-adverse-inference instruction because it had already instructed the jury “several times” that the defendant is not required to prove his innocence and did not have to produce any evidence. *Id.* at 742 n. 1. The Fifth Circuit reversed, holding that “[i]t is established in this circuit that the ‘burden of proof’ charge given in this case is ‘significantly dissimilar’ from a ‘failure to testify’ instruction and does not satisfy the constitutional requirements.” *Id.* at 743.

Finally, in *United States v. Burgess*, 175 F.3d 1261, 1265 (11th Cir. 1999), the government argued that “because the district court thoroughly instructed the jurors concerning the presumption of innocence and the burden of proof, the harm of failing to deliver the requested ‘no-adverse-inference’ instruction is somehow overcome.” Contrary to the Ninth Circuit in this case, the Eleventh Circuit recognized that the Carter decision “flatly rejected this argument.” *Id.*

[Remaining portions of the brief were deleted for purposes of this writing sample.]