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5 SUPERIOR COURT OF ARIZONA  
6 COCONINO COUNTY

7 STATE OF ARIZONA )  
8 Plaintiff, ) CR 2020-00632  
9 vs. )  
10 ANN MARIE MARTINEZ ) MOTION FOR A GRAND JURY  
11 Defendant. ) REMAND  
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13 COMES NOW the Defendant, by and through her attorney undersigned, and  
14 respectfully moves this Court, pursuant to Rule 12.9, Arizona Rules of Criminal  
15 Procedure, for an Order Remanding this matter to the Coconino County Grand Jury  
16 for a redetermination of probable cause;

17 AS GROUNDS THEREFORE, the defendant submits that she was denied a  
18 substantial procedural right and due process guaranteed to her through Rule 12.9,  
19 Arizona Rules of Criminal Procedure, the Fifth, Sixth, Eighth and Fourteenth  
20 Amendments to the United States Constitution and Article 2 sections 4 and 24 of  
21 the Arizona Constitution.

22 This Motion is further supported by the attached Memorandum.  
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MEMORANDUM

**FACTS:**

On August 6, Ms. Martinez was Indicted with Count 1, First Degree Felony Murder as to victim D.M.; Count 2, Child Abuse as to victim D.M.; Count 3, Child Abuse as to victim A.M.; Count 4, Kidnapping as to victim D.M.; and Count 5, Kidnapping as to victim A.M. This Indictment is a supervening Indictment containing essentially the same charges as a former Indictment did in CR 2020-00359.

As to Count 1, the predicate felony of the Felony Murder charge is alleged to be Child Abuse with an alleged culpable mental state of intentionally or knowingly, a class 2 felony and Dangerous Crimes Against Children. The grand jury was read a list of applicable statutes before the presentation of any evidence. These statutes included Child Abuse committed intentionally or knowingly pursuant to A.R.S. 13-3623(A)(1) (G.J. Transcript p. 7-8.) and First Degree Felony Murder pursuant to A.R.S. 13-1105(A)(2) (G.J. Transcript p. 6-7.) The grand jury was specifically instructed that Felony Murder “requires no specific mental state other than what is required for the commission of any of the enumerated felonies.” (G.J. Transcript p. 7.)

After a few additional instructions the prosecutor called its sole witness, Flagstaff Police Department Detective Casey Rucker. (G.J. Transcript p. 12.) According to Detective Rucker’s testimony, on March 2, 2020, Flagstaff Police Officers and Flagstaff Fire Department responded to a call to an apartment where a six-year-old boy D.M., was unresponsive and not breathing. (G.J. Transcript p. 14-15.) The apartment belonged to the Defendant, Ann Marie Martinez, the grandmother of D.M. (G.J. Transcript p. 14.) Staying at her apartment were her son, Anthony Martinez, Anthony’s wife, Elizabeth Archibeque, their two sons, six-year-old D.M. and seven-year-old A.M., their daughter, four-year-old G.M. and

1 Elizabeth's two-year-old daughter, N.M. (G.J. Transcript p. 13-14.) As police and  
2 fire tried to revive the boy, they noticed he looked very thin. (G.J. Transcript p.  
3 15.)

4 D.M.'s mother, Elizabeth Archibeque informed the officers that D.M. and  
5 his seven-year old brother, A.M., were talking to each other at 8:00 a.m. (G.J.  
6 Transcript p. 16.) The boys went back to bed and around 11:30 a.m., A.M. woke  
7 back up but D.M. did not. (G.J. Transcript p. 16.) The Defendant, Ann Marie  
8 Martinez, who is the boys' grandmother, told officers that D.M. had only been  
9 unresponsive for a couple minutes before police and fire arrived. (G.J. Transcript  
10 p. 15.)

11 D.M. was not revived and pronounced deceased on scene. (G.J. Transcript  
12 p. 16.) An autopsy took place and the medical examiner concluded that D.M.  
13 died as the result of starvation. (G.J. Transcript p. 36.) D.M. also had parallel  
14 linear style abrasions on his back. (G.J. Transcript p. 36.) He weighed 18 pounds.  
15 (G.J. Transcript p. 36.) His brother, A.M., was taken to Flagstaff Medical Center  
16 and was found to have extreme metabolic derangements consistent with starvation.  
17 (G.J. Transcript p. 22.) He weighed 28 pounds. (G.J. Transcript p. 18.)

18 Interviews were conducted and police learned that Anthony and Elizabeth  
19 were trying to survive on \$900 per month of food assistance. (G.J. Transcript p.  
20 24.) Once grocery money ran out, the family would have to live on the food they  
21 had until the next monthly payment came. (G.J. Transcript p. 24.) During the  
22 interview with Anthony Martinez, he informed officers that D.M. and A.M. would  
23 steal food. (G.J. Transcript p. 25.) To prevent this, he and Elizabeth would put the  
24 boys in a closet. (G.J. Transcript p. 25.) If the boys were caught stealing food, that  
25 would be their meal and they would have to wait until their next meal for food.  
26 (G.J. Transcript p. 25.) Anthony Martinez also explained that the boys did not eat  
27 dinner the past couple days because they were out of food. (G.J. Transcript p. 26.)

1 Ann Marie Martinez informed officers that her son and his family started to  
2 stay in her apartment right before Christmas of 2019. (G.J. Transcript p. 29.) Ann  
3 Marie indicated that one time she tried to give the boys food, but Elizabeth became  
4 upset so Ann Marie could only give the boys food when Elizabeth approved it.  
5 (G.J. Transcript p. 29.) Ann Marie did admit to disciplining the boys by spanking  
6 them with a red hanger. (G.J. Transcript p. 31.) Ann Marie stated that she did not  
7 give the boys food because Elizabeth would not let the boys have food and  
8 Elizabeth kept the boys in Elizabeth's room. (G.J. Transcript p. 32.) If anyone tried  
9 to give the boys food Elizabeth would start fighting and try to have them thrown in  
10 jail. (G.J. Transcript p. 32.) Simply stated, Ann Marie tried to help the boys but  
11 Elizabeth would not allow her to do so.

12 Anthony Martinez, Elizabeth Archibeque and Ann Marie Martinez were all  
13 arrested. They have all now been charged with the previously listed counts.  
14 Anthony Martinez has two additional counts of Aggravated Assault.

15 Ann Marie Martinez now moves this Court for an Order remanding this to  
16 the Coconino County Grand Jury for a redetermination of probable cause.

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### 18 **LEGAL ANALYSIS:**

19 The Arizona Supreme Court has construed Rule 12.9 to require that an  
20 accused have grand jury proceedings meet the test of due process. This includes a  
21 fair and impartial presentation of evidence. *Maretick v. Jarrett (State of Arizona)*,  
22 204 Ariz. 194, 62 P. 3d 120 (2003). The due process required by an unbiased grand  
23 jury proceeding requires that the grand jury be adequately informed of the facts  
24 and the law. *Crimmons v. Superior Court*, 137 Ariz. 39, 41, 668 P. 2d 882, 884  
25 (1983).

26 Specifically, with respect to the duties of the prosecutor in grand jury  
27 proceedings, the Arizona Supreme Court has stated: "The prosecutor's role before  
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1 the grand jury is unique in our system. The prosecutor acts not simply as an  
2 advocate, but as a ‘minister of justice,’ who assists the jurors in their inquiry.  
3 Prosecutors bear a particularly weighty duty not to influence the jury because the  
4 defendant has no representative to watch out for his interests before the grand jury.  
5 The prosecutor therefore must not take advantage of his or her role as the ex parte  
6 representative of the state before the grand jury to unduly or unfairly influence it.”  
7 *Maretick v. Jarrett (State of Arizona)*, 204 Ariz. 194, 197 62 P. 3d 120, 123 (2003).  
8 (citations omitted).

9 Prosecutors must instruct the grand jury on all law applicable to the facts of  
10 the case, even if the grand jury does not make any specific request for additional  
11 legal instruction. *Trebus v. Davis (State of Arizona)* 189 Ariz. 621, 623, 944 P.2d  
12 1235 (1997).

13 In this case, the prosecutor never clearly instructed the grand jury as to the  
14 causation requirement and the interplay of the three discrete methods of  
15 committing child abuse under Arizona law, *specifically* as it relates to the Felony  
16 Murder count. The prosecutor never specifically instructed the grand jury as to the  
17 causation requirement of Ann Marie’s actions, or inaction, to the actual harm of the  
18 child. In other words, but-for Ann Marie’s actions or inactions, the specific harm  
19 to, and/or death of, D.M. would not have occurred.

20 The child abuse statute, A.R.S. §13-3623, “is complex, in that the offense  
21 may be committed in alternative ways.” *State v. Poehnelt*, 150 Ariz. 136, 144  
22 (App.1985). There are three discrete methods of child abuse and criminal liability.  
23 The first discrete method, causing a child to suffer physical injury with the  
24 accompanying *mens rea*, is simple enough. “Physical injury” is defined at A.R.S.  
25 §13- 3623(F)(4). It includes observable physical injuries and entities impacting  
26 health—such as failure to thrive, malnutrition, and dehydration. The provision  
27 doesn’t require the perpetrator to have custody or care of the child when injury is  
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1 inflicted, and it doesn't matter how the child suffered injury. Proof of but-for  
2 causation is required. A.R.S. § 13-203(A).

3 The second discrete method prohibits one having “care or custody of a  
4 child” from causing or permitting the person or health of a child to be injured.  
5 Basic principles of statutory interpretation require avoidance of rendering language  
6 mere surplusage, giving meaning to each word, phrase, clause and sentence—  
7 which perform a function—so that no part of the statute will be redundant.

8 Thus, *permitting* injury is to be distinguished from *causing* injury.  
9 Evidence that a person intentionally or knowingly caused injury to a child satisfies  
10 this provision so long as causation is established. The government must prove both  
11 requirements of causation: case-in-fact and proximate cause. Cause-in-fact requires  
12 proof that but-for the defendant's conduct, the harm would not have occurred.  
13 Proximate cause principles inject a foreseeability element into the statute: To be  
14 proximately caused, the harm must be a reasonably foreseeable result of the  
15 conduct. A.R.S. § 13-203; *Burrage v. United States*, 571 U.S. 204 (2014). A  
16 contributing cause is insufficient to establish criminal causality. *Id.*

17 Permitting injury is different. By definition, one permits by omission; the  
18 failure to do something is passive conduct. Whereas causing child abuse is  
19 sometimes synonymous with inflicting the abuse, *permitting* child abuse refers to  
20 the passive act of failing to prevent someone else—a third person—from inflicting  
21 the abuse. “Put another way, causing and permitting abuse correlate with primary  
22 and secondary responsibility for the victim's injury. By including both theories in  
23 the statute, the Legislature ensured that both active and passive abusers would be  
24 held equally responsible” in the eyes of the law for the injury. *State v. Nichols*, 363  
25 P.3d 1187, 1193 (N.M. 2015).

26 Even so, where the conduct is passive, the government must still prove  
27 causation in order to impose liability for the resultant harm: but-for the permitting,  
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1 the harm would not have occurred and the harm that did occur was foreseeable. In  
2 contrast, one who permits conduct by another is not liable for the acts of that other  
3 causing injury unless it can be shown she acted as an accomplice to that other.

4 A.R.S. §§ 13-301, 13-303.

5 Causing and permitting abuse seem to lose their distinctions when a person  
6 acts alone. Logically, one acting alone does not “permit” his or her own conduct.  
7 The person is primarily responsible for causing injury where causation is  
8 established. This second discrete method is unconcerned with how injury occurs; it  
9 is, however, redundant of the harms proscribed in the first method: Both require  
10 “physical injury.” But this second discrete method contains elements the first  
11 doesn’t: the element of “care or custody” and the element of “permitting” injury.  
12 Its elements are also distinguishable from the third discrete method.

13 The third discrete method occurs when one having care or custody causes or  
14 permits a child “to be placed in a situation” where the person or health of the child  
15 is endangered. Permitting is governed by the same analysis outlined above,  
16 including causation. “Endanger” as used in this provision means “to subject to  
17 potential harm.” *State v. Mahaney*, 193 Ariz. 566, 569 ¶18 (App. 1999). Unlike the  
18 first and second methods, this third method specifies how the provision is violated,  
19 whether actively or passively: the person must place the child in a situation where  
20 endangerment occurs. Unlike the first method but like the second, it requires the  
21 perpetrator have “care of custody.” And unlike the first and second discrete  
22 methods, “physical injury” is not an element.

23 In this case, the grand jury was never explained the causation requirement  
24 with respect to Ann Marie’s action or inaction. In other words, but-for Ann Marie’s  
25 specific action or inaction, the harm to D.M. would not have occurred. Given the  
26 fact that food was withheld by Anthony and Elizabeth, and given the fact that Ann  
27 Marie actually tried to give food to the boys but his mother would not permit it, the  
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1 grand jury should have been explained the but-for causation requirement. The facts  
2 as explained to the grand jury from Detective Rucker, required the grand jury be  
3 given an explanation of the but-for causation requirement.

4 Given the complexity of the child abuse statute, causation should have been  
5 more clearly and specifically explained. Especially in light of the fact that the  
6 grand jury was also instructed to review the accomplice liability statutes. (G.J.  
7 Transcript p. 10.). To complicate matters even further for the grand jury, the grand  
8 jury members were specifically instructed that felony murder “requires no specific  
9 mental state other than what is required for the commission of any of the  
10 enumerated felonies. So, in this case, child abuse.” (G.J. Transcript p. 7.)

11 Again, given the complexity of all of the numerous statutes and the  
12 confusion that must have followed, the grand jury should have been explained the  
13 specific causation required as to Ann Marie’s actions or inactions. This never  
14 occurred.

15 As such, Ms. Martinez was denied a substantial procedural right and due  
16 process guaranteed her through Rule 12.9, Arizona Rules of Criminal Procedure,  
17 the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States  
18 Constitution and Article 2 sections 4 and 24 of the Arizona Constitution. For  
19 these reasons, Ms. Martinez moves this Court for an Order Remanding this to the  
20 Coconino County Grand Jury for a redetermination of probable cause.

21 Respectfully submitted this 30th day of November, 2020.

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23  
24 By /s/Gregory T. Parzych  
25 Gregory T. Parzych

26  
27 By /s/Ryan J. Stevens  
28 Ryan Stevens



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2 Original of the foregoing Pleading  
e-filed this 30<sup>th</sup> day  
3 of November, 2020, to:

4 Clerk of Superior Court – Coconino County

5 Copy of the foregoing Pleading  
sent this 30<sup>th</sup> day  
6 of November, 2020, to:

7 Stacy L. Krueger  
DEPUTY COUNTY ATTORNEY  
8 110 E. Cherry Avenue  
Flagstaff, Arizona 86001-4627  
9 *Via email*

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