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OCT 25 2006



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9 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
10 **IN AND FOR THE COUNTY OF MARICOPA**

11 THE STATE OF ARIZONA,
12 Plaintiff,

13 vs.

14 DAVID A. PETERSEN,
15 Defendant.

No. CR2006-012587-001 DT

**STATE'S MEMORANDUM RE:
PLEA AGREEMENT**

(Assigned to the Honorable James H.
Keppel)

17 Pursuant to Rule 17.4, Arizona Rules of Criminal Procedure, the State of Arizona
18 respectfully submits the attached Memorandum to explain the State's reasons for the plea
19 agreement and to assist the Court in its decision whether to accept the plea agreement.

20 RESPECTFULLY SUBMITTED this 25th day of October, 2006.

21 TERRY GODDARD
22 Attorney General

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25 KELLY O'CONNOR
E. G. NOYES, JR.
26 Assistant Attorneys General
Criminal Division

1 MEMORANDUM

2 **A. Applicable Law**

3 “Rule 17.4(a), Arizona Rules of Criminal Procedure, 17 A.R.S., provides that the
4 State and the defendant may negotiate concerning “any aspect of the disposition of the
5 case.” By this language, the State and the defendant may bargain both as to the plea of
6 guilty and as to the sentence to be imposed. The rules recognize that properly negotiated
7 plea agreements or “plea bargains,” as they are frequently called, are an essential part of
8 the criminal process and can enhance judicial economy, protect the resources of the State,
9 and serve the ends of justice for the defendant, the State and the victim.” *State v.*
10 *Superior Court In and For Maricopa County*, 125 Ariz 575, 577, 611 P.2d 928, 930
11 (1980).

12 “While the state and a defendant may negotiate over “any aspect” of a case,
13 including sentencing, the trial court ultimately has authority to approve or reject a
14 bargain in the interests of justice. *See* Ariz. R.Crim. P. 17.4(d). Such a decision falls
15 within the judge's sound discretion, and wide latitude is permitted in this regard. *See*
16 *State v. De Nistor*, 143 Ariz. 407, 411, 694 P.2d 237, 241 (1985).” *State v. Lee*, 191
17 Ariz. 542, 544, 959 P.2d 799, 801 (1998).

18 Because the State is filing both the charging document and the plea agreement at
19 the same time, the Court will have had no prior contact with the case before being
20 presented with a plea agreement. Therefore, the State provides in this Memorandum
21 some factual background and context to explain the reasons for the plea agreement and to
22 assist the Court in reaching its decision on whether to accept the plea agreement.

23 **B. The Investigation**

24 The State’s investigation into Defendant’s alleged criminal behavior as Arizona
25 State Treasurer began on about February 1, 2006, and became public shortly after
26 February 18, 2006, when the State executed search warrant SW2006-000572 on the
27 Arizona State Treasurer’s Office. The Affidavits sworn to by Attorney General Chief

1 Special Agent Tina McMillion in support of the search warrant presented facts from
2 which the Court Commissioner found probable cause to believe that Defendant
3 committed the crimes of Theft (ARS § 13-1802), Fraudulent Schemes and Practices
4 (ARS § 13-2311), and Conflict of Interest (ARS § 38-504(c)), and that evidence of those
5 crimes would be found in the offices of the Arizona State Treasurer.

6 In the next several months, investigators examined the search warrant materials,
7 interviewed witnesses (including Defendant), and obtained additional records and
8 information regarding Defendant's financial activities and organizational involvements.

9 The investigation found no evidence that Defendant stole, fraudulently obtained,
10 misused, or wrongfully controlled public funds in the custody of the State Treasurer's
11 Office or invested by the State Treasurer's Office. Numerous issues pertaining to
12 Defendant's performance of his duties and management of his office were found to be
13 outside the scope of a criminal investigation.

14 Probable cause for Theft was mainly based on information that Defendant
15 wrongfully converted a \$1500 honorarium he received for a speech as State Treasurer,
16 knowing that he could not personally accept money for speaking in his official capacity.
17 The State's investigation found that the \$1500 honorarium was paid by check to David
18 A. Petersen/Arizona Character Council. Defendant deposited the check into an account
19 owned by Arizona Communities of Character, a non-profit corporation he formed in
20 2003. The funds were not deposited into Defendant's personal account.

21 The State also traced how the honorarium funds were used and found no evidence
22 that the funds were converted to Defendant's personal use. The \$1500 honorarium was
23 used for purposes related to Arizona Communities of Character. Specifically, in 2005,
24 \$250 of the honorarium was used to form a new non-profit corporation, Arizona
25 Communities of Character Foundation, and the remainder of the funds was used to pay
26 expenses relating to a December 2005 seminar called "Building Cities of Character
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1 Training,” which was attended by Arizona local government officials. The investigation
2 found no evidence that Defendant received income from the December 2005 seminar or
3 from the sale of character training materials to any governmental entity. Defendant’s
4 commissions from sales of Character First! materials arose from the sale of another
5 product line, the “educational curriculum” sold to schools. Given the absence of
6 evidence that Defendant made personal use of the \$1500 honorarium, there appears no
7 reasonable likelihood that a jury would find him guilty of Theft or other felonies
8 regarding his use of that money.

9 The investigation did find a credit card in Defendant’s name with his wife’s
10 picture on it but found no illegal purpose or use of that credit card.

11 The probable cause for Conflict of Interest charges was mainly based on
12 Defendant’s open promotion of the Character First! program while making appearances
13 as the State Treasurer. Character First! is part of the Character Training Institute, a not-
14 for-profit organization based in Oklahoma City, Oklahoma.

15 The applicable Conflict of Interest statute, ARS 38-504(C), provides as follows:

16 C. A public officer or employee shall not use or attempt to use the officer's
17 or employee's official position to secure any valuable thing or valuable
18 benefit for the officer or employee that would not ordinarily accrue to the
19 officer or employee in the performance of the officer's or employee's
20 official duties if the thing or benefit is of such character as to manifest a
21 substantial and improper influence on the officer or employee with respect
22 to the officer's or employee's duties.

23 Intentionally or knowingly violating that statute is a Class 6 felony; recklessly or
24 negligently violating that statute is a Class 1 misdemeanor.

25 The State’s investigation produced no substantial evidence on one of the essential
26 elements of ARS 38-504(C); namely, that the benefit Defendant received from his
27 Character First! interests was “of such character as to manifest a substantial and improper
28 influence” on Defendant with respect to his duties as State Treasurer. The State found
insufficient evidence to establish that Defendant received a financial benefit from the

1 “character training” conducted in the Treasurer’s Office. Many of Defendant’s efforts
2 were intended to promote character training by state agencies and local governments, and
3 the investigation failed to find evidence that Defendant received income from his
4 promotion of character training to government entities. The commissions he received,
5 which totalled about \$4,200, were from sale of character training material to schools.
6 With regard to sales to schools, the investigation found no evidence that that income or
7 activity resulted in an identifiable “substantial and improper influence” with respect to
8 Defendant’s conduct of his duties as State Treasurer.

9 The State also concluded that Defendant’s travel as State Treasurer showed
10 sufficient nexus to State business that conviction on conflict of interest felonies was
11 unlikely on that theory, even when he also did some “character” business on those
12 travels. For example, when Defendant traveled to California to meet with Michael
13 Milken in October 2005, the agenda for discussion included a financial education
14 initiative and internship programs at the Arizona State Treasury, both of which relate to
15 the business of the Treasurer’s Office. Character education for Arizona cities also was
16 part of the agenda, but, again, there is no evidence that Defendant profited from sales of
17 “character” products to governmental entities.

18 **C. Other Potential Charges**

19 The State’s investigation did uncover evidence of criminal conduct by Defendant
20 that was unknown to the State when it applied for a search warrant in February 2006.
21 This evidence concerned the Financial Disclosure Statements that ARS section 38-542
22 requires all public officials to file each year with the Secretary of State. That statute
23 requires, in part, that a public officer disclose “[t]he name and address of each employer
24 and of each other source of compensation other than gifts amounting to more than one
25 thousand dollars received during the preceding calendar year by the public officer”
26 and also to disclose “the names and addresses of all businesses and trusts in which the
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1 public officer or any member of his household held any office or had a fiduciary
2 relationship at any time during the preceding calendar year” ARS § 38-542 (A)2
3 and (A)4.

4 The evidence shows that, for the years 2004 and 2005, Defendant received income
5 of more than \$1,000 (for a total of about \$4,200) from the Character Training Institute
6 and filed Financial Disclosure Statements that failed to disclose that information and also
7 failed to disclose his relationships with several not-for-profit corporations in which he
8 held an office or fiduciary position in the preceding calendar year.

9 A public officer commits Filing a False Financial Statement, a Class 1
10 misdemeanor in violation of ARS section 38-544, if he knowingly files an incomplete or
11 false financial disclosure statement required by ARS section 38-542.

12 In response to requests to discuss a pre-Indictment disposition of the case, the
13 State made the plea offer that Defendant has accepted: Plead guilty to one count of
14 Filing a False Financial Disclosure Statement, a Class 1 misdemeanor.

15 The State made that plea offer after deciding that, under all the facts and
16 circumstances presented, the interests of justice would be served if Defendant, in return
17 for a pre-Indictment guilty plea and resignation, was allowed to plead guilty to the exact
18 Class 1 misdemeanor that the legislature has prescribed for a public official who
19 knowingly files a false Financial Disclosure Statement.

1 In conclusion, under all the facts and circumstances presented, the State
2 respectfully submits that the plea agreement is an appropriate resolution of the case and
3 is in the interests of justice.

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5 RESPECTFULLY SUBMITTED this 25th day of October, 2006.

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7 TERRY GODDARD
Attorney General

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10 _____
KELLY O'CONNOR
11 E. G. NOYES, JR.
Assistant Attorneys General
Criminal Division

12 The original of the foregoing
13 filed with the Clerk of the
Superior Court on this
14 25th day of October, 2006.

15 Copies of the of the foregoing
16 mailed/delivered/faxed on this
25th day of October, 2006 to:

17 The Honorable James H. Keppel
18 Maricopa County Superior Court
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Phoenix, Arizona 85003

19 Craig D. Henley
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931 E Southern
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21 Counsel for Defendant David A. Petersen