MARC J. VICTOR, P.C.
3920 South Alma School Road, Suite 5
Chandler, Arizona 85248
(480) 455-5233
Fax (480) 857-0150
Marc J. Victor - SBN 016064
Marc@AttorneyForFreedom.com
Attorneys for Defendant

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff, vs. ELIZABETH JOHNSON Defendant.	Case No. CR2010-101760-001 MOTION TO DISMISS COUNT ONE OF THE INDICTMENT (Oral Argument Requested)

Defendant ELIZABETH JOHNSON (hereinafter "Ms. Johnson"), by and through undersigned counsel, moves the Court to dismiss the charge of Kidnapping because jurisdiction for this charge is not proper in Arizona. This Motion is supported by the accompanying Memorandum of Points and Authorities.

RESPECTFULLY SUBMITTED this 12th day of October, 2012.

MARC J. VICTOR, P.C.

By: /s/ *Marc J. Victor*
Marc J. Victor
Attorney for Defendant

MEMORANDUM OF POINTS AND AUTHORITIES

I. THE STATE HAS PRESENTED EVIDENCE OF THE FOLLOWING FACTS:

On December 17, 2009, a parenting order was issued by Judge McVey establishing parenting time between Ms. Johnson and Logan McQueary, Gabriel Johnson's father. The order stated Mr. McQueary was to have parenting time with Gabriel starting from 8:00am on Sundays until 8:00am on Wednesdays to commence on December 20, 2009. On December 18, 2009, Ms. Johnson legally traveled to the state of Texas with her son, Gabriel. Ms. Johnson remained in Texas and failed to allow Mr. McQueary his court ordered parenting time with Gabriel on December 20, 2009. While in Texas at the Tornado Bus Station, Ms. Johnson sent Mr. McQueary a text message stating she had killed Gabriel. Shortly after receiving the text message, Mr. McQueary called Ms. Johnson and she again stated she killed Gabriel. Mr. McQueary responded to that he did not believe Ms. Johnson. It is under these facts the State alleges Ms. Johnson committed the crime of Kidnapping and the State of Arizona has jurisdiction.

II. LAW AND ARGUMENT

A.R.S. § 13-108 "Territorial applicability" states:

A. This state has jurisdiction over an offense that a person commits by his own conduct or the conduct of another for which such person is legally accountable if:

1. Conduct constituting any element of the offense or a result of such conduct occurs within this state; or

2. The conduct outside this state constitutes an attempt or conspiracy to commit an offense within this state and an act in furtherance of the attempt or conspiracy occurs within this state; or

3. The conduct within this state constitutes an attempt, solicitation, conspiracy or facilitation to commit or establishes criminal accountability for the commission of an offense in another jurisdiction that is also an offense under the law of this state; or

4. The offense consists of an omission to perform a duty imposed by the law of this state regardless of the location of the defendant at the time of the offense; or

5. The offense is a violation of a statute of this state that prohibits conduct outside the state.

A. No Element of Kidnapping Occurred in the State of Arizona

The Kidnapping charge in this case requires the State to prove, beyond a reasonable doubt, Ms. Johnson 1) knowingly restrained Gabriel, 2) with the intent to place Logan McQueary in reasonable apprehension of imminent physical injury to Gabriel. The State has presented no nexus to the State of Arizona when Ms. Johnson allegedly committed the crime of Kidnapping. Under the State's theory, each and every act committed that allegedly establishes the elements for the crime of Kidnapping occurred in Texas.

When Ms. Johnson left Arizona with Gabriel she did so legally, as testified to by the State's case agent, Detective Ramirez. As such, there is no allegation of restraint of Gabriel prior to Ms. Johnson's exiting Arizona that can be made. Any restraint that may have occurred occurred in Texas, not Arizona. The allegation of Ms. Johnson's intent to place Mr. McQueay in fear of imminent physical injury to Gabriel also occurred in the state of Texas, not Arizona. Ms. Johnson was in Texas at the time the State alleges her intent was formed. At the time Ms. Johnson sent the text messages saying she killed Gabriel and spoke to Mr. McQueary on the phone, Ms. Johnson was in Texas.

A.R.S. § 13-108 was thoroughly analyzed in *State v. Willoughby*, 181 Ariz. 530 (1995). The Court stated, "jurisdictional facts must be established beyond a reasonable doubt in all cases in which jurisdictional facts are questioned." 181 Ariz. at 538. In *Willoughby*, the defendant drove his family to Mexico and killed his wife while in Mexico. *Id*. at 533-534. The defendant was convicted of first-degree murder in an Arizona court, but challenged jurisdiction at trial and on appeal. *Id*. at 535-536. The Court held that Arizona had jurisdiction, but only because the first-degree murder charged required premeditation and there was no question that the premeditation occurred in Arizona. *Id*. at 540. However, Kidnapping requires no premeditation.

Additionally, there is no charge or allegation of conspiracy to commit Kidnapping. Kidnapping does not include an element of omission to perform a duty in Arizona. The Kidnapping statute does not prohibit conduct outside Arizona.

B. The State has Failed to Present any Evidence of a Result in Arizona to Sufficient to Establish Jurisdiction.

Jurisdiction can be established provided the result of the conduct occurs in Arizona. A.R.S. § 13-108(A)(1). The evidence presented by the State fails to establish a result occurring in Arizona. The State presented evidence Ms. Johnson communicated to Mr. McQueary she had killed Gabriel as its basis for element of placing Mr. McQueary in fear of an imminent physical injury to Gabriel. However, the evidence presented by the State indicated Mr. McQueary was never actually placed in fear of a physical injury to Gabriel. In fact, the admitted recording and transcript of the call conveys Mr. McQueary was not in fear and didn't even believe Ms. Johnson's claims. Mr. McQueary repeatedly states, "I don't believe you." "You wouldn't hurt Gabriel, you love him too." and other such things indicating a lack of belief and fear.

While Mr. McQueary's state of mind is not an element of the crime to be proven and therefore the State is not required to prove Mr. McQueary was placed in fear to prove Kidnapping, Mr. McQueary's state of mind is relevant and a necessary factor for the State to prove jurisdiction beyond a reasonable doubt. In order to have jurisdiction based on the "Effect" principle of A.R.S. § 13-108 (A)(1), the State must not only show an adverse consequence in Arizona from conduct outside of Arizona. The State must show the adverse consequence was ***"part of the design of the actor."*** *State v Flores*, 188 P.3d 706, 714, 218 Ariz. 407, 415 (Ariz. App. 2008) (*emphasis added*). The State has presented no evidence of an adverse consequence occurring in Arizona which was part of Ms. Johnson's design.

The State's entire allegation rests on the presupposition Ms. Johnson's design in all of this was to place Mr. McQueary in fear of harm to Gabriel. However, the State's own evidence

contradicts the argument this effect ever occurred. The State had an opportunity to present evidence Mr. McQueary was placed in fear, however it failed to do so. Instead, the only evidence presented as to Mr. McQueary's state of mind was the phone call in which he indicated several times he did not believe Ms. Johnson despite her best attempts to cause him to do so.

Additionally to be considered are this Court's own statements in regards to the previously dismissed charge of Child Abuse. This Court commented the Child Abuse charge was dismissed for lack of jurisdiction. It could have been argued that any alleged Child Abuse to Gabriel had an effect in Arizona. However, the effect it would have had would not be within the framework of the jurisprudence on jurisdiction to support a jurisdictional nexus to Arizona. The effect of the Child Abuse in Arizona, ie: the effect on Mr. McQueary as the father and on the effect on the Tempe Police Department as a result of Mr. McQueary's reporting his concern, would have been insufficient to support jurisdiction as ***outside of Ms. Johnson's design***. Similarly, any effect of the alleged Kidnapping beyond Mr. McQueary being placed in fear is outside of Ms. Johnson's design. If this Court is to be consistent with its previous statements regarding the jurisdictional issues surrounding the Child Abuse charge, it should also find no jurisdiction in regards to alleged Kidnapping.

III. CONCLUSION

Without evidence any element of kidnapping occurred in Arizona or evidence of an adverse consequence in Arizona which was part of Ms. Johnson's design, Arizona does not have jurisdiction over the charge of kidnapping. For these reasons, Ms. Johnson requests the Court dismiss the charge of Kidnapping because the State has failed to establish evidence of Arizona's jurisdiction to bring this charge.

//

//

//

//

RESPECTFULLY SUBMITTED this 12th day of October, 2012.

MARC J. VICTOR, P.C.

By: */s/ Marc J. Victor*
Marc J. Victor
Attorney for Defendant

Original filed with the Court and
a copy emailed October 12, 2012 to:

Angela Andrews, Esq.
Maricopa County Attorney's Office
301 West Jefferson
Phoenix, Arizona 85003
Attorney for Plaintiff

By */s/ Andrea Yirak*