SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2008-031021-001 DT 01/14/2015

HON. SHERRY K. STEPHENS

CLERK OF THE COURT
K. Schermerhorn
Deputy

STATE OF ARIZONA

JUAN M MARTINEZ

v.

JODI ANN ARIAS (001)

KIRK NURMI
JENNIFER L WILLMOTT

CAPITAL CASE MANAGER

RULING

The Court has considered the defendant's Motion to Dismiss the State's Notice of Intent to Seek the Death Penalty Due to Defendant's Inability to Present a Complete Case for Life filed September 26, 2014 (with attachments), the defendant's Motion to Dismiss State's Notice of Intent to Seek the Death Penalty Due to Continued Misconduct filed October 1, 2014, the State's Objection to Motion to Dismiss State's Notice of Intent to Seek the Death Penalty Due to Defendant's Inability to Present a Complete Case for Life filed October 6, 2014, the State's Objection to Defendant's Motion to Dismiss Notice to Intent to Seek Death Penalty Due to Continue State Misconduct filed October 10, 2014, Motion to Dismiss State's Notice of Intent to Seek the Death Penalty Due to Continue State Misconduct Supplement #1 filed October 24, 2014, the defendant's Motion to Dismiss All Charges with Prejudice and/or in the Alternative to Dismiss the State's Notice of Intent to Seek the Death Penalty due to Recently Discovered Purposeful and Egregious Prosecutorial Misconduct and Supplemental Containing Exhibit "A", both filed on November 10, 2014, the State's Motion for Discover (Compaq Presario Computer) filed November 13, 2014, the State's Motion for Sanctions (Compaq Presario Computer) filed November 16, 2014, the State's Motion to Strike (Compaq Presario Computer) filed November 18, 2014, the State's Objection to Defendant's Motion to Dismiss All Charges with Prejudice and/or in the Alternative to Dismiss the State's Notice of Intent to Seek the Death Penalty Due to Recently Discovered Purposeful and Egregious Prosecutorial Misconduct filed on November 20, 2014, the Defendant's Response to State's Motion for Sanctions and State's Motion to Strike filed November 20, 2014, the Defendant's Motion for Reconsideration: Motion to Dismiss

State's Notice of Intent to Seek the Death Penalty Due to Defendant's Inability to Present a Complete Case for Life filed November 26, 2014, Objection to Defendant's Motion for Reconsideration: Motion to Dismiss State's Notice of Intent to Seek the Death Penalty Due to Defendant's Inability to Present a Complete Case for Life filed December 1, 2014, the Defendant's Supplemental Motion to Dismiss all Charges with Prejudice and/or in the Alternative to Dismiss the State's Notice of Intent to Seek the Death Penalty Due to Recently Discovered Purposeful and Egregious Prosecutorial Misconduct filed December 14, 2014, the evidence presented at the evidentiary hearings conducted on November 21, 2014 and December 11, 2014, the exhibits admitted at the evidentiary hearing (Exhibits 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, and 12), the oral argument conducted on December 11, 2014, the Objection to Defendant's Supplemental Motion to Dismiss All Charges with Prejudice and/or in the Alternative to Dismiss the State's Notice of Intent to Seek the Death Penalty Due to Recently Discovered Purposeful and Egregious Prosecutorial Misconduct filed on December 22, 2014, the supplemental exhibit to the Defendant's Motion for Reconsideration: Motion to Dismiss State's Notice of Intent to Seek the Death Penalty Due to Defendant's Inability to Present a Complete Case for Life filed November 26, 2014 (filed under seal on January 5, 2015), the Supplement to State's Objection to Defendant's Motion for Reconsideration: Motion to Dismiss State's Notice of Intent to Seek the Death Penalty Due to Defendant's Inability to Present a Complete Case for Life (with attachment) filed January 7, 2015 the Reporter's Transcript of Proceedings for Testimony of Lonnie Dworkin dated February 4, 2013, the testimony of John Smith at the penalty phase retrial on January 8, 2015 and January 14, 2015, the testimony of Detective Esteban Flores at the penalty phase retrial on January 12, 2015, and the oral argument conducted on January 9, 2015.

Defendant seeks dismissal of all charges against her or, alternatively, the dismissal of the Notice of Intent to Seek the Death Penalty, claiming there has been purposeful and egregious prosecutorial misconduct.

Prosecutorial misconduct is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial. *State v. Aguilar*, 217 Ariz. 235, 172 P.3d 423 (App. 2007). To prove prosecutorial misconduct, the proponent must show : (1) the State's action was improper; and (2) a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying the defendant a fair trial. *State v. Ramos*, 235 Ariz. 230, 330 P.3d 987 (App. 2014); *State v. Montano*, 204 Ariz. 413, 65 P.3d 61 (2003); *State v. Atwood*, 171 Ariz. 576, 832 P.2d 593 (1992). To prevail upon a claim of prosecutorial misconduct, a defendant must demonstrate that the prosecutor's misconduct so infected the trial with unfairness as to make the resulting conviction a denial of due process. Prosecutorial misconduct sufficient to justify reversal must be so pronounced and persistent that it permeates the entire atmosphere of the trial. *State v. Edmisten*, 220 Ariz. 517, 207 P.3d 770 (2009). There is a distinction between simple prosecutorial error and misconduct that is so egregious that it

raises concerns over the integrity and fundamental fairness of the trial. *State v. Minnitt*, 203 Ariz. 431, 438, 55 P.3d774 (2002); *Pool v. Superior Court*, 139 Ariz. 98, 105, 677 P.2d 261, 268 (1984). Conduct is egregious when the material at issue was highly significant to the primary jury issue with the potential to have an important effect on the jury's determination. *Donnelly v. DeChristoforo*, 416 U.S. 637, 647 (1974). The prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police. It is the duty of the State as a whole to conduct prosecutions honorably and in compliance with the law. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). The trial judge is in the best position to determine the atmosphere of the trial, the circumstances surrounding the incident, the manner in which any objectionable statement was made, and its possible effect on the jury and trial. *State v. Nelson*, 229 Ariz. 180, 273 P.3d 632 (2012): *State v. Koch*, 138 Ariz. 99, 673 P.2d 297 (1983).

The prosecutor has wide discretion in deciding whether to seek the death penalty. Allowing prosecutors the discretion to seek the death penalty is constitutional. *State v. Roque*, 213 Ariz. 193, 226, 141 P.3d 368 (2006); *State v. Spears*, 184 Ariz. 277, 291, 908 P.2d 1062 (1996).

Each allegation of prosecutorial misconduct claimed by Defendant Arias will be discussed below.

1. Potential mitigation witnesses will not testify. Defendant claims possible mitigation witnesses will not speak with defense counsel and others will not testify at the penalty phase retrial for fear of reprisal and/or "cyber-bullying". Defendant provided affidavits to support her claim in the attachments to the Motion to Dismiss State's Notice of Intent to Seek the Death Penalty Due to Defendant's Inability to Present a Complete Case for Life filed under seal on September 26, 2014. In addition, the Court has reviewed the information provided in the sealed supplements filed on January 5, 2015 and January 7, 2015. In the defendant's motion to reconsider filed November 26, 2014, Defendant Arias argues the decision made by the Court of Appeals on the special action has inhibited her ability to present a complete defense of her life since potential defense witnesses cannot testify in sealed proceedings. This Court disagrees. The ruling issued by the Court of Appeals does not address the testimony of any witness other than the defendant.

   There are many ways to address the concerns expressed by these potential witnesses. For example, it is possible that testimony of a potential defense witness could be provided through the testimony of another witness. (See A.R.S. § 13-751 (C), which provides the prosecution or defendant may present any information that is relevant to any mitigating circumstance regardless of its admissibility under the rules governing the admissibility of evidence in criminal trials.) In fact, that has occurred during the

penalty phase retrial. During the testimony of the defense expert witnesses, Dr. Miccio Fonsecca and Dr. Robert Geffner, the defendant elicited information obtained from some of the witnesses listed in the Motion to Dismiss State's Notice of Intent to Seek the Death Penalty Due to Defendant's Inability to Present a Complete Case for Life, filed under seal on September 26, 2014. Other options are available if a witness is reluctant or refuses to appear and testify. Defendant could subpoena a witness to appear in court. See A.R.S. § 13-4071(A)(D). The name of a witness could be sealed to protect the privacy interests of that witness. Defendant could present information from potential witnesses through the mitigation specialist. The testimony of witnesses who testified at the first trial could be provided to the penalty phase jury through transcripts or the video-recording made by the court's For the Record (FTR) system. Alternatively, affidavits and video-taped statements of a witness could be presented to the penalty phase retrial jury.

The Court finds the defendant has failed to establish any misconduct by the State throughout the course of these proceedings that has impaired or hindered the defendant's ability to present mitigating evidence and/or prove mitigating factors pursuant to A.R.S. § 13-751(C). The Court finds no ground for dismissal of the indictment or the Notice of the Intent to Seek the Death Penalty based upon this claim.

2. Text messages were not timely disclosed. The State provided text messages sent or received by the victim in October 2010 after initially indicating to the defendant that these text messages were not available. Defendant argues there was exculpatory content within these electronic messages which was contrary to the testimony of Detective Flores at a hearing conducted in June 2010. As noted in the defendant's motion filed October 1, 2014, many of the victim's text messages and e-mails were admitted in evidence during the first trial. The defendant has reviewed many of the victim's e-mails, text messages and g-mail messages in great detail with her expert witnesses during the penalty phase retrial. Defendant has failed to establish the failure to provide the victim's electronic messages earlier than October 2010 was for any reason other than the messages were not available due to technological issues. The Court finds no ground for dismissal of the indictment or the Notice of the Intent to Seek the Death Penalty based upon this claim.

3. Defendant's rights were violated by the Maricopa County Sheriff's Office. Specifically, Defendant alleges three incidents support her claim. First, Defendant alleges her jail cell was searched by jail personnel in February 2014. Second, in February 2014, the mitigation specialist was denied entrance to the jail after taking the defendant's drawings with her after a jail visit. Jail personnel deemed the

drawings to be contraband. Finally, in May 2014, a legal document (a photocopy of a book) was taken from the defendant's cell during a jail search. Defendant "suspects" the book was copied and provided to the prosecutor.

These matters were previously addressed by the Court. Defendant cannot show the searches were other than routine searches conducted as part of security protocols at the jail. Defendant cannot show any prejudice to her case as a result of these jail searches. Defendant failed to provide any evidence to support her allegation that the book taken from her cell was photocopied and/or provided to the prosecutor. With regard to the mitigation specialist, the matter was resolved within a one week period and the mitigation specialist was permitted to resume visits with the defendant. See minute entry dated May 27, 2014. The Court finds no ground for dismissal of the indictment or the Notice of the Intent to Seek the Death Penalty based upon these claims.

4. Inconsistent testimony was given by Detective Flores regarding the sequence of injuries sustained by the victim. The defendant argues it was prosecutorial misconduct for the prosecutor to elicit testimony from the case agent, Detective Esteban Flores, regarding the sequence of injuries sustained by the victim at the *Chronis* hearing knowing his testimony was inconsistent with the testimony of the medical examiner. In January 2013, the defendant sought a new probable causing hearing (*Chronis* hearing) arguing that the testimony of Detective Flores at trial warranted a new probable cause finding on the aggravating factor alleged by the State. The Court denied the request for a new finding of probable cause by minute entry dated January 10, 2013. Defendant filed a special action with the Arizona Court of Appeals. The Court of Appeals declined jurisdiction.

   During the guilt phase, the defendant cross-examined both Detective Flores and the medical examiner about the sequence of wounds and the detective's testimony at the probable cause hearing in August 2009. During the penalty phase retrial, the defendant examined both Detective Flores and the medical examiner about these issues. Detective Flores has testified and explained to both juries the reasons for his testimony in August 2009. The medical examiner has testified regarding his expert opinion on the sequence of wounds. It is for the jury to determine the credibility of witnesses. The defendant fully explored and argued her position on the sequence of wounds. The Court finds the defendant has failed to show any State misconduct with regard to Detective Flores' testimony. The Court finds no ground for dismissal of the indictment or the Notice of the Intent to Seek the Death Penalty based upon this claim.

5. There was a delay in providing the defendant with the mirror image of the hard drive to the victim's Compaq Presario computer created on June 11, 2008. The victim's body was discovered in his home on June 9, 2008. The victim's Compaq Presario laptop computer was found in the office of his home during the search that followed. Detective Flores touched a key on the computer with a pen which awakened it from sleep mode. The computer was impounded as evidence on June 10, 2008. On June 11, 2008, the Mesa Police Department made a mirror image of the Toshiba hard drive that was on that laptop computer. The State disclosed the laptop computer to the defense. On June 19, 2009, the laptop computer was turned on and accessed at the Mesa Police Department during a review-of-evidence meeting attended by attorneys representing the defendant. The case agent, prosecutor, and defense investigator were also present during that meeting.

   On January 31, 2013, Lonnie Dworkin, an expert witness for the defendant, testified at the guilt phase trial that he had reviewed items at the Mesa Police Department, including item #390633, the Compaq Presario laptop computer that belonged to the victim. Mr. Dworkin testified he received a mirror image of the Toshiba hard drive for that computer from the Mesa Police Department. According to Detective Perry Smith, who testified at the evidentiary hearing on December 11, 2014, that mirror image was created in December 2009. This mirror image contained changes made to the hard drive when it was awakened from sleep mode by Detective Flores on June 10, 2008 and changes that occurred when it was turned on for review by defense counsel on June 19, 2009. At the guilt phase trial, Mr. Dworkin explained to the jury the procedure he followed to forensically examine the hard drive he received in the E01 file format, including the steps he took to recover lost or deleted folders. He also explained the method he used to retrieve the internet history. Mr. Dworkin provided testimony regarding when the laptop computer was accessed on June 4, 2008. See R.T. January 31, 2013. On February 4, 2013, during cross-examination at the guilt phase trial, Mr. Dworkin testified he recalled seeing some pornography on the victim's computer but he was not asked to look for that type of information. See R.T. February 4, 2013, page 52, line 3 through page 54, line 3.

   During an interview with a Mesa Police Department detective on December 10, 2014, reference was made to a mirror image of the victim's hard drive made by the Mesa Police Department on June 11, 2008. Defense counsel requested a copy of that mirror image. The State provided a copy of that mirror image to the defendant in December 2014. According to one of the defendant's expert witnesses, Bryan Neumeister, when the victim's laptop computer was awakened from sleep mode on June 10, 2008, the computer downloaded updates that were not installed until it was turned on again. This did not occur until June 19, 2009. Thus, the mirror image created on June 11,

2008 should contain the changes made to the hard drive after it was awakened from sleep mode on June 10, 2008 prior to those changes being installed. There is also an issue regarding files being over-written. The computer experts working with the parties are still analyzing the mirror image of the victim's hard drive made in June 2008.

On January 8, 2015, John Smith, a computer forensic expert witness hired by the defendant, testified at the penalty phase retrial. Mr. Smith examined the mirror images of the hard drive created on June 11, 2008 and December 12, 2009 as well as the original hard drive seized by the Mesa Police Department on June 10, 2008. He testified he had only 3 or 4 days to conduct a review of the June 11, 2008 mirror image of the hard drive. He testified he found data sites containing pornographic links to websites on the Toshiba hard drive. Mr. Smith testified if he had more time to analyze the hard drive it was possible he could have found more pornography links. Mr. Smith testified that none of the images he reviewed were an exact image of the Toshiba hard drive before it was awakened from sleep mode on June 10, 2008. However, the June 11, 2008 hard drive is the closest exact image. The source evidence and mirror images of the hard drive created on June 11, 2008 and December 12, 2009 contained the same pornographic data sites. These data sites provide the historical record to the pornographic sites visited or accessed by that computer. Mr. Smith testified he found artifacts or remnants of porn in the logs and history files. He testified he found no pornographic photographs, videos or other pornographic media on the hard drive. There was no indication data had been manipulated on that hard drive. Mr. Smith also testified the mirror images of the hard drive he reviewed were automatically modified or altered by the computer on June 10, 2008 and June 19, 2009 but the data files containing the pornographic links were still present after the alterations. Mr. Smith testified that the victim's laptop computer contained numerous cleaner programs. The goal of these programs is to clean the computer and make it run more efficiently. These programs clean the registry and internet history and can be set to run at a regularly scheduled time or can be run manually.

On January 14, 2015, Mr. Smith testified that a modification to a hard drive does not change the data on the registry tables. No evidence files were deleted and the history or cookies were not affected when the hard drive was accessed on June 10, 2008 or June 19, 2009. The files that were modified or overwritten were the operating files.

Defendant claims the failure to provide the defendant with a copy of the mirror image created on June 11, 2008 prior to December 2014 was an intentional disclosure violation. Further, Defendant claims that mirror image contains exculpatory evidence. No testimony was provided at the evidentiary hearing to explain why the

Mesa Police Department provided Mr. Dworkin with a hard drive of the victim's computer created on December 12, 2009. The Court has no basis to find the Mesa Police Department withheld evidence or refused to provide a copy of any evidence to Mr. Dworkin. To the contrary, a mirror image of the victim's computer was given to Mr. Dworkin. As he testified at the trial, the focus of the defense at that time was not on the pornography contained on the victim's computer. Rather, the focus was on the timeline of events that occurred on June 4, 2008. Mr. Dworkin was able to testify about those matters at the guilt phase trial. During cross-examination at the guilt phase trial, Mr. Dworkin testified he had been interviewed by the prosecutor about the pornography on the victim's computer but it had been two years earlier and he could not recall specific details or what he had stated during that interview. Exhibit 9 from the evidentiary hearing conducted on December 4, 2014, the Chain of Custody log maintained by the Mesa Police Department, shows that Detective Melendez and Detective Rios removed the computer from the evidence room on June 11, 2008, stating the evidence was out for investigation. Defense counsel and their expert witnesses received a copy of this log. Mr. Dworkin discussed protocols he followed for examining hard drives. As a computer forensic expert, he would have been aware that it is routine for law enforcement to make a mirror image of the hard drive.

Detective Melendez was interviewed by defense counsel prior to trial and testified at the guilt phase trial and the penalty phase retrial. He was examined about his review of the laptop computer hard drive. There is no evidence he intentionally hid the existence of the June 11, 2008 mirror image or failed to provide a copy of the mirror image created in June 2008. According to the defense expert, John Smith, the content on the original hard drive (the "source evidence") and all mirror images is the same with regard to the pornographic data sites to which Mr. Smith testified. In fact, the source evidence and June 11, 2008 mirror image are the same.

Defendant argues that failure to provide the June 11, 2008 mirror image could have affected the jury's verdict in the guilt phase trial because the State argued during closing argument that there was no corroboration for the defendant's claim that she saw the victim viewing child pornography on his laptop computer. That issue is not properly before this Court. However, Mr. Dworkin testified at the guilt phase trial he had seen pornography on the laptop. Thus the defendant had the opportunity to pursue the issue during the guilt phase trial. The defendant has an expert witness who testified at the penalty phase retrial about the pornography links he found on the victim's computer. The State may present evidence disputing the findings of that expert. However, the penalty phase retrial jury will have the benefit of the testimony about the contents found on the victim's computer hard drive in evaluating the

defendant's testimony about what she says she observed the victim doing on January 21, 2008 as well as the testimony of the defendant's expert witnesses.

The original laptop computer and hard drive were disclosed by the State and available for analysis by defense expert witnesses. The evidence at issue was on the source evidence (the original hard drive) and mirror images created from the source evidence. The penalty phase retrial is ongoing. If the defense expert finds additional evidence after further review of the 2008 mirror image, he can be recalled as a witness. Dismissal of the notice of intent to seek the death penalty is not an appropriate sanction for a discovery violation of this nature. The Court finds no ground for dismissal of the indictment or the Notice of the Intent to Seek the Death Penalty based upon this claim.

6. Social media postings by the case agent's wife prejudiced the defendant. Defendant alleges the case agent, Detective Flores, provided non-public details about the case to his wife who "tweeted" her opinions on social media. In addition, Detective Flores' wife supposedly posted a video on You Tube which Defendant Arias describes as a mock movie trailer about the case. Defendant also provided copies of other social media exchanges in which the parties discussed trial matters including a claim that the defendant had a buddy write for her "in prison to create evidence for her story." See attachments to Motion to Dismiss State's Notice of Intent to Seek the Death Penalty Due to Continued State Misconduct, Supplement #1 filed October 24, 2014. No testimony was provided at the evidentiary hearing regarding these claims. Defendant relies on the attachments to her motion filed on October 1, 2014 as support for her allegations. The Court has reviewed those attachments.

   The Court finds the defendant has failed to establish that Detective Flores provided information to his wife about the case that was not public information. The attachments to the motion indicate Ms. Flores stated there "was much condemning evidence and situations that most ppl (sic) never heard by watching the trial," discusses the dismissal of a juror, and discusses a court assistant who allegedly made a derogatory statement about the prosecutor. The Court previously made a record about the matter involving the court assistant. The statement supposedly occurred in the courtroom, not a sealed proceeding. The court assistant denied making the statement. Whether there is any truth to the other statements purportedly made by the detective's wife in her posts is unclear. The Court does not take lightly the allegation that Detective Flores provided non-public information to his wife about the case. Detective Flores has testified numerous times about a variety of issues related to this case. Defense counsel has not questioned him about these matters or provided any other evidence that would permit this Court to find he violated any court orders.

Additionally, some of the information referenced in the attachments may have been discussed in open court and thus there was no violation. There have been numerous court hearings on this case, including hearings in chambers and sealed hearings. This Court cannot recall all of the details of those hearings. Without transcripts or testimony by individuals present at those hearings, this Court has insufficient information to find a violation of the court's orders.

The Court is unaware of any legal reason the detective's wife should be restricted from providing her opinion or commenting about the case on social media. Even if the court had evidence that Detective Flores had discussed matters from a sealed proceeding with his wife, Defendant has failed to show that it affected her case in any way. The penalty phase retrial jurors were questioned about any prior knowledge of the case including information obtained through the media. None of the jurors indicated any knowledge about these social media exchanges. Defendant does not allege how her case was prejudiced by these incidents. The Court finds no ground for dismissal of the indictment or the Notice of the Intent to Seek the Death Penalty based upon this claim.

7. Detective Flores allegedly commented or provided information to the press about the dismissal of a juror. No testimony was provided at the evidentiary hearing about this claim. Exhibit G to the defendant's motion filed on October 1, 2014 contains a social media message allegedly from the detective's wife referencing a conversation with a juror that occurred in chambers. It is unknown how the information was provided to Ms. Flores. Defendant presumes the information came from the detective. Defendant does not allege how her case was affected by the social media statement. Even if the detective had discussed a sealed matter with his wife, Defendant has not shown that her case was affected in any way. The jurors empanelled for the penalty phase retrial were questioned about any knowledge about the case and none of them referenced any knowledge of this incident. Based upon the information provided, the Court finds no ground for dismissal of the indictment or the Notice of the Intent to Seek the Death Penalty based upon this claim.

8. The Maricopa County Sheriff made harassing comments about the defendant to the media. Defendant claims the Maricopa County Sheriff responded to media inquiries about a pleading allegedly filed by the defendant and those responses were intended to harass the defendant. A document was filed with the federal court alleging violations of law relating to Defendant Arias. The document, purportedly filed by or on behalf of the defendant, alleged various ways Defendant Arias had been improperly treated while in custody. The media apparently contacted the Maricopa County Sheriff seeking his response to the allegations. The sheriff denied the

allegations in the document. It is unclear whether the sheriff viewed any document prior to speaking with the media. However, the sheriff told the media that inmates are not required to state the pledge of allegiance in order to receive meals. The sheriff also stated he had no knowledge of a Hepatitis C infection at the jail. He denied that the defendant was videotaped while in the restroom and that he or his staff had intercepted letters from or to the defendant and provided them to the media. The sheriff also denied the allegation that the defendant was denied medical treatment while in the jail.

Defendant now asserts she was harassed by the sheriff's comments. This situation occurred after the first trial and before the penalty phase retrial began. Defendant does not suggest that any information provided by the sheriff was inaccurate or misleading. During jury selection, the potential jurors for the penalty phase retrial were questioned about their knowledge of the case and any media coverage of the case. The defendant had an opportunity to question each potential juror about this incident. Knowledge of this incident was not reported by any of the jurors selected for the penalty phase retrial. Defendant has not shown any prejudice to her case from this incident. The Court finds no ground for dismissal of the indictment or the Notice of the Intent to Seek the Death Penalty based upon this claim.

9. Detective Flores "awakened" the victim's computer from sleep mode on June 10, 2008 resulting in the destruction of potential evidence. Defendant alleges that Detective Flores' actions in waking the computer from sleep mode at the crime scene caused changes to the hard drive of the victim's computer, destroyed potential evidence, and violated the written policy of the Mesa Police Department regarding handling seized computers. See paragraph 5 above. The State is required to disclose any exculpatory evidence that is favorable to the defendant and which may create a reasonable doubt in juror's minds regarding the defendant's guilt. See *Strickler v. Greene*, 527 U.S. 263, 281 (1999); *State v. Montano*, 204 Ariz. 413, 424, 65 P.3d 61, 72 (2003), *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972). Failure to adhere to this requirement whether willfully or inadvertently by suppressing favorable evidence violates a defendant's due process rights. See B*rady*, 373 U.S. at 86 and *Giglio*, 405 U.S. at 155. Based upon the testimony provided at the evidentiary hearing, the Court finds the defendant failed to establish that any exculpatory evidence was withheld or intentionally destroyed by the State when Detective Flores awakened the victim's computer from sleep mode at the scene of the crime. Detective Smith testified at the evidentiary hearing that changes to files made when a computer is brought out of sleep mode may go to unallocated space on the computer. Some files may be over-written. In this case, the State made a mirror image of the victim's computer the day after it was seized and again in December

2009. A copy of the mirror images has been provided to the defendant. At the penalty phase retrial, John Smith testified that the victim's computer contained numerous anti-virus programs that regularly erased files from the victim's computer. The relevance of the victim's computer at the penalty phase retrial, according to the defendant, is to corroborate the defendant's claim that she saw the victim viewing pornography in January 2008. Mr. Smith was able to locate such links on data sites found on the victim's computer.

There is no evidence establishing relevant, material data was deleted from the victim's computer or that material evidence was destroyed. Some files may have been updated and/or over-written. (Computer files for I-tunes and Southwest Airlines were used as examples at the evidentiary hearing. Mr. Smith testified that the overwritten files were operating files). Defendant failed to show how she was prejudiced by the computer updating these files. As discussed above, at the guilt phase trial, the testimony elicited by the defendant related to the events of June 4, 2008. The computer contained the information necessary to establish those facts. The parties are still in the process of analyzing the mirror image of the victim's hard drive made on June 11, 2008. Defendant has already presented such evidence to this penalty phase retrial jury. Regarding the effect on the guilt phase trial, that issue is not appropriately before the court at this time.

Regarding the violation of Mesa Police Department Policy, Detective Flores and Detective Smith testified that it was not a violation of policy for Detective Flores to awaken the computer at the crime scene. However, Detective Smith acknowledged the better practice would have been to remove the power source since cache files can be deleted when a computer is awakened from sleep mode. See testimony of Detective Perry Smith, December 11, 2014. Detective Flores testified on January 12, 2015 that it was common practice in 2008 for police seizing a computer to awaken it from sleep mode. He was unaware that doing so could result in the modification of files on the computer. Even if there was a violation of Mesa Police Department policy, dismissal of the charges is not the appropriate sanction under the circumstances of this case. The Court finds no ground for dismissal of the indictment or the Notice of the Intent to Seek the Death Penalty based upon these claims.

10. Evidence was possibly destroyed when the victim's computer was accessed on June 19, 2009. Detective Flores and the prosecutor were present when former defense counsel for the defendant viewed the victim's computer on June 19, 2009. Turning on the computer at that time changed the hard drive on the victim's computer. The Mesa Police Department made a mirror image of the victim's computer on June 11, 2008, the day after the victim's computer was seized. Any changes that were made to

the hard drive as a result of turning on the computer without a write blocker on June 19, 2009 will not affect the content of the mirror image created on June 11, 2008. The Court finds no ground for dismissal of the indictment or the Notice of the Intent to Seek the Death Penalty based upon this claim.

11. Prior attorneys for the defendant were ineffective. Defendant claims her former attorneys were ineffective on June 19, 2009 when they permitted the victim's computer to be turned on without proper precautions being taken to preserve evidence on that computer. As noted in paragraphs 5 and 10 above, a mirror image of the victim's computer hard drive was made on June 11, 2008. Any error that occurred because defense counsel accessed the computer on June 19, 2009 was harmless since the information on the victim's computer was preserved on that mirror image. The defendant has not established any prejudice to her case. The Court finds no ground for dismissal of the indictment or the Notice of the Intent to Seek the Death Penalty based upon this claim.

12. Detective Melendez testified at trial and the penalty phase retrial that he found no pornography or viruses on the victim's computer. Detective Melendez testified at the guilt phase trial on April 23, 2013 that he examined the internet history on the victim's computer and found no adult sites. He testified he looked at the computer files and found no images of children. At the penalty phase retrial, Detective Melendez testified he found no pornography or viruses on the victim's computer. The defendant has one or more expert witnesses who analyzed the mirror image of the hard drive to the victim's laptop computer. Lonnie Dworkin examined the hard drive to the victim's laptop computer and testified on behalf of the defendant at the guilt phase trial. See paragraph 5 above. John Smith testified at the penalty phase retrial that there were pornography links found on data sites. In addition, he found viruses or malware on the victim's computer.

    Detective Melendez was subject to cross-examination at all proceedings at which he testified and can be recalled by the defense at the penalty phase retrial. Defendant could have called witnesses to dispute his findings at the guilt phase trial. The defendant presented evidence to the penalty phase retrial jury on this issue. It is the role of the jury to resolve any factual disputes, evaluate the credibility of witnesses and determine the significance of the evidence. The Court finds no ground for dismissal of the indictment or the Notice of Intent to Seek the Death Penalty based upon this claim.

13. Comments by the prosecutor during a bench conference were insulting and unprofessional. Defendant alleges the prosecutor made a comment to Defense

Counsel during a bench conference that was insulting and unprofessional. After the verdicts were returned from the first trial, bench conferences were unsealed and information from those bench conferences was publicized by the media. The specific comment by the prosecutor was publicized.

During the trial, the Court addressed this matter with counsel. The prosecutor apologized to Defense Counsel. The prosecutor was quick to acknowledge his error and regret. Nothing inappropriate was said before the jury and there is no basis to find the prosecutor's comments affected the guilt phase verdict. The Court found no other sanction was appropriate under the circumstances. The penalty phase jurors were questioned about their knowledge of the case and the media coverage. No juror indicated any knowledge about this incident. The Court finds no ground for dismissal of the indictment or the Notice of the Intent to Seek the Death Penalty based upon this claim.

14. The prosecutor harassed a defense witness. Defendant alleges the prosecutor harassed an expert witness at the guilt phase trial by suggesting the witness had inappropriate feelings toward the defendant. This matter was addressed during the guilt phase trial. The State suggested an expert witness for the defendant had developed personal feelings toward the defendant and lost his professional objectivity. The prosecutor referred to a gift the witness gave to the defendant and the number of visits (12) the witness made to see her as the basis for his questions. See cross-examination of Dr. Samuels on March 18, 2013. A party is entitled to explore the bias, credibility and motive of witnesses. The prosecutor zealously cross-examined the defense expert on these matters. Defense Counsel questioned the witness about these issues on re-direct examination. The Court finds no basis to conclude there was prosecutorial misconduct. The Court finds no ground for dismissal of the indictment or the Notice of the Intent to Seek the Death Penalty based upon this claim.

15. The prosecutor signed an autograph in front of the courthouse. Defendant claims the prosecutor's action in signing the autograph prior to the jury returning with a verdict during the guilt phase trial was misconduct. This matter was address by the Court during the guilt phase trial. The prosecutor stated he walked outside the courthouse and was unexpectedly confronted by someone who asked for an autograph. He was surprised and complied without thinking about the significance. A photographer captured the incident and it was published. The prosecutor stated he was no longer using public entrances to the courthouse to avoid the situation recurring. While it was a lapse of judgment for the prosecutor to provide an autograph under those circumstances, there was no evidence this incident affected the verdict. The jurors in

the guilt phase trial were questioned regularly about media coverage of the trial. No juror acknowledged seeing or hearing anything about the incident.

The Court finds the defendant failed to demonstrate that the prosecutor's misconduct so infected the trial with unfairness as to make the resulting conviction a denial of due process (*State v. Edmisten*, 220 Ariz. 517, 524) or that the misconduct was so egregious that it raises concerns over the integrity and fundamental fairness of the trial (*State v. Minnitt*, 203 Ariz. 431, 438). The Court finds no ground for dismissal of the indictment or the Notice of the Intent to Seek the Death Penalty based upon this claim.

16. Reluctance of witnesses to testify at penalty phase retrial. Defendant claims that potential defense witnesses have refused to participate in the penalty phase retrial because they fear the prosecutor may make "improper personal attacks in court and inspire others to attack them outside court." See page 19, defendant's October 1, 2014 Motion to Dismiss. A party has the right to challenge the credibility, bias and motive of a witness unless the court determines the probative value of the evidence is outweighed by the danger of unfair prejudice or will confuse the issues. See Rule 403, *Arizona Rules of Evidence*. If the challenge is objectionable, the opposing party has the right to object and the court will rule. In this case, the prosecutor has zealously cross-examined the witnesses. The courtroom is open to the public. The court cannot control what the public and media report about what they observe in the courtroom. The Court has stated the defendant may request accommodations be made for witnesses who have concerns about testifying in this case. The Court has indicated it is willing to consider creative ways to protect the privacy interests of potential witnesses. For example, the Court has previously permitted the defendant's expert witnesses to refer to individuals by their relationship to the defendant without using proper names. If a witness is unwilling to testify voluntarily, the defendant may subpoena that witness to testify to assure the jury has the benefit of the testimony. Alternatively, that testimony could be provided through an affidavit, videotaped statement or the testimony of the mitigation specialist or another witness. See paragraph 1 above. The Court finds no ground for dismissal of the indictment or the Notice of the Intent to Seek the Death Penalty based upon this claim.

17. The cumulative effect of the prosecutorial misconduct resulted in an unfair trial. Defendant alleges that the cumulative effective of the prosecutor's misconduct has created an atmosphere in which the defendant cannot receive a fair trial in the penalty phase retrial thus requiring dismissal of the charges and/or dismissal of the Notice of Intent to Seek the Death Penalty. The defendant has filed numerous motions to

dismiss and made numerous motions for mistrial in this case. Many of those motions alleged prosecutorial misconduct. The Court ruled on each motion. None of the motions were granted. Since none of the motions were granted, the cumulative effect of those allegations does not require dismissal of the charges or the Notice of Intent to Seek the Death Penalty. This was a long trial, covered by the media from gavel to gavel. Every action of the defendant, the attorneys, the victim family members, the witnesses, the court, and court staff were subjected to intense and constant scrutiny. There may have been errors made, but those errors were not so egregious that they create concerns about the integrity or fundamental fairness of the trial. See *State v. Minnitt*, 203 Ariz. 431, 438, 55 P.3d774 (2002); *Pool v. Superior Court*, 139 Ariz. 98, 105, 677 P.2d 261, 268 (1984). The Court finds no ground for dismissal of the indictment or the Notice of the Intent to Seek the Death Penalty based upon this claim.

IT IS ORDERED denying the defendant's Motion to Dismiss State's Notice of Intent to Seek the Death Penalty Due to Continued Misconduct filed October 1, 2014, the defendant's Motion to Dismiss the State's Notice of Intent to Seek the Death Penalty Due to Defendant's Inability to Present a Complete Case for Life filed September 26, 2014, the defendant's Motion to Dismiss State's Notice of Intent to Seek the Death Penalty Due to Continue State Misconduct Supplement #1 filed October 24, 2014, the defendant's Motion to Dismiss All Charges with Prejudice and/or in the Alternative to Dismiss the State's Notice of Intent to Seek the Death Penalty due to Recently Discovered Purposeful and Egregious Prosecutorial Misconduct filed on November 10, 2014, the Defendant's Motion for Reconsideration: Motion to Dismiss State's Notice of Intent to Seek the Death Penalty Due to Defendant's Inability to Present a Complete Case for Life filed November 26, 2014, and the Defendant's Supplemental Motion to Dismiss all Charges with Prejudice and/or in the Alternative to Dismiss the State's Notice of Intent to Seek the Death Penalty Due to Recently Discovered Purposeful and Egregious Prosecutorial Misconduct filed December 14, 2014.

IT IS FURTHER ORDERED denying the State's Motion for Sanctions (Compaq Presario Computer) filed November 16, 2014 and the State's Motion to Strike (Compaq Presario Computer) filed November 18, 2014.