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15 **SUPERIOR COURT OF THE STATE OF ARIZONA**
16 **IN AND FOR THE COUNTY OF MARICOPA**

17 THE STATE OF ARIZONA)
18) No. CR 2008-031021-001DT
19 Plaintiff,)

20 vs.

21 JODI ANN ARIAS,)
22) **MOTION TO PRECLUDE**
23) **TESTIMONY OF DR. JANEEN**
24) **DEMARTE FOR FAILURE TO**
25) **TIMELY DISCLOSE REPORT**
26)

27 Defendant.)

28 (Hon. Sherry Stephens)

29
30 Defendant, Ms. Jodi Ann Arias, by and through undersigned counsel,
31 hereby moves to preclude the state from presenting the testimony of Dr. Janeen
32 DeMarte regarding Dr. DeMarte’s witness interviews. This motion is made via
33 the 5th, 6th, 8th and 14th Amendments of the United States Constitution as well as
34 Article 2 §§ 4, 15, 23 and 24 of the Arizona Constitution. This motion is based
35 upon the aforementioned authorities as well as those cited in the attached
36 Memorandum of Points and Authorities.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. Factual Background**

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4 Dr. DeMarte was previously noticed as a penalty phase witness for the
5 state. Defense counsel disclosed the written notes of its experts Dr. Fonseca and
6 Dr. Geffner in July 2014. The state interviewed both of the defense experts Dr.
7 Fonseca and Dr. Geffner prior to the start of trial. After disclosing the defense
8 expert notes and providing interviews, defense counsel repeatedly requested Dr.
9 DeMarte's notes and the opportunity to interview Dr. DeMarte prior to the start of
10 trial. The state continued to advise this Court and counsel that Dr. DeMarte had
11 no notes as of yet and while counsel could interview her, she had nothing new to
12 say. This Court eventually ordered Dr. DeMarte to disclose her notes by October
13 16, 2014. The state disclosed one page of notes, bates number 2351 in October
14 2014. However, there was nothing substantive contained within the notes. On
15 about December 5, 2014 the state disclosed additional notes, bates numbers 2389
16 to 2403.

17
18 On January 30, 2015 the defense was finally allowed to interview Dr.
19 DeMarte. Partway through the interview, Dr. DeMarte admitted that she had
20 created additional notes of interviews that she conducted. At that point, Dr.
21 DeMarte disclosed an additional 14 pages of single-spaced typewritten notes. Ten
22 pages of the notes were created on December 15, 2014 when she interviewed Ms.
23 Lisa Diadone (Andrews) and Ms. Sky Hughes. An additional four pages of single-
24 spaced typewritten notes were created on December 24, 2014 when Dr. DeMarte
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1 interviewed Mr. Chris Hughes. Dr. DeMarte did not disclose any handwritten
2 notes at all.

3
4 All of these notes were created prior to defense expert, Dr. Geffner
5 finishing his testimony. However, none of these notes were disclosed by the state
6 until January 30, 2015, two business days prior to Dr. DeMarte's testimony and
7 *after* the defense rested.

8
9 Furthermore, Dr. DeMarte's recently disclosed notes indicate that she spent
10 12.5 hours consulting with Mr. Martinez between the dates of December 7, 2014
11 and January 29, 2015. Not once in this time frame did the state ever disclose the
12 newly created notes to the defense.

13
14 Not only did the state fail to timely disclose it, the notes were not disclosed
15 until the issue arose during an interview with Dr. DeMarte. Therefore, the
16 substance of the interview was also compromised since 14 pages of new notes
17 were disclosed as the interview was ongoing.

18
19 When Dr. DeMarte was questioned as to why she failed to turn over her
20 notes, she claimed she would just give it to the defense when she was interviewed.
21 However, this claim is wholly inconsistent with the first page of her notes where it
22 indicates that she was ordered to disclose her notes by October 16, 2014.

23
24
25 **II. Argument**

26 The state is *again* attempting to call an expert witness to testify without
27 timely providing a full and complete report that the expert witness created.

28 Furthermore, the state disclosed the interview notes only *after* Dr. Geffner

1 completed his testimony. Arizona Rules of Criminal Procedure, Rule 15.1(i)(5)
2 states in part:

3
4 (5) Within 60 days of receipt of the disclosure required under Rule
5 15.2(h)(1), the prosecutor shall disclose to the defendant the following:

6 (c) The names and addresses of experts who may be called at the penalty
7 hearing together with any reports prepared by the expert.

8
9 (d) A list of any and all papers, documents, photographs or tangible objects
10 that the prosecutor intends to use during the aggravation and penalty hearings.

11 Additionally, because of the late disclosure the state forced the defense to
12 present its case without knowing all of the evidence the state intended to use to
13 attempt to achieve a death sentence. This is in direct violation of *Skipper v. South*
14 *Carolina*, 476 U.S. 1 (1986).

15
16 As *Brady* and its progeny have made clear, a defendant is entitled to due
17 process of law throughout the criminal proceedings, including during the
18 discovery process. *Brady v. Maryland*, 373 U.S. 83 (1963). The prosecution has a
19 constitutional duty to disclose exculpatory evidence to the defense, even without a
20 defense request. *United States v. Agurs*, 427 U.S. 97, 107-13, 96 S.Ct. 2392,
21 2399-2402 (1976); accord, *State v. Fowler*, 101 Ariz. 561, 564, 422 P.2d 125, 128
22 (1967). The prosecution is also obligated to obtain information from persons who
23 have investigated the case and are under the prosecution's control. ARCP Rule
24 15.1(d); *State v. Krone*, 182 Ariz. 319, 321 n.3, 897 P.2d 621, 623 n.3 (1995). The
25 prosecution has a duty to keep itself apprised of the evidence relating to its case,
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1 and it may be held accountable for the negligence of its investigators. *State v.*
2 *Towery*, 186 Ariz. 168, 186-87, 920 P.2d 290, 308-09 (1996). The defense is
3
4 unable to properly investigate a case when it is surprised by the state’s untimely
5 discovery disclosure. *State v. Smith*, 140 Ariz. 355, 359, 681 P.2d 1374, 1378
6 (1984).

7
8 When the defense’s investigation of the evidence is impaired by the state’s
9 delay in disclosure, prejudice results. *State v. Towery*, 186 Ariz. at 186-87, 920
10 P.2d at 308-09. “[T]he individual prosecutor has a duty to learn of any favorable
11 evidence known to the others acting on the government’s behalf in the case,
12 including the police.” *Kyles v. Whitley*, 514 U.S. at 437, 115 S.Ct. at 1567.

13
14 Failing to disclose this type of evidence is a constitutional violation
15 (including of due process), even in the absence of bad faith. *United States v.*
16 *Agurs*, 427 U.S. at 110, 96 S.Ct. at 2400; *see also*, ARCP Rule 15.1(i)(5)(a)(c)(d).
17
18 A *Brady* violation is constitutional error that cannot be harmless. *Kyles v. Whitley*,
19 514 U.S. 419, 435-36, 115 S.Ct. 1555, 1566-67 (1995).

20
21 **III. Conclusion**

22 Therefore, the defense respectfully requests this Court to preclude the state
23 from providing or eliciting testimony from Dr. DeMarte regarding her interviews
24 of Mr. and Mrs. Hughes and Ms. Diadone.

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RESPECTFULLY SUBMITTED this 2nd day of February, 2015.

WILLMOTT & ASSOCIATES

By: /s/ Jennifer L. Willmott
JENNIFER L. WILLMOTT
Attorney for Ms. Arias

Copy of the foregoing emailed/
delivered this 2nd day of
February 2015, to:

Clerk of the Court
175 W. Madison
Phoenix, AZ 85003

Hon. Sherry Stephens
Judge of the Superior Court
175 W. Madison
Phoenix, Arizona 85003-2243

Juan Martinez
Deputy County Attorney
301 W. Jefferson
Phoenix, Arizona 85003

Court Chatter

By: /s/ Jennifer L. Willmott
JENNIFER L. WILLMOTT
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JLW/aj