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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) No. CR 2008-031021-001DT

18 Plaintiff,

19 vs.

20 JODI ANN ARIAS,

21 Defendant.

22 **MOTION TO PRECLUDE**
23 **TESTIMONY OF MESA PD DET.**
24 **SMITH FOR FAILURE TO**
25 **TIMELY DISCLOSE REPORT**
26 **PRIOR TO TESTIMONY**

27 (Hon. Sherry Stephens)

28 Defendant, Ms. Jodi Ann Arias, by and through undersigned counsel,
hereby moves to preclude the state from presenting the testimony of Detective
Smith. This motion is made via the 5th, 6th, 8th and 14th Amendments of the United
States Constitution as well as Article 2 §§ 4, 15, 23 and 24 of the Arizona
Constitution. This motion is based upon the aforementioned authorities as well as
those cited in the attached Memorandum of Points and Authorities.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. Factual Background**

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4 The state intends to call Detective Smith to testify regarding his
5 investigation and research of the 2009 image of Mr. Alexander’s hard drive.
6 Smith was never officially noticed by the state. However, the state informed the
7 Court and counsel on or near January 23, 2015 that it intended to call Smith to the
8 stand for rebuttal. The defense was allowed to conduct an interview of Smith on
9 Thursday, January 29, 2015. He is supposed to testify on Monday, February 2,
10 2015. During the interview, Smith advised counsel that he has continued to work
11 on a “report” that details the research that he has conducted on a 2009 image of
12 Mr. Alexander’s hard drive. The report should be completed in one or two weeks
13 at most.
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17 During the interview it became clear that Smith was not able to answer
18 numerous questions about the work he has done because he would have to refer
19 back to the information contained on his computer. Further, because counsel was
20 not provided with a report of Smith’s work and Smith chose not to bring his
21 computer to the interview, counsel was unable to learn specific information
22 relating to the investigation. Therefore, the interview was practically useless for
23 purposes of discovery.
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1 **II. Argument**

2 The state is attempting to call an expert witness to testify without providing
3 a report that the expert witness authored but has not completed. Arizona Rules of
4 Criminal Procedure, Rule 15.1(i)(5) states in part:

5 (5) Within 60 days of receipt of the disclosure required under Rule
6 15.2(h)(1), the prosecutor shall disclose to the defendant the following:

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

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 As *Brady* and its progeny have made clear, a defendant is entitled to due
12 process of law throughout the criminal proceedings, including during the
13 discovery process. *Brady v. Maryland*, 373 U.S. 83 (1963). The prosecution has a
14 constitutional duty to disclose exculpatory evidence to the defense, even without a
15 defense request. *United States v. Agurs*, 427 U.S. 97, 107-13, 96 S.Ct. 2392,
16 2399-2402 (1976); accord, *State v. Fowler*, 101 Ariz. 561, 564, 422 P.2d 125, 128
17 (1967). The prosecution is also obligated to obtain information from persons who
18 have investigated the case and are under the prosecution's control. ARCP Rule
19 15.1(d); *State v. Krone*, 182 Ariz. 319, 321 n.3, 897 P.2d 621, 623 n.3 (1995). The
20 prosecution has a duty to keep itself apprised of the evidence relating to its case,
21 and it may be held accountable for the negligence of its investigators. *State v.*
22 *Towery*, 186 Ariz. 168, 186-87, 920 P.2d 290, 308-09 (1996). The defense is
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1 unable to properly investigate a case when it is surprised by the state's untimely
2 discovery disclosure. *State v. Smith*, 140 Ariz. 355, 359, 681 P.2d 1374, 1378
3 (1984).
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5 When the defense's investigation of the evidence is impaired by the state's
6 delay in disclosure, prejudice results. *State v. Towerly*, 186 Ariz. at 186-87, 920
7 P.2d at 308-09. "[T]he individual prosecutor has a duty to learn of any favorable
8 evidence known to the others acting on the government's behalf in the case,
9 including the police." *Kyles v. Whitley*, 514 U.S. at 437, 115 S.Ct. at 1567.
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11 Detective Smith admits that he has a report, but that he just has not
12 completed it. He believes the report will be finished in a week or two. However,
13 the state intends to have him testify regarding his work on the 2009 image of Mr.
14 Alexander's hard drive without first disclosing his report to the defense. This
15 directly violates ARCP Rule 15.1(i)(5).
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18 Although the defense was allowed to interview Smith, he was unable to
19 answer numerous questions because the report was not available. A further
20 complication occurs because the defense was not only unable to conduct a
21 meaningful interview; the defense is unable to provide Smith's report to its own
22 experts to review prior to testimony. Smith's testimony is based on computer
23 forensic work. It is highly technical in nature. Therefore, access to his report
24 prior to his testimony is crucial.
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27 Although a defense expert was present during the interview, since Smith
28 was unable to answer numerous questions about his investigation, the defense

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expert is not able to provide any guidance or explanation of Smith’s work prior to his testimony.

Allowing Smith to testify prior to providing his full report to the defense prevents the defense from conducting a proper investigation into Smith’s claims. Furthermore, it violates Ms. Arias’ 6th amendment rights to confront and cross-examine witnesses against her. The defense is at a distinct disadvantage due to the state’s failure to disclose Smith’s report prior to his testimony.

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

III. Conclusion

Therefore, the defense respectfully requests this Court to preclude the state from providing or eliciting testimony from Detective Smith regarding his investigation of the 2009 image of Mr. Alexander’s hard drive.

RESPECTFULLY SUBMITTED this 30th day of January, 2015.

WILLMOTT & ASSOCIATES

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

1 Copy of the foregoing emailed/
2 delivered this 30th day of
3 January 2015, to:

4 Clerk of the Court
5 175 W. Madison
6 Phoenix, AZ 85003

7 Hon. Sherry Stephens
8 Judge of the Superior Court
9 175 W. Madison
10 Phoenix, Arizona 85003-2243

11 Juan Martinez
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13 301 W. Jefferson
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15 By: /s/ Jennifer L. Willmott
16 JENNIFER L. WILLMOTT
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Court Chatter