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

THE STATE OF ARIZONA  Plaintiff,  vs. JODI ANN ARIAS, Defendant.	) ) ) ) ) ) ) ) )	No. CR 2008-031021-001DT  <b>MOTION FOR MISTRIAL;          PROSECUTORIAL MISCONDUCT          THAT OCCURRED DURING THE          CROSS EXAMINATION OF DR.          ROBERT GEFFNER</b>
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(Hon. Sherry Stephens)

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Ms. Arias, through undersigned counsel, pursuant to the rights due her via the Fifth, Eighth and Fourteenth Amendments of the United States Constitution, as well as Art. II, § 4 and Art. III of the Arizona Constitution, hereby requests that this Court declare a mistrial based on the State’s misconduct during its cross examination of Dr. Robert Geffner. In this motion Ms. Arias takes the position that in violating this Court’s Order not to disclose the name of a corroborating witness, not once, not twice but to date

three times and counting as well as their choice to improperly attack Dr. Geffner not only amounts to blatant prosecutorial misconduct but an intentional interference with Ms. Arias' ability to present mitigating evidence in violation the well-established dictates found in *Skipper v. South Carolina* 476 U.S. 1 (1986) *Smith v. Texas*, 543 U.S. 37, 43-45 (2004); *Tennard v. Dretke*, 542 U.S. 274, 285-86 (2004) as well as the authorities mentioned in the attached Memorandum of Points and Authorities which is incorporated herein all of which support the reality that the oral motion for mistrial Ms. Arias made on January 21, 2015, should be granted.

## **MEMORANDUM OF POINTS AND AUTHORITIES**

### **I. RELEVANT FACTS**

On January 21, 2015, the State began its cross examination of Ms. Arias' expert witness Dr. Robert Geffner. During direct examination counsel for Ms. Arias, consistent with an order issued by this court months before trial began to keep the names of Ms. Arias' witnesses and/or collateral sources under seal, refrained from referring to these individuals by name in open court. Of note is the fact that Ms. Arias requested that the court issue such an order because mitigation witnesses and/or potential mitigation witnesses were reluctant and/or unwilling to speak with counsel for Ms. Arias out of concerns that should the fact that they even talked to counsel for Ms. Arias be made public that their personal safety would be threatened. Furthermore, as has been documented in other motions, many of these same individuals have refused to testify at trial out of fear for their personal safety due to threats they received personally or because

they are aware of others who have received such threats.

In direct defiance during cross examination the State violated this order by naming one such witness (aka Witness 1) during cross examination. After Ms. Arias objected to this violation of the Court's Order, a bench conference was held to discuss the issue. After the State was advised of its mistake cross examination resumed. Within minutes the State again acted in defiance of the Court's Order by mentioning Witness 1 by name again. As occurred after the first violation, Ms. Arias once again objected and the court once again held a bench conference. Of note is the fact that during this conference after being confronted with his second violation, counsel for the State avowed to the Court that he would not do it again. Within minutes of making such an avowal, the first words out of counsel for the State's mouth included the name of Witness 1.

On January 22, 2015, the State's cross examination of Dr. Geffner continued. During this day long cross examination the State again defied the Order of this court by revealing the name of an expert witness as well. Finally, while not in direct defiance of this court's order relating to sealing the names of witnesses, note should be made of the fact that during this same day the State accused Dr. Geffner of smearing Mr. Alexander for a second time.

The cross examination of Dr. Geffner is set to resume on January 26, 2015.

## II. LAW AND ARGUMENT

Legitimate issue cannot be taken with the fact that the State violated the Court's Order that the names of these witnesses not be spoken in open court and that the State did so three times. Likewise, Ms. Arias would assert while she can't prove intent on behalf of the State when it acted in defiance of this Court's Order it seems to strain all logic to conclude that it was not intentional given the fact that the same violation occurred 3 times within an hours-time and that the third violation occurred directly after the State avowed to this Court that it would not happen again.

The question posed by this motion then is what consequence or sanction should be imposed upon the State for its violation of this Court's Order. To be clear, Ms. Arias is not seeking a sanction against counsel for the State personally but rather a substantive sanction related to the State's pursuit of the death penalty against Ms. Arias. Now in this regard when Ms. Arias made her initial verbal motion for a mistrial the Court advised her in order for such sanctions to be imposed she must demonstrate more than potential harm. In this motion Ms. Arias would respectfully disagree with the court on this issue of the harm she must show, not because it is not the typical legal standard but because it is not the applicable legal standard that should be applied when the sole issue is whether or not a life sentence or a death sentence is to be imposed upon Ms. Arias. Instead under such circumstances the proper legal standard is if the improper comments of counsel probably influenced the jury. *State v. Price*, 111 Ariz 197, 576 P.2d 736 (1974), *State v. Gonzalez* 105 Ariz. 434, 466 P.3d 388 (1970). Considering the fact that the State then asserted that it was "Witness 1" who had an interest in this pornography and then

illustrated for the jury that his true identity was being protected probably led the jury to believe there was some validity to the State's unsupported assertion. Such actions in and of itself warrant the granting of a mistrial, however the constitutional violations do not end with this impropriety, because for any sentence of death that may be imposed upon Ms. Arias, her jury must have a full opportunity to consider all of the mitigating circumstances before imposing a sentence of death. *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954 (1978), *Eddings v. Oklahoma* 455 U.S. 104, 102 S.Ct. 869 (1982).

In accord with *Eddings* and *Lockett* Ms. Arias takes the position her undisputed right to present mitigation is of such significance that the mere potential that these rights may be restricted or hampered in any way by purposeful misconduct of the nature that occurred during the cross examination of Dr. Geffner is enough to warrant a mistrial. Ms. Arias bases this assertion on the reality that should any one of Ms. Arias' 14 witnesses, who were previously unwilling to participate, be contemplating changing their mind what occurred over the past few days would demonstrate to that should they choose to come forward on Ms. Arias' behalf that their identity would most assuredly be revealed despite any assurances that this court may provide.

It is Ms. Arias' position that assuring the non-participation of "Witness 1" and/or any other potential mitigation witnesses is why the State purposefully published the name of "Witness 1."

Further evidence that the State's true motivation for violating the court's Order is to preclude mitigation in violation of the rights due Ms. Arias pursuant to Fifth, Eighth and Fourteenth Amendments of the United States Constitution, as well as Art. II, § 4 and

Art. III of the Arizona Constitution is found in the reality that the State violated well established case law which dictates that it is not proper for counsel to imply that an expert witness is conducting themselves unethically without having evidence to support the allegation. *State v. Hughes* 193 Ariz. 72, 969 P.2d 1184 (1998) citing *State v. Bailey* 132 Ariz. 472, 647 P.2d (1982). Furthermore, “a prosecutor may not insinuate that an expert is unethical or incompetent without properly admitted evidence to support it. Unfair attacks on the veracity of a witness are of particular concern when the target is a key witness *Bailey at* 480 (citations omitted). Given that Dr. Geffner is one of three witnesses that Ms. Arias is calling during her case and given that Dr. Geffner is the only expert who is addressing the subject of domestic violence in this case it is hard to imagine how he could not be considered as a key witness. Additionally, the State offered no evidence to support its assertions that Dr. Geffner was testifying in order to smear the victim. Combining this reality with the reality that a County Attorney’s comments receive extra scrutiny in a capital case and the need for a mistrial seems undeniable. *Burrows v. State* 38 Ariz. 99, 297 P.2d 1029 (1931).

In considering this motion Ms. Arias would also remind the court that the State. Pursuant to A.R.S. 13-751, is not entitled to a sentence of death, nor is the State entitled to act in a “win at all costs” manner to obtain such a sentence. *In Re Peasley* 208 Ariz. 27, 90 P.3d 964 (2004) citing *Pool v. Superior Court* 139 Ariz. 98, 103, 677 P.2d 261, 266 (1984).

### III. CONCLUSION

This is not the first time that the State has acted improperly in this case and logic dictates that it will most assuredly not be the last unless their misconduct is met with meaningful sanctions. As described above, the actions that the State undertook during its cross examination of Dr. Geffner stand in direct contrast to the rights due Ms. Arias pursuant to the Fifth, Eighth and Fourteenth Amendments of the United States Constitution, as well as Art. II, §4 and Art. III of the Arizona Constitution. Thus, for the reasons mentioned above, Ms. Arias asks that the request she made for a mistrial on January 21, 2015, be granted.

RESPECTFULLY SUBMITTED this 25<sup>th</sup> day of January, 2015.

By: */s/ L. Kirk Nurmi*  
L. KIRK NURMI  
Counsel for Ms. Arias

Copy of the foregoing  
E-Filed/delivered this 25<sup>th</sup>  
day of January, 2015, to:

THE HONORABLE SHERRY STEPHENS  
Judge of the Superior Court

JUAN MARTINEZ  
Deputy County Attorney

By */s/ L. Kirk Nurmi*  
L. Kirk Nurmi  
Counsel for Ms. Arias

Court Chatter