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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

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

(Evidentiary Hearing Requested)

(Hon. Sherry Stephens)

Ms. Arias, through undersigned counsel, pursuant to the rights due her via the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution, as well as Art. II, § 4 and § 24 of the Arizona Constitution, hereby requests that the charges

against her be dismissed with prejudice due to the fact that Ms. Arias has recently discovered that the State has purposely destroyed evidence that was clearly exculpatory and or mitigating. In the alternative, Ms. Arias requests that this Court dismiss the "State's Notice of Intent to Seek the Death Penalty" that the State filed against her on October 31, 2008. Support for Ms. Arias' position can be found in the Memorandum of Points and Authorities as well as the evidence she produces at the evidentiary hearing she is requesting in conjunction with this motion.

Finally, given the ever changing nature of the case and the evolving scope of the State's misconduct, Ms. Arias reserves the right to supplement this motion as circumstances currently unforeseen dictate.

MEMORANDUM OF POINTS AND AUTHORITIES

I. RELEVANT FACTS

On or about June 10, 2008, after Mr. Alexander's body was found the Mesa Police Department collected various items from his home. Amongst the items collected was a Compaq Presario Computer. This item, which was subsequently labeled as item number 390633 (henceforth Compaq Computer).

The internal workings of the Compaq Computer were later analyzed over the pendency of this case. The original examination of this computer was conducted in 2008 be Detective Melendez of the Mesa Police Department who on October 21, 2014, testified that he analyzed this computer by using Encase software and this was the only software that he used because he followed Mesa Police Department protocol. Detective

Melendez further indicated that Mesa Police Department protocol would require the use of a "write blocker" so that nothing on the hard drive would be altered. Detective Melendez further testified his work in the case ended in November of 2008, when he transferred out of the Computer Forensics Unit. Subsequent to the initial analysis done by Detective Melendez, this hard drive was analyzed by Lonnie Dworkin of Compufor. His analysis did not uncover the existence of any pornography on this computer.

Thus, when guilt phase proceedings began on January 2, 2013, Ms. Arias, despite her best efforts had no evidence that any pornography was on Mr. Alexander's Compaq Computer. Thus, when Ms. Arias took the stand and testified that on or about January 21, 2008, she caught Mr. Alexander masturbating to an image of a child, she had no objective support for the reality that Mr. Alexander viewed child pornography. Thus, at various stages of the proceedings the State claimed that Ms. Arias was lying about this incident, that she was making this incident up to disparage Mr. Alexander and that Ms. Arias was a "liar" whose testimony should not be believed.

This attack on Ms. Arias' credibility also expanded to include attacks upon Ms. Arias' expert witnesses. In particular, the State went on to attack the professionalism of Domestic Violence Expert Ms. Alyce LaViolette and psychologist Dr. Richard Samuels because they based their diagnosis on the words of a "liar," Jodi Arias. Furthermore, the State called their own computer expert, Detective Melendez who testified that he found no pornography on Mr. Alexander's computer. However, at the time the State was attacking Ms. Arias and the professionals that were working on her behalf and offering testimony that no pornography was found on Mr. Alexander the State knew that the

attacks they were making and the testimony they were offering was untrue. In that, prior to gaining a conviction on the charge of first degree murder on May 8, 2013, the State had full knowledge that Mr. Alexander's computer did contain a plethora of pornography and that this computer further contained evidence that Mr. Alexander had a sexual interest in children. In fact, as the evidence produced at the evidentiary hearing will demonstrate, it is clear that the State knew this evidence existed because, on June 19, 2009, before Ms. Arias examined Mr. Alexander's computer the State deleted this evidence.

Specifically, recent Forensic Analysis has shown that between the times of 13:56:19 and 16:51:34 on June 19, 2009, that thousands of files were deleted from Mr. Alexander's computer. To clarify further, evidence produced at the evidentiary hearing will demonstrate that this was not some sort of inadvertent forensic error, but instead that someone went into the computer without a "write blocker" and sought to alter its content, and alter they did, with such a level of success that the State's deceit was not uncovered for several years. Whoever had the computer that day for this period of time, deleted the browser history and registry for the computer. Amongst the files that were deleted are several that are easily recognizable as pornographic websites and thereby demonstrating the purposeful nature of their targeting and their exculpatory or mitigating value they include:

- [redacted]
- [redacted]
- [redacted]
- [redacted]

Still others are mentioned herein because the date and time they were viewed negates any valid argument that Ms. Arias put these items on Mr. Alexander's computer. These pages include;

[redacted] which was accessed on the following dates

- 5-28-08
- 5/29/08
- 5/31/08
- 6/1/08
- 6/2/08

[redacted] which was accessed on the following dates

- 5-28-08
- 5/29/08
- 5/31/08
- 6/1/08
- 6/2/08
- 6/10/08

[redacted] which was accessed on the following dates

- 5-28-08
- 5/29/08
- 5/31/08
- 6/1/08
- 6/2/08
- 6/3/08

[redacted] which was accessed on the following dates

- 5-28-08
- 5/29/08
- 5/31/08
- 6/1/08
- 6/2/08
- 6/3/08

[redacted] which was accessed on the following dates

- 5/28/08
- 5/29/08
- 5/31/08
- 6/1/08
- 6/2/08
- 6/3/08

[redacted] which was accessed on the following dates

- 5/28/08
- 5/29/08
- 5/31/08
- 6/1/08
- 6/2/08
- 6/3/08

Still others are recognizable as web pages that likely contain child pornography. They include [redacted] and [redacted].

Coincidentally, June 19, 2009, at 13:56:19 Detective Flores took possession of the Compaq Computer to take it to "Forensic Services" and that on the same day he returned the computer from "Forensic Services" at 16:51:34 (See Exhibit A). At the present time, Ms. Arias does not know who "Forensic Services" is as she has never received any report from such a person or entity and instead only knows that Detective Flores took Mr. Alexander's computer to this person or entity and that while this person or entity had the computer exculpatory and/or mitigating information was intentionally destroyed.

II. LAW AND ARGUMENT

A. THE STATE'S MISCONDUCT IS OF THE NATURE THAT DISMISSAL OF ALL CHARGES IS WARRANTED

1. Any Misdeeds Performed By The Mesa Police Department Are Attributable To The State

As an initial matter should any doubt be cast on the viability of this motion or the requested sanctions because it cannot be shown that any member of the Maricopa County Attorney's Office was involved in these misdeeds, the law is clear that when a law enforcement agency "investigating a criminal action operates as an arm of the prosecutor for the purpose of obtaining information that falls within the provisions of Rule 15.1" *Carpenter v. Superior Court* 176 Ariz. 486, 490 862 P.2d 246, 250 (1993).

Moreover, this duty to disclose extends to any information within the possession of any attorney or agent of the prosecutor's office, *Giglio v. United States, supra,* and any known information within the possession and/or control of cooperating law enforcement personnel. *Inbler v. Craven,* 298 F.Supp. 795 (C.D. Cal. 1969), affirmed 424 F.2d 631 (9th Cir. 1970); *Barbee v. Warden,* 331 F.2d 842 (4th Cir. 1972), *see also, United States v. Bailleau,* 685 F.2d 1105, 1113-14 (9th Cir. 1982) [prosecution has duty under Rule 16 to search investigative files of other government agencies for evidence material to the defense, even if the prosecution does not intend to use such evidence at trial]. *United States v. Jensen, 608 F.2d 1349 (10th Cir. 1979). See also* Rule 15.1(d), Arizona Rules of Criminal Procedure. The prosecutor's duty to disclose information is especially great when specific information is requested by the defense. *Agurs v. United States,* 427 U.S. 97 (1976).

Of course here the complaint goes beyond the failure to disclose the evidence, in that attempts were made to destroy the evidence and hence the claim being made is that of clear prosecutorial misconduct, the sort of misconduct that clearly violated the rights due

Ms. Arias due her via the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution, as well as Art. II, § 4 and § 24 of the Arizona Constitution and thus are of the nature that all charges against her should be dismissed.

2. **The Actions Of The State Infested The Proceedings With A Level Of Unfairness Warranting The Dismissal Of The Charges**

Dismissal of a conviction is warranted when the misconduct is of the nature that it "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *State v. Hughes,* 193Ariz 72, 79, 969 P.2d 1184, 1191 (1998). Granted, *Hughes*, deals with a conviction after it is finalized by sentencing and Ms. Arias' conviction has yet to be finalized but it is hard to conceptualize how such a distinction would negate the dictates of *Hughes.* Equally hard to conceptualize would be how this misconduct that the State brazenly partook in could not have infected the guilt phase of the trial with such a level of unfairness that the conviction at issue was not a denial of due process.

As an initial matter, destroying this clearly exculpatory evidence stands in direct contrast to *Brady v. Maryland* 373 U.S. 83, 83 S. Ct. 1194 (1963) in that she was unable to present exculpatory evidence to her jury because she was not aware of its existence. Furthermore, in destroying this evidence the State purposefully inhibited Ms. Arias' ability to present a full and complete defense to the charges *California v. Trombetta,* 467 U.S. 479, 104 S. Ct 2528 (1984).

Not only did the purposeful destruction of this evidence prevent Ms. Arias from

presenting this evidence but had the evidence at issue not been destroyed Ms. Arias could have used it to effectively cross-examine key prosecution witnesses. *Davis v. Alaska*, 415 U.S. 308 (1974); *Burr v. Sullivan*, 618 F.2d 583 (9th Cir. 1980); *United States v. Williams*, 668 F.2d 1064, 1070 (9th Cir. 1982); *Bagley v. Lumpkin*, 798 F.2d 1297 (9th Cir. 1986). Furthermore, evidence impeaching the credibility of key government witnesses is material to the defense *United States v. Shaffer*, 789 F.2d 682, 688-89 (9th Cir. 1986) [because testimony implicating defendant critical to conviction, jury assessment of credibility crucial to trial outcome]; *Bagley v. Lumpkin, supra*, at 1301. Of course the credibility of the "key government witness" whose credibility is at issue is that of Detective Flores, the State's case agent. Who based on the evidence discussed above was willing to purposefully destroy evidence to unlawfully convict and perhaps kill Ms. Arias. This would lead to obvious questions about what else Detective Flores has done to garner a particular outcome in a case; Did he destroy text messages before they were disclosed? Did he destroy e-mails before they were disclosed? Did he discard taped interviews that were not favorable to the State? Did he destroy the SIM cards for the cell phones that were seized in order to destroy exculpatory or mitigating evidence? What other evidence could he have destroyed? None of these questions were placed before the jury that convicted Ms. Arias. This Court should also consider the fact that, the choice of Detective Flores to purposefully destroy evidence also adds doubts to all of his testimony up to and including his claims that his testimony at the *Chronis* hearing held in this matter was based on his misunderstanding of what Dr. Horn said rather than his choice to be untruthful. Had Ms. Arias not been deprived of this evidence she could have

demonstrated to the jury who convicted her that Detective Flores is a witness who lacks any credibility and rather than being an objective fact finder, he was willing to destroy evidence to help obtain a conviction and/or a sentence of death. Thus, the destruction of the evidence at issue would constitute clear constitutional error as its destruction deprived Ms. Arias of a fair trial. *Bagley v. Lumpkin*, 798 F.2d 1297, 1300 (9th Cir. 1986).

Other examples that support Ms. Arias' contention that dismissal of all charges is appropriate can be found in *State v. Escalante* 153 Ariz. 55, 734P.2d 597 (Ariz. App. 1986) a case that dealt with the destruction of a biological sample, in which the failure to preserve the sample was ruled to be akin to prosecutorial suppression of evidence. Furthermore, in *Arizona v. Youngblood* 488 U.S. 51, 109, S.Ct. 333 (1988), where it was held that the malicious failure to preserve evidence which could be tested suggests "that the evidence could form the basis for exonerating the defendant" *Id at 58, 337.*

In fact, Arizona case law deems that the sanction for a mere discovery violation should be proportionate to the harm caused. *State v.Krone*, 182 Ariz. 319, 897 P.2d 621 (1995). Of course, in this motion Ms. Arias takes the position that the conduct of the State is egregious in that not only was the evidence not disclosed, but because its disclosure was prevented by its purposeful destruction and while further being mindful that "egregious misconduct occurs where the prosecutor's manipulation of evidence is likely to have an important effect on the jury's determination." *Milke v. Ryan*, 711 F.3d 998, 1005 (9th Cir. 2013) *citing Donnelly v. DeChristoforo*, 416 U.S. 637, 647, 94 S.Ct 1868, 40 L.Ed.2d 431 (1974).

B. IF THE COURT DOES NOR BELIEVE THAT THE DISMISSAL OF ALL CHARGES IS WARRANTED MS. ARIAS WOULD ASSERT THAT THE ALTERNATIVE REMEDY OF THE DISMISSAL OF THE DEATH PENALTY IS WARRANTED

Rule 15.7, Arizona Rules of Criminal Procedure dictates that this Court can impose sanctions on the State for the failure to make disclosure include (a)(2) dismissing the case with or without prejudice or (a)(6) any other appropriate sanctions. In this regard it is clear and Ms. Arias must concede that sanctions limiting the evidence are rarely imposed 141 Ariz. 227, 246, 686 P.2d 750 (1984), *Barrs v. Wilkinson*, 186 Ariz. 514, 924 P.2d 1033 (1996). However, the same cannot be said when the requested sanction relates merely to sentencing, for as *Barrs* points out:

> '[E]liminating a sentencing alternative is not the same as precluding a witness or other evidence from trial. Because the exclusion of proof can profoundly impact a case on its merits we have held such action to be suitable "only where other less stringent sanctions are not applicable to effects the ends of justice.'

Barrs at 516, *citing State v. Fisher 141 Ariz. 227, 246, 686 P.2d 750, 769(1984).*

Furthermore, as *Barrs* goes on to point out '[s]imilar concerns, however, are not present where the only potential "loss" to the criminal proceeding is a sentencing option." *Barrs at* 516, 1035. In this regard, Ms. Arias would assert that the State's decision to either be grossly negligent when caring for this evidence or to purposefully destroy this exculpatory and/or mitigating evidence warrants sanctioning the State and sanctioning the State harshly perhaps far more harshly than the mere elimination of a sentencing option, but given the posture of this case, that is all that is being requested herein. When

considering the viability of imposing such a sanction Ms. Arias would pose the following question to the court: If the mere restriction of a sentencing option is not warranted for conduct like this how could it ever be warranted?

Given how repugnant the State's conduct is to the rights due Ms. Arias pursuant to the 5th, 6th, 8th and 14th Amendments to the United States Constitution as well as Art. II, § 4 and § 24 of the Arizona Constitution, the answer to this question would seemingly be obvious in and of itself, however should any doubt exist; a series of death penalty jurisprudence dealing with Ms. Arias' right to present a full case for life provides a clear answer.

Death penalty jurisprudence demands that, in her retrial, Ms. Arias be permitted to paint a complete picture of her relationship with Mr. Alexander through an expert witness on the subject of domestic violence and addictive relationships. *Wiggins v. Smith*, 539 U.S. 510 (2003) at 524, *citing* ABA GUIDELINES.

This same line of jurisprudence also dictates that a capital sentencer may not be precluded from considering, and in fact may not refuse to consider, any relevant mitigating evidence, regardless of whether that evidence has a specific nexus to the crime committed. Instead, the sentencer in a capital case must consider in mitigation anything in the life of the defendant that might mitigate against a sentence of death. *Smith v. Texas*, 543 U.S. 37, 43-45 (2004); *Tennard v. Dretke*, 542 U.S. 274, 285-86 (2004); *see also* U.S. Const., Amends VIII & XIV; Ariz. Const., Art. 2, § 15. Mitigating circumstances are, "circumstances which do not justify or excuse the offense, but which, in fairness or mercy, may be considered as extenuating or reducing the degree of moral

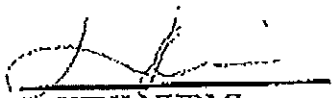
culpability." *Coker v. Georgia*, 433 U.S. 584, 590-91 (1977). Of further note is that preclusion of mitigation evidence constitutes a violation of the Due Process Clause of the United States Constitution. *Green v. Georgia*, 442 U.S. 95, 97 (1979); U.S. Const., Amend. XIV; *see also* Ariz. Const., Art. 2, § 4.

In this regard, Ms. Arias would bring to the courts attention what will come forth at the evidentiary hearing, that Ms. Arias' analysis of the computer will take weeks, thus the full extent of Mr. Alexander's use of pornography and the extent of what sort of pornography he sought out will not be known to Ms. Arias until after she has presented her case for life. Thus, the experts Ms. Arias will call in defense of her life will not be able to incorporate the results of the most recent forensic analysis into the opinions they offer about the relationship that Ms. Arias shared with Mr. Alexander. What that means specifically, is something that Ms. Arias cannot say at this point in time but at the very least Mr. Alexander's use of pornography would support Ms. Arias' contention about his sexually aggressive nature. However, at this point in time Ms. Arias cannot say if the evidence she has obtained about Mr. Alexander's zeal for pornography relates to the sexual behavior he wanted her to engage in with him or not. Thus, at this point in time due to the State's misdeeds she cannot make a complete case for life because she is not yet aware of all of the evidence thus any sentence of death that may be imposed can never lawfully be carried out. *Skipper v. South Carolina*, 476 U.S. 1 (1976).

III. CONCLUSION

While the actions denoted above document only a portion of the misconduct that the State has engaged in during the pendency of this case, the facts outlined above and those that will be articulated at the requested evidentiary hearing are certainly the most repugnant to any sense of justice found in the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution, as well as Art. II, § 4 and §24 of the Arizona Constitution and for the reasons mentioned above, the charges against Ms. Arias should be dismissed with prejudice. In the alternative, for the reasons mentioned above any sense of justice that comports with the death penalty jurisprudence detailed above would require that this Court dismiss the "State's Notice of Intent to Seek the Death Penalty" with prejudice.

RESPECTFULLY SUBMITTED this 10th day of November, 2014.

By: 

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Copy of the foregoing
Filed/delivered this 10 th
day of November, 2014, to:

THE HONORABLE SHERRY STEPHENS
Judge of the Superior Court

JUAN MARTINEZ
Deputy County Attorney

By _____
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