

**ARIZONA SUPERIOR COURT  
GILA COUNTY**

Date: 5/27/2014

PETER J. CAHILL, JUDGE  
Division One

C. DURMAN  
Judicial Assistant

STATE OF ARIZONA,  <p style="text-align:right">Plaintiff,</p> v.  BRANDON L. LEWIS,  <p style="text-align:right">Defendant.</p>	CR201200336
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**ORDER GRANTING MOTION TO DISMISS**

Defendant was put on trial in April 2013 for multiple felony charges. Convicted of some charges and acquitted of another, he then moved to vacate the convictions arguing that misconduct by prosecutors and police made his trial so unfair that the guilty verdicts could not stand. The motion was granted. Then, on the eve of a scheduled new trial, Defendant filed this motion arguing that the State should suffer some consequence for the tactics used to convict him. Otherwise, he urges, the State will be rewarded for its misconduct and get an undeserved do-over, forcing him to pay the high cost of another trial which his actions did not provoke.

In response, the State acknowledges that mistakes were made. It argues that this issue was “previously determined” and that a retrial is barred only when the misconduct was intentional.

In reply, Defendant argues that when the totality of the misconduct is considered, the law bars a retrial because another chance at a conviction would reward those who violated the rules. He will be prejudiced, Defendant says, first because prosecutors will now have a better chance to convict him at a second trial because they know his defense strategy and also because a second trial will be expensive, especially to pay expert witness fees again.

Defendant acknowledges that the setting aside of the verdicts was the relief he requested in his motion and that this result, a new trial date, was predictable. But, because the State is wholly to blame for this result, dismissal is nevertheless justified, he argues, because our constitutions do not allow the State to take advantage of its own misconduct and try him twice for the same offenses.

In order to resolve these competing arguments, the court must decide whether, considering the misconduct in total, the actions of the police and prosecutors were so egregious that dismissal is required. The claimed misconduct includes: multiple instances of withholding exculpatory evidence from the defense and a plea bargain strategy by prosecutors that attempted to use the criminal justice system to gain an advantage in a civil matter.

Defendant was charged with three counts of aggravated assault on a peace officer, one count of resisting arrest, one count of criminal damage of \$1,000 or more, and one count of criminal damage of \$250 or less. After he was found guilty and sentenced, Defendant filed his Motion to Vacate Judgment. An order dated December 3, 2013, explained the reasons why the court vacated the convictions. A date for another trial was set but, on March 13, 2014, Defendant filed a motion seeking to have the charges dismissed. The Motion to Dismiss, the State's Response and the Reply, the arguments of counsel, relevant case law and the case record were considered.

The court agrees with Defendant. The requirements of Due Process and the United States and Arizona constitutions require dismissal. "Due Process of law" is not a meaningless slogan. It is the indispensable foundation of individual freedom; it defines the rights of the individual and delimits the powers which the state may exercise.

#### **A. Whether the Motion Has Already Been Determined.**

The State's primary opposition to the Motion is an argument that the issues were "determined" in 2013. Relying on Ariz. R. Crim. P. 16.1(d), it argues that the issue presented here, whether the State's misconduct bars a retrial, was "previously determined" and, therefore, may not be considered now. Response, p. 2. The State says that this 2014 motion "makes the same arguments but uses the same verbiage, and cites to the same case law" as the 2013 Motion to Vacate.

The State misunderstands the Order Vacating Judgment and Convictions. That Order made it clear that Defendant's informal request for a dismissal was not decided by that ruling, that a ruling on the request would be deferred and would be

“determined” only after a formal motion was filed as stated at page 9 of the ruling, , with emphasis added:

Defendant argued in oral argument that the proper remedy here is a dismissal of all charges with prejudice. ... **However, the motion now before the court is a motion to vacate, not a motion to dismiss.**

And, at page 2:

After review and with good cause appearing, Defendant’s Motion to Vacate Judgment is granted for the following reasons. **However, the court defers to later a decision on a dismissal of charges.**

The motion presently before the court, Defendant’s Motion Dismiss, was filed in 2014. The prosecutors’ argument that this motion was decided back in 2013, even before it was filed, has no merit.

The issues before the court now are: whether prosecutors and police engaged in extreme misconduct that was grossly improper; were these actions highly prejudicial to Defendant and the integrity of the system; and, whether prosecutors acted with a knowing indifference to the danger that another trial would become necessary.

## **B. The Law.**

The allegations of misconduct and bad faith involve violations of disclosure rules and improper plea-negotiations. To prevail, Defendant must demonstrate that the State’s misconduct “so infected the trial with unfairness as to make the resulting conviction a denial of due process. *State v. Hughes*, 193 Ariz. 72, 969 P.2d 1184 (1998) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S. Ct. 1868 (1974)). Misconduct must be “so pronounced and persistent that it permeates the entire atmosphere of the trial.” *State v. Atwood*, 171 Ariz. 576, 611, 832 P.2d 593, 628 (1992) (quoting *United States v. Weinstein*, 762 F.2d 1522, 1542 (11th Cir. 1985)). The court should recognize the cumulative effect of any misconduct. *Hughes*, 193 Ariz. at 79, 969 P.2d at 1191.

The principle behind the United States constitutional prohibition against double jeopardy is that the government, with all its resources and power, should not be allowed to make repeated attempts to convict an individual, thereby subjecting him to embarrassment, expense and ordeal, and compelling him to live in a continuing state of anxiety and insecurity. *Green v. U.S.*, 355 U.S. 184, 78 S. Ct. 221 (1957).

The Arizona Constitution provides this same protection. In article 2, section 10, it states that no person shall be “twice put in jeopardy for the same offense.” As part of this protection against multiple prosecutions, the clause protects a defendant’s valued right to have his or her trial completed by the tribunal first assigned. *Pool v. Superior Court*, 139 Ariz. 98, 109, 677 P.2d 261, 272 (1984).

Applying the principles in *Pool*, Jeopardy attaches under art. 2, § 10 of the Arizona Constitution when convictions were set aside and a retrial made necessary under the following conditions:

1. The convictions were set aside because of improper conduct or actions by agents of the State of Arizona; *and*
2. This conduct was not merely legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which State agents knew to be improper and prejudicial, and which were pursued for any improper purpose with indifference to a significant resulting danger of mistrial, retrial or reversal; *and*
3. The conduct causes prejudice to the defendant which cannot be cured by means short of a retrial.

*Pool*, 139 Ariz. at 109, 677 P.2d at 272.

Plaintiff’s Response focuses on *State v. Trani*, 200 Ariz. 383, 26 P.3d 1154 (Ariz. App. 2001), noting that the prosecutor there was found to have not acted intentionally and his conduct was “more akin to an isolated incident...” *Id.* 200 Ariz. 386, 26 P.3d at 1157. But the *Trani* court distinguished those facts from the misconduct in *Pool* and *Hughes* where there was a “cumulative effect” of egregious conduct by the prosecutor. *Id.* The facts here, however, are less like *Trani* than the State would want the court to believe. The misconduct by police and prosecutors here is more like the serious misconduct in *Pool* and *Hughes* than the less serious conduct in *Trani*.

The State also argues that this court has already “determined that ... the action [ ]by the prosecutors was not intentional ...” Response, page 2, L. 27-8. But this was not the finding in the December Order granting the Motion. Instead, the court found: “A failure to disclose statements *not* in possession is not intentional conduct where the prosecutor had no knowledge of the statements.” Order Vacating Convictions, 12/3/13, Page 8. Defendant has now shown what knowledge prosecutors did have and when they had it.

The prosecutors in fact, before trial, had “knowledge of the statements.” A Town of Payson document was in their possession then making them aware of the

fact that Town policy required reports in these “use of force” incidents and that the reports went to the Chief—and were not placed in the “Agency report” sent to prosecutors. This was enough to put them on notice that they needed to “ask if there were any such reports.” A failure to disclose statements amounts to intentional conduct where prosecutors were on notice that the statements existed and they did nothing to obtain them. To conclude that this not intentional just because prosecutors never bothered to ask for what they were duty bound to collect would “reward ignorance.” *Pool*, 139 Ariz. at 107, 677 P.2d at 261. The prosecutors had a duty to get these statements from Payson police, especially where they knew Town policy required officers to make statements and give them to the Chief separate from the “agency report.”

In assessing these violations and making its findings of fact, the court used a “totality of circumstances” analysis, an objective examination of the relevant facts to determine whether prosecutors engaged in misconduct and acted in bad faith.

### **C. Findings of Fact.**

This court’s findings are grouped as follows: (1) Failure to disclose an exculpatory exhibit; (2) Failure to disclose findings of a police officer’s dishonesty; (3) Witness statements discovered before trial, that were not properly disclosed; (4) Witness statements discovered after trial, not properly disclosed; *and* (5) improper use of the criminal justice system.

#### **1. Failure to Disclose the “*Repair Estimate.*”**

Count 5 charged Defendant with criminal damage to a police vehicle. The amount of the damage allegedly exceeded \$1,000.00, thereby making the crime a felony. The damage and the cost of repairs were hotly contested at trial. The State’s only proof on this issue was testimony from Payson Police Sgt. Donnie Garvin; no other evidence was presented. A “lesser-included” jury instruction placed increased significance on the issue of cost of repairs. If the jury was not convinced that repairs would exceed \$1,000.00, they could find him guilty of a misdemeanor. In the end, the jury believed Sgt. Garvin that the repairs would cost over \$1,000 and found Defendant guilty on the felony criminal damage charge.

In preparation for sentencing, a probation officer asked the Town to substantiate its restitution claim. Town staff submitted a body-shop repair estimate. It was, however, dated January 3, 2012, sixteen months before trial. The estimate was

that repairs would cost \$719.04,<sup>1</sup> making the crime a misdemeanor and contradicting Sgt. Garvin's testimony that the damage was \$1,200. Prosecutors never disclosed the estimate.

Prosecutors admitted, once the estimate was discovered, that all along it was in their "Trial Notebook," including when Ms. Joy Riddle asked Sgt. Garvin at trial:

Q. And what was the estimated amount of damage that you submitted?

A. I had estimated the damage to be at \$1200.

Tr., May 2, 2013, p. 242.

Prosecutors had this \$719.04 estimate in their notebook when it was argued to the jury: "You heard from Sergeant Garvin ... the damage was \$1200." Tr. pp 253-4, May 7, 2013.

The State argues that this was an "inadvertent error." State's Response to Motion to Vacate, October 17, 2013, p. 3, L. 3. However, where a prosecutor elicits witness testimony on one of the elements of the crime and that witness exaggerates or misstates a critical fact known to the prosecutor and in the trial notebook, the court cannot find this inadvertent. The excuse was that this was a newly assigned prosecutor. But, there always had been some prosecutor assigned to the case. The other excuse is that there were a lot of materials to review. Disclosure is mandatory no matter how many "materials" there are. This estimate was the only evidence of one of the elements of the criminal damage charge, no matter how many "materials" the State possessed. If what happened here was a lack of diligence, then it also demonstrates a disregard for the high standards expected of attorneys who represent the State of Arizona.

"If evidence highly probative of innocence is in his file, [the prosecutor] should be presumed to recognize its significance even if he has actually overlooked it." *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963). The fact that prosecutors overlooked evidence with such compelling significance (that the offense was not a felony, but a misdemeanor) shows more than a lack of diligence. It shows indifference to basic rules of procedure and constitutional protections for a fair trial. It demonstrates also that prosecutors had little concern for the risk that Defendant would be put twice in jeopardy. *State v. Jorgenson*, ¶ 5, 198 Ariz. 390, 10 P.3d 1177 (2000).

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<sup>1</sup> The estimate \$719.04 is "crossed out" and \$700.00 written in.

## **2. The “Garvin ‘Brady List’ problem.”**

Another disclosure violation that was only revealed after trial was the discovery that Sgt. Garvin was at the time of the trial on the County Attorney’s “*Brady-List*.” See, Exhibit #6, Defendant’s Motion to Vacate. However, this was never disclosed. Just as with the repair estimate, when defense counsel discovered this disclosure violation, prosecutors then conceded that they had again violated the disclosure rules. Prosecutors say they “inadvertently failed to disclose” that Sgt. Garvin was on the “*Brady List*.” Response to Motion to Vacate, October 17, 2013, p. 2, L. 14.

This was addressed in the court’s Order vacating the convictions. But the context then was different. Then the issue was whether this disclosure would have changed the verdict. *State v. Fisher*, 141 Ariz. 227, 686 P.2d 750 (1984). But the reason why the conviction for criminal damage was vacated was primarily because of the discovery of the repair-shop estimate, not because of a “*Brady-List*” problem.

Defendant argues that this is another example of how the prosecution’s lack of diligence prejudiced him and how it shows the prosecutors’ indifference to the consequences of a retrial if their carelessness was discovered.

Sgt. Garvin’s testimony was the only evidence that Count 5 crime was a felony, that repair costs exceeded \$1,000.00. To find Defendant guilty of a felony, jurors had to believe Sgt. Garvin. By not telling the defense about the “*Brady List*,” prosecutors kept from jurors that the Payson Police Department made “... findings of dishonesty ...” regarding Sgt. Garvin, based on “...evidence that (he) was untruthful when questioned” by a law enforcement officer. Exhibit #6, Motion to Vacate, 10/4/13.

Sgt. Garvin’s credibility was the determinative issue on this count. The disclosure violation deprived defense counsel of powerful cross-examination ammunition. This violation shows more than a lack of diligence. Instead, it shows indifference to our rules and constitutional protections, a further disregard of the risk that Defendant would be put twice in jeopardy. *Jorgenson*, 198 Ariz. 390, 10 P.3d 1177.

## **3. Pre-Trial Disclosure Problems.**

Before trial, Defendant discovered other disclosure violations. He sought to have the case dismissed because written statements made by Ms. Janet Yates and Officer Lorenzo Ortiz, both State’s witnesses, were not disclosed. The motion was denied.

The Yates statement was disclosed by the State April 26, 2013, just four days before trial, even though police had it for over a year. It should have been disclosed 30 days after the August 6, 2012 arraignment. Rule 15.1. When a party violates Rule 15.6, the court may impose “any sanction it finds appropriate.” Rule 15.7(a) and *Jimenez v. Chavez*, \_\_\_ P.3d \_\_\_, 2014 WL 1603502 (App. 2014).

The Ortiz statement (dated October 30, 2011) was never disclosed although police had it for a year before trial. Defendant obtained it weeks before trial, April 18, 2013, through his district court civil litigation.

Defendant argued in his pre-trial motion that these violations demonstrated ‘bad faith,’ prejudicing him because his lawyer had to interview Ortiz and Yates without their statements.<sup>2</sup>

When the court denied the motion, it was not fully aware of all of the conduct of the State’s agents, police and prosecutors. As a result, the motion to dismiss was denied. However, the court now considers everything that happened in full context. *State v. Minnitt*, 203 Ariz. 431, 55 P.3d 774 (2002)(“The protections afforded by the due process clause do not turn on whether the state’s overreaching is apparent during trial.”)

The defense went on to use the Ortiz statement to its advantage at trial and, not coincidentally, there was an acquittal on that charge. In the context of this current motion, Defendant says that the real significance of the Officer Ortiz statement is what it shows about the State’s conduct. He says it proves that there was more here than the so-called “inadvertent” mistakes acknowledged by prosecutors. It shows, Defendant says, a deliberate strategy to ignore readily available witness statements, a “pronounced and persistent” misconduct that permeated the entire atmosphere of his trial. *See State v. Atwood*, 171 Ariz. 576, 611, 832 P.2d 593, 628 (1992).

Defendant says that the Ortiz statement put prosecutors on notice that:

- Payson Police “Use of Force” Policy #1100 required reports for any “reportable use of force” incident;
- This was a “reportable use of force” incident; *therefore*
- Officers Ortiz, Deaton and Davies prepared reports.

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<sup>2</sup> Defendant made a request on November 21, 2011, to the Payson Police Department for, among other things, “...any witness statements.”

Because prosecutors were aware of Policy #1100, they were aware that officers prepared reports in “use of force” incidents and gave them to the Chief.<sup>3</sup> To comply with their ethical obligations, all prosecutors had to do was ask the Chief for the statements.

The State has argued:

At no time was [Marc Stanley] aware that any Payson Police Officer prepared a use of force report in the case as such reports were not included in the report that was submitted for charges to the County Attorney’s office. [Marc Stanley] was not aware of such reports and **had no reason to ask if there were any such reports.**

“Affidavit” of Deputy County Attorney Marc Stanley (unsigned), attached as Appendix B, to State’s Response, filed October 17, 2013, emphasis added.

Contrary to what the State has argued, prosecutor Stanley did have good reason to ask about the “use of force reports.” This is because he reviewed an exhibit to Defendant’s Motion to Dismiss, April 26, 2013. Exhibit 4 is the “Ortiz statement,” referred to above. It was obtained by the defense before the trial. It explained Payson Police Department’s “Policy #1100”: officers involved in a use of force incident had to prepare reports and give them to the Chief, not the County Attorney.

Exhibit 4 was given to Mr. Stanley. It was addressed before the trial began. Exhibit 4 did give him reason, contrary to his statement, “to ask if there were any such [other] reports.” Mr. Stanley knew that other officers were involved in the incident; they were his witnesses at the upcoming trial. He was thus made aware, per Policy #1100,” that these witnesses were required by Town policy to prepare reports and give them to the Chief, not to the county attorney’s office.

In *Kyles v. Whitley*, the Supreme Court stated that a “prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police.” 514 U.S. 419, 437, 115 S. Ct. 1555, 131 (1995). Arizona rules require prosecutors to disclose witness statements that are in the possession of the Payson Police, an investigating agency under the prosecutor’s direction or control. Ariz. R. Crim. P. 15.1(f). The Payson Police Department is an arm of the prosecutor and, for purposes of criminal prosecution, is under their

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<sup>3</sup> Exhibit 4 states: “Do not place a copy of this report with the agency report.” Instead, the report went directly to the Chief of Police—and not with the “agency report” given to prosecutors.

control. Disclosure was required. *Carpenter v. Superior Court In and For County of Maricopa*, 176 Ariz. 486, 862 P.2d 246 (App. 1993).

Prosecutors must make reasonably diligent efforts to comply with their discovery obligations. ABA Criminal Justice Standards – Prosecution Function; Standard 3-3.11 Disclosure of Evidence by the Prosecutor. A reasonably diligent prosecutor would have asked the Payson Police for “use of force” statements given to the Chief. And even if prosecutors never bothered to ask the Chief for the statements, they are nevertheless charged with the knowledge of the police, that the three officers made use-of-force reports and they were kept separate from the “agency report.” *State v. Fowler*, 101 Ariz. 561, 563, 422 P.2d 125, 127 (1967) (“Prosecutors and the police, as public officers acting on behalf of the state, are sworn to uphold the law and are duty bound to protect the rights of the innocent as well as to prosecute the guilty. Their primary duty is not to convict, but to see that justice is done. A prosecutor who fails to reveal evidence that clearly would aid the accused’s defense would seem to have lost sight of his proper objective”).

#### **4. Discovery of Witness Statements After Trial.**

After trial, while awaiting sentencing, Defendant obtained even more undisclosed witness statements. These had been made by Payson Police Officers Deaton and Davies, and another statement by Officer Ortiz. Just as with the pre-trial discovery of the first Officer Ortiz statement, these additional statements were obtained through discovery in Defendant’s civil action. The newly discovered witness statements were Use of Force memoranda by Officers Deaton (11/1/11), Ortiz (10/31/11), and Davies (11/1/11); and Officer Deaton’s Use of Force Report (10/30/11).

The ruling granting the Motion to Vacate found that these “new” statements were not cumulative. Inconsistencies between them and the witnesses’ trial testimony involved important, disputed facts. Therefore, the failure to disclose deprived the defense of important evidence to use to discredit key witnesses’ testimony. Defendant met his burden to show that if they had been disclosed, there was a reasonable probability of a different result.

Agents of the State violated disclosure rules. Who made the decision to do this, either the prosecutors or the police, is not as important as the result, the failure to disclose. Prosecutors blame the police. But police gave the statements to their civil lawyer. Prosecutors knew Town policy required preparation of reports and that they went to the Chief. Prosecutors may not now disclaim any knowledge of the reports

on the ground that they ignored Exhibit 4. Blame lies where it belongs, on the agents of the State. Police did not “accidentally” withhold these statements from prosecutors.

With just one of the Ortiz statements, Defendant received a fair trial on the Ortiz assault charge and he was acquitted. But, on the Deaton and Davies assault charges, the trial was not fair. Police withheld their statements from prosecutors. As a result, Defendant is at risk to be put twice in jeopardy.

Failure to obtain and disclose the witness statements shows indifference to the rules of criminal procedure. Defendant has not proved that the officers’ statements were in the prosecutors’ possession and that they made the decision not to disclose them. What he has shown however, is that it was other agents of the state, the Payson police department that had the statements. They made the decision not to give them to prosecutors. Prosecutors had good reason “to ask if there were any such reports,” they just failed do so. The Town’s civil attorney, Mr. Michael Warzynski obtained the statements, presumably because he asked.

## **5. Improper Use of Plea Offers.**

Defendant argues that the State improperly “utilized the powerful tool of the plea offer” to “influence the resolution of civil claims.”

The State’s Response is that it “never entered into or discussed dismissing the criminal charges against Defendant in exchange for him dropping the civil claim against the Town of Payson.” But Defendant does not say there was an offer to dismiss charges in exchange for him dropping his claim. He makes a different argument.

Defendant’s argument, not responded to by the State, is that once he filed his A.R.S. 12-821.01 notice of claim against the Town of Payson, the State changed its plea bargain position, and withdrew a more favorable plea offer. Then, “in direct response to the Notice of Claim and specifically designed to shield the Payson Police Department from civil liability,” prosecutors offered a different agreement requiring Defendant to plead guilty to a different offense, resisting arrest. A plea to this offense, as he put it, “would have substantially hindered” his civil claim against the Town. Motion, p. 6.

Defendant’s logic is that there is a causal link between his filing a claim against the Town and the new requirement that he plead to resisting arrest, that the “design” and purpose was to “to shield the Payson Police Department from civil liability.”

The State says that it “has discretion whether or not they [sic] will offer any plea agreement...” The State is correct that it is not required to offer any plea at all. However, once the State embarks on plea negotiations, certain principles come into play. The State did not respond to the argument that there are constraints on a prosecutor’s use of the criminal justice process.

Defendant relies on *Caughlen v. Coots*, a 1993 6<sup>th</sup> Circuit case. There, the court held that an admission in a plea agreement will not be held to bar a 1983 action for unlawful arrest where it was entered into just to resolve criminal charges brought as a “bargaining chip” to either cover up wrongful conduct by the police or to induce the defendant to give up his claim. 5 F.3d 970 (6<sup>th</sup> Cir. 1993). Defendant also refers to Justice O’Connor’s comment in a concurring opinion in *Town of Newton v. Rumery*, where she cautioned against a “twisted” use of the criminal process to suppress complaints against official abuse. 480 U.S. 386, 107 S.Ct. 1187 (1987).

The State’s only response to the argument that there was a causal connection between Defendant’s making a claim against the Town, the withdrawal of one plea offer, and the requirement that he plead to resisting arrest, is to say that the “accusation was baseless.” The State does not provide the court with any reason why its first offer was withdrawn. It does not explain why it made another offer. This leaves only one plausible explanation, that the State’s plea-strategy was “designed to shield the Payson Police Department from civil liability.”

Recognized standards for the proper conduct of plea negotiations suggest that that the prosecution ought not to condition agreement to a plea bargain upon relinquishment of a civil claim unless this part of the agreement is specifically stated and approved by the court. ABA Criminal Justice Standards – Prosecution Function; Standard 3-3.9 Discretion in the Charging Decision.

The court finds that prosecutors did use the criminal justice system in an attempt to influence the resolution of Defendant’s civil claim.

#### **D. Conclusions of Law.**

1. The verdicts were vacated because of improper conduct and actions by prosecutors and the police. The cumulative effect of the undisclosed witness statements, undisclosed damage estimate, and information regarding Sgt. Garvin’s credibility all justified vacating Defendant’s convictions. *See* Order Vacating Judgment and Convictions, December 3, 2013.

2. The State's conduct was not the result of legal error, mere negligence, mistake, or insignificant impropriety. Instead, it amounts to intentional conduct which prosecutors and police knew was improper and prejudicial, a pattern of indifference to their obligation to obtain and disclose exculpatory evidence.

Police made decisions to keep statements from prosecutors which resulted in depriving Defendant of information he was entitled to receive before trial.

Explained as "inadvertent," these violations were hardly "simple prosecutorial error(s)." This was no "isolated misstatement ..." This was no "mere negligence" and it was no "insignificant impropriety."

Taken together, what happened here was an egregious disregard of important police and prosecutorial obligations.

Actions by prosecutors and police were grossly improper and violated basic principles of fundamental fairness. It was not "slight" nor was it confined to a single instance. It was pronounced and persistent.

Prosecutors and police had reason to believe the disclosure rules had not been complied with and this, under these circumstances, amounts to actual knowledge.

3. Prosecutors and police were indifferent to a significant danger that guilty verdicts could not stand making either mistrial, retrial or a reversal necessary as follows:

- a. Prosecutors failed to disclose evidence in their own trial notebook.
- b. On notice that the police had not given them all of the use-of-force statements, prosecutors did nothing to obtain and disclose the statements.
- c. Police kept the statements from prosecutors.

This indifference was a violation of the prosecutors' duty to undertake a careful study of their case and exercise diligence in its preparation. Their objective is justice. The goal of justice is hardly satisfied by less.

4. The prejudice to Defendant cannot be cured by means short of a retrial.

Defendant was prejudiced. Another trial will result in significant additional financial costs for expert witness fees and other expenses. And, Defendant has been forced to reveal and explain his trial strategy.

This prejudice cannot be cured short of dismissal.

Finally, Defendant's right to have his trial completed by the trial jury first empanelled was violated.

5. Prosecutors used the criminal justice system to influence the resolution of a civil claim.

## **E. Conclusion.**

The State is not entitled to multiple trials to convict Defendant when police and prosecutors acted in this manner. It had its chance to fairly prosecute Defendant on these charges and it is not entitled to another. *Jorgenson*, 198 Ariz. 390, 10 P.3d 1177 ¶ 13. Consequently, it is unfair to put Defendant twice in jeopardy for these same crimes.

A decision otherwise, denying the motion to dismiss, would encourage prosecutors to behave this way and ignore their obligations under rules of procedure and due process. It would invite police to keep witness statements from prosecutors. It would discourage prosecutors from looking for and asking for exculpatory evidence. It would "reward ignorance" for the court to excuse the prosecutors' decision not to ask police for their "use of force" reports. It would mean that the worst that would happen when these violations occur is another trial, giving the State another shot at a conviction. Defendant is entitled to something more than a bitter and expensive remedy when it was someone else responsible for the wrongdoing. Double jeopardy protection is aimed at exactly the type of abuses shown to have occurred here. Accordingly,

**IT IS HEREBY ORDERED** that Defendant's Motion to Dismiss the Indictment with prejudice is **GRANTED**.

**IT IS FURTHER ORDERED** that Plaintiff's Motion to Set Trial is therefore **DENIED**.

cc: MICHAEL J. HARPER WALKER & HARPER PC 111 WEST CEDAR LANE, SUITE C PAYSON AZ 85541	cc: COUNTY ATTORNEY COURT ADMINISTRATION PROBATION DEPARTMENT VICTIM ADVOCATE
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