Chuck Walker, Bar #011343
Michael J. Harper, Bar #18386
WALKER & HARPER, P.C.
111 West Cedar Lane, Ste. C
Payson, Arizona 85541
Telephone: (928) 474-0322
Attorneys for Defendant

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SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF GILA

STATE OF ARIZONA; Plaintiff, v. BRANDON LEE LEWIS; Defendant.	NO. CR2012-0336 **MOTION TO DISMISS** (Assigned to the Honorable Peter J. Cahill)

Defendant, through undersigned counsel, hereby moves the Court for the dismissal of this matter with prejudice. Having suffered a deprivation of his constitutional rights during the course of his first trial, and having been put through the extraordinary expense and emotional cost of this highly-publicized proceeding, the State should not be permitted to force Defendant through the same process again simply because it committed a series of serious constitutional violations in connection with the first proceeding. In this case the prosecutor's misconduct "so infested the trial with unfairness as to make the resulting conviction a denial of due process." *See Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1941). Repeated instances of prosecutorial misconduct have caused jeopardy to attach. For the reasons described in the following Memorandum of Points and Authorities, dismissal with prejudice is warranted because the evidence is irrevocably tainted and there has been misconduct that was both prevalent and continuous. *See State v. Young*, 149 Ariz. 580, 585, 720 P.2d 965, 970 (App. 1986).

cc: Ct Admin

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DATED: March 13, 2014.

WALKER & HARPER, P.C.

By

Michael J. Harper
Attorneys for Defendant

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

The American criminal justice system entrusts extraordinary powers to the State. Through its officers, employees and agents, the State has the power to deprive suspects of their liberty by placing them under arrest and confining them. It has the power to bring criminal charges against those accused, thereby forcing them to defend themselves at significant personal, emotional and financial expense. It has the power of the plea offer - a tool by which an accused can avoid the drastic consequences that might come with a full conviction on all charges brought.

With these great powers come great responsibility and obligation. They also bring a great potential for abuse. Inherent in our system is the proposition that, having been entrusted with such significant power by the citizens, the State must abide by the constitutional protections afforded to all those accused. Simply put, it must fully respect the rights of those subjected to its power. It must play fair.

That did not happen in this case. The Court has correctly determined that:

> "It [was] an injustice that so many important and legally relevant documents were not properly disclosed prior to trial. **The failure of due process here is clear.**"

(December 3, 2013 Ruling, p. 9.) (Emphasis added.)

The Court's December 3, 2013 ruling "[deferred] to later a decision on a dismissal of charges." (*Id.*, p. 2.) Defendant respectfully requests that the Court now address that issue and, for all the reasons already presented to the Court along with those stated below, dismiss this matter with prejudice.

II. THESE PROCEEDINGS ARE INFECTED WITH REPEATED CONSTITUTIONAL VIOLATIONS.

a. Withheld Officer Statements.

This is the second Motion to Dismiss filed by Mr. Lewis in this case. The first came immediately prior to trial after Mr. Lewis's counsel (through its own efforts) discovered an undisclosed written statement prepared by the State's primary witness -

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Officer Lorenzo Ortiz. The Court will recall that, on the evening in question, Officer Ortiz directed the take-down of Mr. Lewis, straddled Mr. Lewis on his chest, and delivered repeated strikes to Lewis's face with a closed fist and elbow. Officer Ortiz's justification for these actions was central to the determination of the case.

In connection with civil claims asserted by Mr. Lewis, counsel uncovered an undisclosed handwritten witness statement prepared by Officer Ortiz – a "Use of Force Report" prepared immediately following the incident which documented his version of the events in question. As explained the April 26, 2013 Motion to Dismiss, Officer Ortiz's statement was uncovered on April 18, 2013 – less than two weeks before trial. Though the case had been pending for a year and a half, the statement (which itself had been in existence since October 30, 2011) was not disclosed. Given the lack of production, Defendant did not have an opportunity to utilize the statement in connection with his pre-trial preparation – *i.e.*, his recorded interview of Officer Ortiz.

The State successfully defended the pretrial Motion to Dismiss by arguing that it was not aware of the Ortiz Use of Force Report prior to receiving it in connection with Defendant's Motion. Thus, there is no question that the State was aware, prior to trial, that it failed to disclose least one Use of Force Report. However, the State did nothing further to ensure full disclosure. The Town's Use of Force Policy required the preparation of a Use of Force Report by *any* officer utilizing force. As such, the Gila County Prosecutor's office should have been aware that additional materials existed. The State proceeded to trial even though another Use of Force Report (prepared by key witness Officer Deaton) and three detailed Memoranda to Chief Engler (prepared by Ortiz, Davies and Deaton), were not provided to the Defense. These documents are included in the Court's file as Exhibits 2-5 to Defendant's Motion to Vacate.

The State's behavior is particularly egregious in light of defense counsel's specific request for copies of all witness statements. In a November 21, 2011 letter to Chief Engler, undersigned counsel asked the Payson Police Chief to *preserve all evidence relating to this matter* and, further, *to forward copies of "any witness statements"*. (*See* Exhibit 1.) Of course, we now know that this did not occur. Prior to trial, the officers in question had

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prepared no fewer than five witness statements in addition to their standard reports. Defendant's Motion to Vacate, the contents of which are incorporated herein by this reference, described the importance of these documents in detail. Despite a specific request for "any witness statements", neither the Gila County Prosecutor's Office nor the Payson Police Department provided Defendant with *any* of these statements. *See* Rule 15.1, *Ariz.R.Crim.P.* (requiring production of witness statements within thirty days following arraignment). Mr. Lewis and his counsel uncovered *all* these documents through their own efforts. Absent these efforts, the documents never would have seen the light of day.

The State was well aware of its failure to fully disclose critical documents prior to trial. It did nothing to remedy this failure, and instead proceeded to trial while depriving the defense of its ability to consider multiple, highly-relevant officer statements.[1] When, after trial, Mr. Lewis secured additional undisclosed written statements, the State admitted the disclosure violation, downplayed the significance of the documents, and instead proceeded to sentencing. The Court has now concluded the failure to disclose was of constitutional proportions. The State's actions amount to prosecutorial misconduct.

b. Undisclosed Eyewitness Statement.

The Use of Force Reports and Memoranda to Chief Engler were not the only highly relevant witness statements withheld. As described in Defendant's pretrial Motion to Dismiss, the State also did not disclose the handwritten written statement of Janet Yates dated October 30, 2011. (*See* Exhibit 6 to April 26, 2013 Motion to Dismiss.) The Court will recall that Ms. Yates testified at trial for the State with respect to her recollection of the events on the evening in question. Ms. Yates's testimony was not favorable to the Defendant. The Defendant's ability to prepare for her testimony was critical, and the State knew it. During Ms. Yates's recorded interview (which occurred only days before trial), she advised defense counsel that at the request of Officer Davies she had authored a witness statement regarding the incidents in question. She stated

[1] It is notable that it was only *following* a two-week trial and conviction that the State readily admitted that mistakes were made. *See* December 3, 2013 Order, p. 1, ¶ 2.)

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that she completed the statement on the evening in question and delivered it to the Payson Police *the next day*.[2] Even though Ms. Yates was listed as a State's witness in its very first disclosure, her statement was not disclosed until the Defendant learned of its existence. Like each and every other failure to disclose by the State, this document was clearly in the State's possession and the failure to disclose it negatively impacted Defendant's ability to prepare for trial.

c. Pretrial Plea Offers.

The pretrial prosecutorial misconduct in this matter was not limited to concealed documents. It also included the manner in which the State utilized the powerful tool of the plea offer. After the case was initially filed, the State offered to allow Mr. Lewis to plead guilty to the charge of felony criminal damage (based upon the damage to the hood of Sgt. Davies' vehicle allegedly caused by Mr. Lewis). As described in the following section, *it is now clear that the State knew that this charge (and therefore the plea) was not supportable given the undisclosed damage estimate*. The offer, however, was withdrawn and replaced with a new offer *following the Defendant's tender of his notice of a civil claim to the Payson Police Department pursuant to A.R.S. § 12-821.01*. The new offer – a guilty plea to resisting arrest – was in direct response to the Notice of Claim and specifically designed to shield the Payson Police Department from civil liability. Accepting the new plea offer would have substantially hindered Mr. Lewis' civil case. As explained in a March 21, 2013 letter to the Gila County Attorney (*see* copy attached as Exhibit 2) this use of prosecutorial power was misplaced. The Gila County Attorney's office has no obligation to protect the Town of Payson from civil liability and, in fact, has equal obligations to both the Town of Payson and Mr. Lewis.

Counsel's March 21, 2013 letter further explained, with supporting authority, that the law prohibits the use of plea offers to influence the resolution of civil claims. *See Town of Newton v. Rumery*, 480 U.S. 386, 400, 107 S.Ct. 1187, 1196, 94 L.Ed.2d 405 (1987) (O'Connor, J., concurring in part and in the judgment) ("The coercive power of criminal process may be twisted to serve the end of suppressing complaints against official abuse,

[2] Undersigned counsel's letter to Chief Engler requesting copies of all witness statements was received by the Department on November 21, 2011 – only three weeks later.

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to the detriment not only of the victim of such abuse but also of society as a whole.").[3]

The Sixth Circuit's decision in *Coughlen v. Coots*, 5 F.3d 970 (6th Cir. 1993) is instructive. In *Coughlen*, an arrestee brought a § 1983 action against police officers alleging unlawful arrest, excessive force and malicious prosecution. The district court granted summary judgment in favor of the defendants based upon an agreement, executed in exchange for a dismissal of the criminal charges, that no civil charges would be pursued. In that case, the defendant officers maintained that the defendant - who suffered injuries in connection with the arrest which included a cut that required twelve stitches - was intoxicated and resisted arrest so violently that that they had to use force and chemicals to subdue him. "According to the officers, plaintiff's injuries were inflicted when he banged himself against the door and interior of the patrol car." *Id.* at 972. The Sixth Circuit Court of Appeals found that the lower court had not properly applied the standards set forth in *Rumery*, reasoning that:

The Sixth Circuit went on to say:

> "Examples of such prosecutorial misconduct would include situations where, following their use of excessive force, police officers file unfounded criminal charges as bargaining chips to cover up their own conduct or to induce the victim to give up his cause of action; or where a prosecutor, upon discovering that the victim has a meritorious civil claim, files frivolous criminal charges in order to protect the police officers."

Id. at 974.

The letter to the County Attorney brought no relief whatsoever. The State proceeded to trial, making good on its prior promise that if the last plea offer was not accepted, no future plea offers would be forthcoming.

d. Undisclosed Repair Estimate.

The Court is very familiar with the significance of the undisclosed repair estimate. The January 2011 estimate clearly fixes the cost to repair damage to the hood of the

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[3] Other courts have reaffirmed the same prohibition against the use of criminal processes to intentionally stifle civil claims. "[W]hen private parties or public officials use criminal complaints to coerce a release of civil liability from injured persons, this action, as a malicious prosecution, is egregious and qualifies as a deprivation of due process that violates the Fourteenth Amendment." *Lusby v. T.G. & Y. Stores*, 749 F.2d 1423, 1431 (10th Cir.1984), *cert. denied*, 474 U.S. 818, 106 S.Ct. 65, 88 L.Ed.2d 53 (1985).

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vehicle Mr. Lewis allegedly caused with his head (after having been struck repeatedly in the face by Officer Ortiz). The Court will recall that the State initially charged Mr. Lewis with crimes relating to the events in question in CR2011-646. The State dismissed that case in July of 2012, only to re-file the charges later that month so as to allege more serious felony violations. There is no question that the State possessed the repair estimate in the County Attorney's trial notebook, but nevertheless dismissed the existing case only to assert more serious felony charges against Mr. Lewis. *The Payson Police Department's own repair estimate did not support the felony charge for which Defendant was charged (twice), prosecuted and then convicted.* Stated differently, the Gila County Attorney's Office (1) possessed a document which demonstrated that a felony criminal damage charge was not justified, (2) charged Defendant with felony criminal damage on two occasions, (3) proceeded to trial with the document concealed in its possession, (4) elicited testimony from Sgt. Garvin which was directly inconsistent with the undisclosed estimate,[4] and (5) never acknowledged the existence of the document until after it was disclosed by the Gila County Probation Department following conviction and prior to sentencing. This intentional behavior can only be viewed as prosecutorial misconduct.

In connection with the briefing on Defendant's Motion to Vacate Judgment, the State conceded that this violation was so serious as to warrant relief: "The State does not object to the criminal damage count being designated a misdemeanor or, in the alternative being vacated." (Response to Motion to Vacate, p. 3.) The only appropriate remedy under these facts is dismissal with prejudice.

e. Failure to Disclose Sgt. Garvin's Administrative Finding of Dishonesty.

Sgt. Garvin, despite his position as "Fleet Supervisor" and despite the contents of the repair estimate obtained by the Payson Police Department, testified that the cost to repair the police cruiser was sufficient for the jury to convict Defendant of felony criminal damage. Following the trial, the Defendant through his own efforts (a reoccurring theme in this matter) discovered that Sgt. Garvin engaged in dishonest

[4] Knowing use of false testimony by the prosecution is a denial of due process and reversible error, even in the absence of a showing of prejudice. *See Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct.340, 79 L.Ed. 791 (1935).

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behavior in connection with a Payson Police Department internal investigation. This finding led the Gila County Attorneys' Office to, as a matter of policy, place Sgt. Garvin on the *Brady* list for automatic disclosure of the finding in any case in which he was a witness. Exhibit 6 to Defendant's Motion to Vacate contains the disclosure. It states:

> "The Gila County Attorney reviewed materials from the Payson Police Department which contained findings of dishonesty, a memorandum outlining the internal investigation and the findings of a personnel hearing officer. Aspects of this investigation require mandatory disclosure under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963)."

Neither Defendant Lewis nor his counsel received any such disclosure. The State's decision to withhold this information cannot be considered anything but intentional. Having made it a practice to provide this disclosure, the County Attorney's Office, for whatever reason, decided to stop disclosing it. This provides not only evidence of an intentional decision to withhold information, but a systemic decision to do so. These are hallmarks of prosecutorial misconduct.

III. LEGAL STANDARDS.

A claim of prosecutorial misconduct exists when the prosecutor's misconduct "so infested the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1941). To determine whether prosecutorial misconduct permeates the entire atmosphere of the trial, the court necessarily has to recognize the cumulative effect of the misconduct. *State v. Hughes*, 193 Ariz. 72, 79, P.2d 1184, 1191 (1988). Although "harmless error" is a defense to a claim of prosecutorial misconduct, "harmless error" exists only when the court finds beyond a reasonable doubt that it did not contribute to or affect the verdict. *See id.; see also State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993). A dismissal with prejudice for prosecutorial misconduct is warranted **when the evidence is irrevocably tainted or there has been misconduct that is prevalent or continuous**. *See State v. Young*, 149 Ariz. 580, 585, 720 P.2d 965, 970 (App. 1986). (Emphasis added.)

The State concedes the accuracy of these legal propositions. (*See* Response to Defendant's Motion to Vacate, p. 1, ll. 26-27). As such, the State concedes that the

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prosecution's suppression of evidence favorable to an accused "violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecutor". This Court has also found that such a violation occurred. See December 3, 2013 Ruling, p. 9. ("The failure of due process here is clear.")

As described at the outset, the power entrusted to law enforcement and the prosecutor's office cannot be overstated. "[T]he prosecutor is not the representative of an ordinary litigant; he is a representative of a government whose obligation to govern fairly is as important as its obligation to govern at all. The prosecutor's interest in a criminal prosecution 'is not that it shall win a case, but that justice shall be done.'" *Pool v. Superior Court*, 139 Ariz. 98, 103, 677 P.2d 261, 266 (1984) (*quoting Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935)); *see also State v. Bible*, 175 Ariz. 549, 600, 588, 858 P.2d 1152, 1203 (1993). Thus, misconduct exists when "taken as a whole, [the conduct] amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for *any* improper purpose with *indifference* to a significant resulting danger of mistrial or reversal". *Pool*, 139 Ariz. at 108-09, 677 P.2d at 271-72.

Arizona courts review claims of prosecutorial misconduct based upon the cumulative effect of the misconduct. *State v. Hughes*, 193 Ariz. 72, 79, 85, 969 P.2d 1184, 1191 (1998). This behavior can be inferred based upon the conduct of the prosecutors. *See Pool, supra*, at 109 (purposes of questions were so improper that counsel intended the behavior and did with indifference to prejudice to defendant). Thus, *indifference* to danger of a resulting mistrial or reversal will support a finding of misconduct. *Pool*, 139 Ariz. at 107, 677 P.2d at 270 (*citing State v. Kennedy*, 295 Or. 260, 666 P.2d 1316 (1983).) The same principles apply regardless of whether the case ended in a mistrial or proceeded to an infected verdict. *See State v. Jorgenson*, 198 Ariz. 390, 391-92, 10 P.3d 1177, 1178-79 (2000).

When prosecutorial misconduct exists, double jeopardy attaches and a second trial violates the double jeopardy clauses in the Arizona and United States Constitutions. When deciding when double jeopardy bars retrial, the court must distinguish between

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"simple prosecutorial error, such as an isolated misstatement or loss of temper, and misconduct that is so egregious that it raises concerns over the integrity and fundamental fairness of the trial itself." *State v. Minnitt*, 203 Ariz. 431, 438, 55 P.3d 774, 781 (2002).[5] Here, there is no question that the fundamental fairness of the trial was compromised, a finding already reached by this Court.

The protections against double jeopardy apply to protect against precisely these circumstances. Jeopardy attaches upon the selection of a jury. *See McLaughlin v. Fahringer*, 150 Ariz. 274, 277, 723 P.2d 92, 95 (1986). The defendant holds a protected interest in having the prosecution completed by the tribunal before which the proceeding is commenced – an interest which expresses a policy against multiple trials. *Pool*, 139 Ariz. at 108, 677 P.2d at 2710. The Arizona Supreme Court has described this "fundamental principle" as follows:

> "[T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

Id. at 108, *quoting Green v. United States*, 355 U.S. 184, 187-88, 78 S.Ct. 221, 223, 2 L.Ed.2d 199 (1957). When an initial prosecution ends due to conduct of the prosecution, a subsequent retrial will increase the emotional and financial burden imposed on the defendant, and may give the state an unfair opportunity to tailor its case based on what is learned the first time around. *Arizona v. Washington*, 434 U.S. 497, 503-04 & n. 14, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978). "Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial." *Id.* at 505, 98 S.Ct. 824. When prosecutorial misconduct results in a reversal,

> "the burden of another trial cannot be attributed to defendant's preference to start anew rather than to complete the trial before the original tribunal. On the contrary, the burden of retrial in such a case is attributable to the prosecution's misconduct or overreaching . . ."

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[5] A trial court's determination regarding whether prosecutorial misconduct bars retrial is reviewed for an abuse of discretion. *State v. Irani*, 200 Ariz. 383, 384, 26 P.3d 1154, 1155 (App. 2001).

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State v. Jorgenson, 198 Ariz. 390, 392, 10 P.3d 1177, 1179 (2000) (*quoting State v. Rogan*, 91 Hawai'i 405, 984 P.2d 1231, 1250 (1999)).

These legal standards combine to establish the proposition that a person should not be tried twice when the second trial is made necessary not by his own fault, but by the fault of the State. That is the case her.

IV. DIMISSAL IS THE ONLY APPROPRIATE REMEDY.

As stated above, the question of prosecutorial misconduct is evaluated based upon the cumulative impact of the behavior. When evaluating whether prosecutorial misconduct exists, the Court looks to the objective facts and, based upon those facts, may draw appropriate inferences. When the conduct is so significant that it "raises concerns over the integrity and fundamental fairness of the trial itself", jeopardy will attach and bar a second trial. After all the Defendant should not be made to endure the process of a second trial simply because the State engaged in improper conduct the first time around. This is especially true when, as in this case, the State would actually secure an advantage in the second trial by virtue of its own improper conduct.

The burdens of a second trial - financial, emotional and practical - are extraordinary under these circumstances. When evaluating whether the cumulative effect of the State's actions constitutes prosecutorial misconduct, Defendant requests that the Court bear the following in mind:

1. The State withheld witness statements prepared by *each of its eyewitnesses*. Statements of Officer Ortiz (2), Officer Davies (2), Officer Deaton (1) and Amber Jacobs (1) were not disclosed. As noted by the Court, "[t]estimony by the officers was the only evidence that established that Defendant committed crimes; there really was no "other evidence". (Order Vacating Judgment, p. 6, ¶ 3.) Nothing about the withheld evidence was even remotely collateral; all the evidence went directly to the most central disputed facts in the case. The heightened relevance of the withheld evidence should be considered when evaluating the State's misconduct and the consequences it has brought.
2. All these statements were uncovered due to the efforts of defense counsel alone.

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Absent these efforts, the State would never have met its affirmative obligation to provide these materials and the defendant would currently be suffering the consequences of a final felony conviction.

3. Counsel specifically requested all witness statements in November of 2011. At the time of trial nearly two years later, no fewer than four highly-relevant statements remained undisclosed to the Defendant but in the possession of the State.
4. Prior to trial, the State engaged in plea negotiations that were specifically directed to shield the Town of Payson from civil liability in violation - an improper use of prosecutorial power.
5. The Court will recall that the State permitted Amber Jacobs to remain in the Courtroom during opening statements and was admonished by the Court for this failure. As a result, Ms. Jacobs listened to the opening statement of Defendant's counsel, which included comments regarding her anticipated testimony.
6. The State charged Mr. Lewis with felony criminal damage twice. At the time of the charging, the State unquestionably held evidence (the undisclosed repair estimate) which demonstrated that a felony charge was not supported. It proceeded anyway. To prove its unfounded charge, the State elicited testimony from Sgt. Garvin knowing that it held evidence that the damage to the vehicle was actually less than Sgt. Garvin testified to. Prosecutors cannot make insinuations (*i.e.*, that the damage figure was more than $1,000.00) that are not supported by the evidence. *State v. Hughes*, 193 Ariz. 72, 85, 969 P.2d 1184, 1197 (1998).
7. The Gila County Attorneys' Office made a conscious decision not to disclose evidence of Sgt. Garvin's findings of administrative dishonesty, even though the office had made it a practice in the past to do so. This decision takes on an eerie significance in view of Sgt. Garvin's critical testimony regarding the unsupportable felony criminal damage charge.
8. With admitted constitutional violations, it is extraordinarily unfair to put Mr.

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Lewis to the expense of a second trial. The costs in terms of legal fees and expert expenses will be in the tens of thousands of dollars. In essence, a second trial will force the Defendant to pay for the State to have an opportunity to try the case a second time, this time (hopefully) without violating his constitutional rights.

9. The State proceeded to sentencing while *conceding that the conviction should not stand*. It did nothing to correct this admitted error. Instead, it asked that Mr. Lewis be sentenced to an extended jail term.

10. In order to obtain relief from these constitutional violations, Mr. Lewis was forced to demonstrate the materiality of the withheld evidence by explaining how it could have been utilized at trial. This places him at a distinct disadvantage at an upcoming trial and irrevocably taints the evidence. *See State v. Young*, 149 Ariz. at 585, 720 P.2d at 970 (dismissal with prejudice is warranted when evidence is irrevocably tainted). The State, having withheld evidence in violation of Defendant's constitutional rights will benefit from its impropriety by virtue of Defendant's explanation of how the evidence could be used. The value of the evidence to the defense is extraordinarily diminished under these circumstances. It is no coincidence that the only Use of Force Report disclosed prior to trial was that of Officer Ortiz, and it was the Ortiz count of aggravated assault on which the jury returned a not guilty verdict.

11. The Court has determined that "[t]he failure of due process here is clear. (December 3, 2013 Ruling, p. 9.) This is not a case, like some referenced above, where a question remains as to the impact of the improper conduct. Prosecutorial misconduct exists when the prosecutor's misconduct "so infested the trial with unfairness as to make the resulting conviction *a denial of due process*." *Donnelly*, 416 U.S. at 643. (Emphasis added.) That finding has been made.

V. CONCLUSION.

The facts outlined above present undeniable evidence of persistent misconduct in connection with the prosecution of this case. The State intentionally charged Mr. Lewis with felony criminal damage, even though it possessed evidence that disproved the

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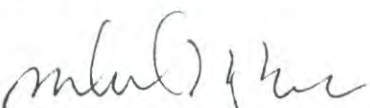
charge. It elicited testimony from Sgt. Garvin which was directly contrary to the concealed evidence in order to obtain a conviction. In connection with its decision to offer Sgt. Garvin as a witness, the State purposely deviated from prior course of conduct whereby Sgt. Garvin's administrative finding of dishonesty was disclosed as *Brady* material. The State withheld multiple, highly relevant witness statements from every one of its eyewitnesses. Had only one or two statements remained undisclosed, a different inference might be drawn. However, the fact that six witness statements were not provided to the Defendant in compliance with the requirements of *Brady* and the Arizona Rules of Civil Procedure can lead to only one conclusion - the decision to withhold information was intentional and/or made with deliberate indifference to Defendant's rights. The purpose of the misconduct was, in every instance, to make Defendant's case more difficult and prevent an acquittal. *See Pool*, 139 Ariz. at 109, 677 P.2d at 272. The fact that counsel specifically requested all this undisclosed information only a month after the incident, but obtained most of it though his own efforts following trial nearly two years later, only reinforces this conclusion.

The State has breached its trust. It has abused the significant powers our justice system places in it with misconduct and violations of constitutional rights that can only be considered "prevalent" and "continuous" over the course of this proceeding. Under the circumstances, dismissal with prejudice is the only acceptable disposition of this case.

DATED: March 13, 2014.

WALKER & HARPER, P.C.

By 

Michael J. Harper
Attorneys for Defendant

COPY of the foregoing hand-delivered this 13th day of March, 2014, to:

Honorable Peter J. Cahill
Gila County Superior Court
714 N. Beeline Hwy.
Payson, AZ 85541

Joy Riddle
Gila County Attorney's Office
714 N. Beeline Hwy.
Payson, AZ 85541

D. Marone

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EXHIBIT 1

www.walkerharper.com

Walker & Harper, PC
ATTORNEYS AT LAW

Michael J. Harper
Direct Dial
Payson (928) 474-9230
Mesa (480) 390-3093

November 21, 2011

Via fax & mail

Chief Don Engler
Officer Don Garvin
Payson Police Department
303 N. Beeline Hwy.
Payson, AZ 85541

Re: Brandon Lewis

Dear Sirs:

This office is legal counsel to Brandon Lewis and the Lewis family in connection with events surrounding Mr. Lewis' arrest on October 30, 2011. Please ensure that all evidence is preserved relating to the events of the evening, including the original video card removed from the phone belonging to Beau Grand Pre and any recordings taken by the officers or equipment installed in their vehicles. Also, please provide the results of the blood alcohol test taken that evening by the Department.

I understand that you would like to speak with my clients regarding the complaint filed with the Department regarding the officers involved. Please contact me (as opposed to my clients) to discuss that issue. Also, please forward my office a copy of the entire police report, including all supplements and any witness statements and photographs. We will, of course, be happy to pay any copying charges.

Thank you.

Sincerely,

Michael J. Harper

Payson: 111 W. Cedar Lane, Suite C, Payson, AZ 85541 Phone: 928.474.0322 Fax: 928.474.2445
Mesa: 2158 N. Gilbert Road, Building 2, Suite 112, Mesa, AZ 85203 Phone: 480.294.6553 Fax: 480.718.7728

EXHIBIT 2

Walker & Harper, PC
ATTORNEYS AT LAW

Michael J. Harper
Direct Dial
Payson (928) 474-9230
Mesa (480) 380-1562

March 21, 2013

Via fax & mail

Bradley Beauchamp
Raymond Geiser
Gila County Attorney's Office
1400 Ash Street
Globe, AZ 85001

Re: *State v. Brandon Lewis*

Dear Bradley & Ray:

I am writing to follow up on our ongoing discussions regarding this case. The purpose of this letter is to document my client's concern regarding the manner in which the case has been charged and the impact that my client's civil claims has had on charging and plea offer decisions made by the Gila County Attorney's Office.

The history of the case is important for purposes of this discussion. Mr. Lewis was initially indicted on December 1, 2011. The Complaint included the following counts:

a. Aggravated Assault – On Police Officer (Class 5 Felony)
b. Aggravated Assault – On Police Officer (Class 6 Felony)
c. Aggravated Assault – On Police Officer (Class 6 Felony)
d. Resisting Arrest (Class 6 Felony)
e. Criminal Damage (Class 6 Felony)
f. Criminal Damage (Class 2 Misdemeanor)

On December 16, 2011 – prior to my office's involvement – Mr. Lewis was presented with an plea offer which would have dismissed all remaining counts in exchange for a plea of guilty to the misdemeanor and felony criminal damage charges.

On approximately January 5, 2012, my office submitted a Notice of Claim to the Payson Police Department and the involved officers which presented my client's civil claims relating to, among other things, the use of excessive force in connection with the events in question.

On January 18, 2012, the State submitted an Amended Plea Offer which modified the prior plea to substitute a guilty plea to the felony criminal damage charge for a guilty plea to the felony count for resisting arrest. This plea offer was an unmistakable response to the Notice of Claims submitted by Mr. Lewis and constitute a deliberate effort to shield the Payson Police Department and its officers from those claims. If Mr. Lewis offered a factual basis to resisting arrest, the negative impact on his civil claims would have been obvious.

On June 7, 2012 the State took a second step to escalate its pressure upon Mr. Lewis. It moved to amend its indictment to increase the severity of its pending charges. Specifically, the State requested leave to up the level of the aggravated assault charges involving the Town of Payson officers from Class 5 and 6 felonies to Class 4 and 5 felonies. The Motion was denied. The County Attorney's Office then advised Mr. Lewis that if he did not accept the amended plea offer, it would dismiss the current case, file new charges, and offer no additional plea agreements.

Mr. Lewis did not bend to this pressure. The Gila County Attorney's Office subsequently dismissed the existing case and filed a second Indictment against Mr. Lewis on July 19, 2012 containing the following charges:

g. Aggravated Assault - On Police Officer (Class 4 Felony)
h. Aggravated Assault - On Police Officer (Class 5 Felony)
i. Aggravated Assault - On Police Officer (Class 5 Felony)
j. Resisting Arrest (Class 6 Felony)
k. Criminal Damage (Class 6 Felony)
l. Criminal Damage (Class 2 Misdemeanor)

The interviews subsequently conducted by Mr. Lewis' counsel have revealed that the officers in question admit that they struck Mr. Lewis repeatedly during the "arrest" in question with closed fists. In fact, Officer Ortiz - who is trained in the martial arts - admitted that he straddled Mr. Lewis during the course of the "arrest", sitting on Mr. Lewis' chest while Mr. Lewis laid face-up on the pavement, and delivered repeated closed fist and elbow strikes directly to Mr. Lewis' face. Mr. Lewis suffered a fractured

eye socket as a result of the strikes. While these strikes were being delivered, two other officers were in the immediate vicinity. Officer Deaton was sitting on Mr. Lewis' legs, delivering closed fists strikes of his own. Office Davies stood by while the beating continued.

As promised, the State has made no additional plea offers. It continues to pursue Mr. Lewis for the heightened charges of felony aggravated assault against a police officer, even though it is clear that Mr. Lewis – not the officers – was the victim of an assault. Not one of the officers can claim to have suffered any injury at the hands of Mr. Lewis. Officer Ortiz simply claims that he suffered scrapes to his knees while delivering the strikes to Mr. Lewis' face.

My concern is simple. The State's power with respect to the prosecution of criminal charges has been utilized in an effort to protect the involved officers from civil rights claims asserted against them individually and the Payson Police Department. The State of Arizona, through the Gila County Attorney, has equal obligations to the involved officers, the Town of Payson, *and Mr. Lewis*. The Town of Payson and its officers should not be the benefactors of special protections, especially when those protections take the form of plea offers and charging decisions designed to force a plea which will, as practical matter, make Mr. Lewis' civil claims much more difficult to pursue.

The law prohibits the use of prosecutorial powers to improperly influence action in connection with civil claims. In *Town of Newton v. Rumery*, 480 U.S. 386, 107 S.Ct. 1187, 94 L.Ed.2d 405 (1987), the plaintiff had signed an agreement dismissing charges of witness tampering against him in connection with the indictment of a friend for sexual assault of the witness. In return, the agreement provided that plaintiff would not file a §1983 action against the town or any of its officials for his arrest. The United States Supreme Court rejected the argument that all such agreements are inherently coercive. However, the decision plainly warned that prosecutorial powers cannot be used to coerce releases of civil liability. "The coercive power of criminal process may be twisted to serve the end of suppressing complaints against official abuse, to the detriment not only of the victim of such abuse but also of society as a whole." *Id.* at 400, 107 S.Ct. at 1196 (O'Connor, J., concurring in part and in the judgment) *See also id.* at 394, 107 S.Ct. at 1193 (plurality opinion) ("We can agree that in some cases there may be a substantial basis for [the] concern [that trumped-up criminal charges will be used against criminal defendants making civil rights claims against police].")

The Sixth Circuit Court of Appeals addressed the same issue in *Coughlen v. Coots*, 5 F.3d 970 (6th Cir. 1993). In *Coughlen*, an arrestee brought a § 1983 action against police officers alleging unlawful arrest, excessive force and malicious prosecution. The district court granted summary judgment in favor of the defendants based upon an agreement, executed in exchange for a dismissal of the criminal charges, that no civil charges would be pursued. In that case, the defendant officers maintained that the defendant – who suffered injuries in connection with the arrest which included a cut that required twelve stitches – was intoxicated and resisted arrest so violently that that they had to use force and chemicals to subdue him. "According to the officers, plaintiff's injuries were inflicted when he banged himself against the door and interior of the patrol car." *Id.* at 972. The Sixth Circuit Court of Appeals found that the lower court had not properly applied the standards set forth in *Rumery*, reasoning that:

> "Permitting such releases may tempt public officials to bring frivolous criminal charges in order to deter meritorious civil complaints. The risk and expense of a criminal trial can easily intimidate even an innocent person whose civil and constitutional rights have been violated. The coercive power of criminal process may be twisted to serve the end of suppressing complaints against official abuse, to the detriment not only of the victim of such abuse, but also of society as a whole."

Id. at 973.

The Sixth Circuit went on to say:

> "Examples of such prosecutorial misconduct would include situations where, following their use of excessive force, police officers file unfounded criminal charges as bargaining chips to cover up their own conduct or to induce the victim to give up his cause of action; or where a prosecutor, upon discovering that the victim has a meritorious civil claim, files frivolous criminal charges in order to protect the police officers."

Id. at 974.

Other courts have reaffirmed the same prohibition against the use of criminal processes to intentionally stifle civil claims. "[W]hen private parties or public officials use criminal complaints to coerce a release of civil liability from injured persons, this

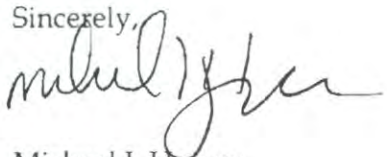
action, as a malicious prosecution, is egregious and qualifies as a deprivation of due process that violates the Fourteenth Amendment." *Lusby v. T.G. & Y. Stores*, 749 F.2d 1423, 1431 (10th Cir.1984), *cert. denied*, 474 U.S. 818, 106 S.Ct. 65, 88 L.Ed.2d 53 (1985).

Arizona has followed suit. The Arizona Court of Appeals has held that "[a] criminal defendant's constitutional right to due process protects him from prosecutorial decisions that are 'motivated by a desire to punish him for doing something that the law plainly allowed him to do.' " *State v. Mieg*, 225 Ariz. 445, 447, 239 P.3d 1258, 1260 (App.2010) (quoting *United States v. Goodwin*, 457 U.S. 368, 384, 102 S.Ct. 2485, 73 L.Ed.2d 74 (1982)). Due process prevents a prosecutor from punishing a defendant who exercises protected rights by subsequently subjecting that defendant to more severe charges. *Mieg*, 225 Ariz. at 447, 239 P.3d at 1260. That is precisely what happened in this case. The Gila County Attorney Office's posture towards the case changed markedly after Mr. Lewis submitted his Notice of Claims. In truth, the Notice of Claims should have had no effect whatsoever on the manner in which the case was pursued. However, it did. Mr. Lewis' due process rights were violated in the process.

Again, the purpose of this letter is to memorialize the concerns that I have verbally stated to the Gila County Attorney's Office regarding this case. If you dispute anything that I have stated above, please provide the basis for that position.

Thank you.

Sincerely,



Michael J. Harper