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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of:

Petition to Amend Rules 10.2, 15.1,
16.6 of the Arizona Rules of Criminal
Procedure

Supreme Court No. R-17 _____

Pursuant to Rule 28 of the Rules of the Arizona Supreme Court, the Arizona Attorneys for Criminal Justice respectfully petition this Court to adopt the attached proposed amendment to Rules 10.2, 15.1, and 16.6 of the Rules of Criminal Procedure. The text of the proposed amendment is set out in the accompanying Appendix A.

The power to dismiss a case and refile charges is one uniquely held by the government. A defendant cannot dismiss and refile charges; a defendant is only permitted to move to dismiss a case if the indictment is insufficient. The prosecution, on the other hand, can dismiss a case for good cause.

This ability to dismiss and reindict creates a tremendous disparity between the government and the defendant. In practice, the dismiss-and-refile process has been used to permit the state to engage in judicial shopping and even restart the deadline for notices of intent to seek the death penalty. But the defendant is left with no coordinating power—she cannot refile charges against herself to shop for a more beneficial court or start a deadline anew.

This proposal simply seeks to level the playing field; to ensure that the government does not have the authority to change the rules of the game. If adopted, the state would merely be forbidden from unilaterally using its power to dismiss and refile cases in order to notice a previously appointed judge or restart the deadline to file a notice of intent to seek death.

I. The Current Case Law permits the state to circumvent various unfavorable rulings by dismissing and refiling charges.

This court has recognized that the state’s dismissal and refiling of a case begins a separate matter:

When a case is dismissed without prejudice, the state’s filing of a new indictment generally begins a separate matter. *See Godoy v. Hantman*, 205 Ariz. 104, 105 ¶ 1, 106 ¶ 8, 67 P.3d 700, 701–02 (2003); *State v. Rose*, 121 Ariz. 131, 137, 589 P.2d 5, 11 (1978). Time limits under the rules begin anew for the separate matter “absent a showing of bad faith on the part of the prosecution or prejudice to the accused.” *Rose*, 121 Ariz. at 137, 589 P.2d at 11 (restarting speedy trial time limits); *see also Godoy*, 205 Ariz. at 106 ¶ 7, 67 P.3d at 702 (restarting change-of-judge time limits).
Mesa v. Granville, ___ P.3d. ___, 2016 WL 7387134, at ¶2 (2016).

In *Godoy*, a case was ordered remanded by the court, and dismissed when a new indictment was not filed in a timely fashion. The state then brought a new cause of action, and additionally filed a notice of change of judge pursuant to Rule 10.2 . *Godoy*, 205 Ariz. 104, ¶¶3-4. The state had not filed a previous change of judge against this judicial officer, and it is clear that without the new indictment, such a notice would have been untimely. *Id.* at ¶6. Although this case was ordered dismissed by the court, rather than moved for dismissal by the state, the court in *Godoy* placed no proscription on strategic dismissals in order to generate a new case number and thus a new deadline.

In two trial-level cases at the Maricopa County Superior Court—*State v. Mena-Cobian*, Maricopa County Superior Court No. CR 2008-007780-001, and *State v. Martinson*, Maricopa County Superior Court No. CR 2004-124662-001—prosecutors notably dismissed and refiled their cause numbers to generate new deadlines and to circumvent substantive rulings of the court.

In *State v. Mena-Cobian*, after the court repeatedly ordered the state to present exculpatory evidence to the grand jury, the state dismissed the case and refiled under a new cause number, then attempted to use this new cause number to file a notice against the trial judge. The court denied the state’s Notice of Change of Judge under Rule 10.2 as untimely, but the issue was moot as the case had been administratively reassigned. *State v. Mena-Cobian*, CR2008-007780-001, ME

dated October 7, 2008 (Appendix B). The new trial court found that the state had engaged in repeated misconduct and ordered the case dismissed without prejudice.

<http://archive.azcentral.com/news/arizona/articles/20131027wintory-prosecutor-conduct-day-2.html>

In *Martinson*, the state dismissed and re-filed an eight-year-old indictment in a frustrated effort to remove the defense counsel and the trial judge. The trial court held:

Following a conviction at trial, the Defendant successfully obtained a mistrial based on other grounds. The Prosecutors responded by engaging in even more obvious misconduct. What has become clear is that the prosecutors viewed Defense counsels' vigorous representation as a roadblock to conviction. They similarly viewed this Court's rulings about the uncharged intentional-murder theory as a roadblock. Accordingly, the Prosecutors relentlessly sought to remove defense counsel and the assigned judicial officer specifically to avoid the risk of acquittal during any retrial. The Court views this post-trial misconduct as part of the totality of the circumstances that support the Court's findings of prosecutorial misconduct and bad faith.

State v. Martinson, CR 2004-124662-001, ME dated 11/19/2013, page 5 (Appendix B). The court detailed its factual and legal findings on this subject in pages 20-25 of the same Minute Entry.

The Arizona Court of Appeals overturned the court's dismissal of the case, predicated on its theory that the court had made an inappropriate legal ruling. It only briefly addressed the state's post-trial misconduct in a footnote, stating:

The superior court found additional instances of prosecutorial misconduct. As we discuss *infra*, though, the primary impetus for its

dismissal with prejudice order was the purported violation of *Styers* and the *Styers*-based ruling. Most of the post-trial conduct the court categorized as misconduct stems from its conclusion that prosecutors viewed the “rulings about the uncharged intentional-murder theory as a roadblock” and “used every opportunity to challenge the Court’s *Styers* ruling and present evidence of intent to kill.”

State v. Martinson, 241 Ariz. 93, ¶ 14 fn.3, 384 P.3d 307, ¶ 14 fn.3 (App. 2016).

This case is pending a petition for review to the Arizona Supreme Court. Even if the Court does not find that the state’s conduct rose to a level warranting the dismissal with prejudice of a murder case, the conduct is still undesirable conduct and should be avoided.

II. The defense has no corresponding power and ability to dismiss and refile a case in order to gain a tactical advantage.

Under Rule 16.6 (a), the state may move to dismiss a case for good cause. However, under Rule 16.6 (b), the defense may move to dismiss only under a theory that the charging document is insufficient. Generally, courts have held that a new indictment is sufficient to constitute good cause. Of course, the defense has no ability to re-charge a case to generate a new cause number.

In fact, the defense has not even been able to use its limited ability in a corresponding fashion. In *Woodington v. Browning*, the defendant attempted to use a second 10.2 notice after his case had been remanded and then reindicted. 240 Ariz. 289, ¶ 10, 378 P.3d 731, 734 (App. 2016), *review denied* (Nov. 15, 2016). The trial court held, and the Court of Appeals affirmed, that the reason that Mr.

Woodington was not entitled to a new 10.2 notice is that *Godoy* only applied to a “new criminal case,” a case with a new cause number. *Id.* Of course, Mr. Woodington never had the ability to generate a new cause number for his case, while this is a power well within the state’s ability.

In *Mesa v. Granville*, the state dismissed and refiled a new cause number in order to create a new case, and thus a new deadline to file a notice of intent to seek the death penalty, over a year after its initial deadline had expired. *Mesa v. Granville*, ___ P.3d. ___, ¶ 12, 2016 WL 7387134, ¶ 12 (2016). This court held that while the state had done this, they had not acted in bad faith because they had done so after learning new information in the course of their investigation. *Id.* This new indictment necessarily required a continuance of the trial date in order to ensure that Mr. Mesa’s defense team had adequate time to prepare. *Id.* at ¶ 6. Certainly, if Mr. Mesa’s defense team had asked for more time to prepare his case, and had that request denied, they could not have generated their own continuance by dismissing and refiled the indictment. The power of the generation of a new cause number only vests in the state.

The result of this decision is a tremendous burden on the defense community to assign capital-qualified counsel to all murder cases. Rules 6.8(b)(1)(iii) and (c)(4) provide that attorneys being appointed to represent a defendant at trial, on appeal, or at post-conviction proceedings be “familiar with and guided by the

performance standards in the 2003 American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.” Rule 6.3’s comment references the Guidelines, as does Rule 6.8’s comment, calling it “a compendium of best practices for representation in capital cases.”

The American Bar Association’s Guidelines for Capital Representation require that a capital-qualified team be appointed as long as the state is legally qualified to seek the death penalty. Guidelines 1.1 and 10.2. Guideline 1.1 indicates the guidelines apply “from the moment the client is taken into custody and extend to all stages of every case in which the jurisdiction may be entitled to seek the death penalty.” Guideline 1.1. The comment to Guideline 1.1 notes that this language was a deliberate choice and a departure from the previous edition, which made the Guidelines applicable to cases where the death penalty was sought. The intention was to ensure that the defense team treat the case as a capital case even though the prosecutor has not yet decided to seek the death penalty. *See* Comment, Guideline 1.1, pg. 921.

Guideline 10.2 details: “Counsel should provide high quality legal representation in accordance with these Guidelines for so long as the jurisdiction is legally entitled to seek the death penalty.” The comment to Guideline 10.2 details “early investigation to determine weaknesses in the State’s case and uncover mitigating evidence is a necessity, and should not be put off in the hope that the

death penalty will not be requested, or that the request will be dropped at a later point.” Comment, Guideline 10.2, pg. 994. Thus, even before the state has officially filed a notice of intent to seek the death penalty, capital representation is vital.

Finally, counsel must continue to treat the case as capital “until the imposition of death is no longer a legal possibility.” *Id.* In light of this Court’s ruling in *Mesa*, even when the government has not timely filed a notice of intent to seek death, death is still a legal possibility. The dismiss-and-refile process gives prosecutors the ability to restart the clock on death notices, and the burden is not inherently high. Rather, this Court’s conclusion in *Mesa* placed the burden upon the defense to argue that refiling was in bad faith. Given this burden, death really only becomes legally impossible once the jury has been sworn.

Moreover, prosecutors regularly engage in ongoing investigation into a case and often learn new information. This everyday occurrence is precisely what the state claimed justified the refile in *Mesa*. And because ongoing investigation is not a form of bad faith, the burden upon a defendant will be incredibly weighty.

Because the state can now develop its case and at any time decide that it wishes to file a death penalty notice, the Court’s ruling will place an enormous strain on defense and court resources.

III. To preserve equity, the state should also be barred from using this ability for such a purpose.

One side should not have a windfall of strategic benefit. Barring such Constitutional and logical differences such as the presumption of innocence and burden of proof, it is not good practice to create procedural powers that permit the state to have such lopsided control over the course of a case. Thus, the state should not have the unique power to generate continuances, new notice of death deadlines, or new judicial strikes when the defense and the courts are left impotent and at the will of the state. Moreover, the court should not be limited to preventing such inequity only upon findings of bad faith. For these reasons, it is respectfully requested that the Court amend Rules 10.2, 15.1, and 16.6 as proposed in the Appendix.

Dated this 10th day of January, 2017.

AMY KALMAN

By /s/ Amy Kalman

Amy Kalman

MIKEL STEINFELD

By /s/ Mikel Steinfeld

Mikel Steinfeld

Arizona Attorneys for Criminal Justice

Electronic copy filed with the
Clerk of the Supreme Court of
Arizona this 10th day of January,
2017.

By: Amy Kalman

APPENDIX A

Proposed Rules Changes

(Proposed deletions are shown with ~~striketrough~~, new language is shown with underscoring)

Arizona Rules of Criminal Procedure

Rule 10.2

- (a) Entitlement. In any criminal case, each side is entitled as a matter of right to a change of judge. Each case, whether single or consolidated, shall be treated as having only two sides; except that whenever two or more parties on a side have adverse or hostile interests, the presiding judge or that judge's designee may allow additional changes of judge as a matter of right. Notwithstanding the foregoing provision, the right to a change of judge by right shall be inapplicable to cases refiled under a subsequent indictment, Rule 32 petitions for post-conviction relief, or remands for resentencing.
- (b) No change
- (c) No change
- (d) No change

Rule 15.1

- (a) No change
- (b) No change
- (c) No change
- (d) No change
- (e) No change
- (f) No change
- (g) No change
- (h) No change
- (i) Additional Disclosure in Capital Case.
- (1) The prosecutor, no later than 60 days after the arraignment in superior court, shall provide to the defendant notice of whether the prosecutor intends to seek the death penalty. This period may be extended up to 60 days upon written stipulation of counsel filed with the court. Once the stipulation is approved by the court, the case shall be considered a capital case for all administrative purposes including, but not limited to, scheduling, appointment of counsel under Rule 6.8, and assignment of a mitigation specialist. Additional extensions may be granted upon

stipulation of the parties and approval of the court. The prosecutor shall confer with the victim prior to agreeing to an extension of the 60 day deadline or any additional extensions, if the victim has requested notice pursuant to A.R.S. Section 13-4405. If a notice of intent to seek the death penalty is not timely made, as provided in this section, the prosecutor may not request the death penalty in this case or any subsequent case or filing involving the same incident and defendant.

(2) No change

(3) No change

(j) No change

Rule 16.6

(a) On Prosecutor's Motion. The court, on motion of the prosecutor showing good cause therefor, may order that a prosecution be dismissed at any time upon finding that the purpose of the dismissal is not to avoid the provisions of Rule 8, to generate a new judicial notice under Rule 10.2, to generate a new death notice deadline under Rule 15.1(i)(1), or to circumvent substantive rulings that are the law of the case.

(b) No change

(c) No change

(d) Dismissal of a prosecution shall be without prejudice to commencement of another prosecution, unless the court order finds that the interests of justice require that the dismissal be without prejudice. The dismissal and refile of a prosecution does not, however, generate a new change of judge by right under Rule 10.2 or deadline to file a notice of intent to seek the death penalty under Rule 15.1(i)(1).

Appendix B
Minute Entries

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2007-165928-001 DT
CR2008-007780-001 DT

10/07/2008

HONORABLE TIMOTHY J. RYAN

CLERK OF THE COURT
B. Navarro
Deputy

STATE OF ARIZONA

ERIC BASTA

v.

JONATHON MENA-COBIAN (001)

JOHN CANBY

DISPOSITION CLERK-CSC
JUDGE FOSTER
JUDGE LARRY GRANT
PRETRIAL SERVICES AGENCY-CCC
VICTIM SERVICES DIV-CA-CCC

MINUTE ENTRY (COMPLEX CASE)

9:31 a.m. This is the time set for an Evidentiary Hearing regarding State's Motion to Dismiss CR 2007-165928-001-DT.

State's Attorney:	Eric Basta
Defendant's Attorney:	John Canby
Defendant:	Present
Court Reporter:	Rochelle Dobbins

Defendant advises the Court that he no longer objects to his matter proceedings under CR 2008-007780-001-DT.

Discussion/oral argument is held regarding the bond previously set.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2007-165928-001 DT
CR2008-007780-001 DT

10/07/2008

IT IS ORDERED denying the State's Notice of Change of Judge under Rule 10.2. The Court does not find compliance with Rule 10.2(b)(3). However, since, the issue is moot, that would affirm Judge Grant's prior rulings at the time the Notice was filed.

Discussion is held regarding the issue of bond.

IT IS FURTHER ORDERED granting the State's Motion to Dismiss CR 2007-165928-001-DT only, without prejudice. **This matter shall proceed under CR 2008-007780-001-DT, which is assigned to Judge Foster.**

IT IS FURTHER ORDERED affirming the Trial Management Conference set for November 12, 2008 before Judge Foster.

IT IS FURTHER ORDERED affirming prior release orders, at this time.

9:51 a.m. Matter concludes.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

NOV 20 2013 8:00AM

CR2004-124662-001 SE

11/19/2013

HON. SALLY SCHNEIDER DUNCAN

CLERK OF THE COURT
C. Castro
Deputy

STATE OF ARIZONA

FRANKIE LYNN GRIMSMAN
STEPHANIE DANICA LOW
COLLEEN CLASE

v.

JEFFREY RICHARD MARTINSON (001)

MICHAEL TERRIBILE
TREASURE L VANDREUMEL

CAPITAL CASE MANAGER
COURT ADMIN-CRIMINAL-CCC
DISPOSITION CLERK-CSC
VICTIM WITNESS DIV-AG-CCC

MINUTE ENTRY

Pending before the Court are two motions: (1) "Defendant's Motion to Dismiss: Prosecutorial Misconduct/Double Jeopardy" filed February 1, 2013; and (2) "State's Motion To Dismiss."¹ There are numerous motions *in limine* pending.

On October 3, 2013, the Court heard oral argument and took the matter under advisement. The Court has reviewed the briefs and the entire file. The Court will: (1) grant "Defendant's Motion to Dismiss: Prosecutorial Misconduct/Double Jeopardy," filed February 1, 2013; and deny "State's Motion to Dismiss." The remaining motions will be denied as moot.

¹ On November 20, 2013, the Court of Appeals granted relief from this Court's decision denying the Motion to Dismiss (filed September 27, 2013) *Memorandum Decision*, 1-CA-SA 12-0217 (November 20, 2012) ("Memorandum Decision"), pp. 8-12. The Court of Appeals found that the State demonstrated good cause to dismiss under Rule 16.1 of the *Arizona Rules of Criminal Procedure*. *Id.* The Court of Appeals expressly observed that it did "not reach the issue of whether good cause would have been lacking if the trial court had determined that the State attempted to dismiss the 2004 Indictment in bad faith or to avoid the speedy trial provisions of Rule 8." *Memorandum Decision* at p. 12. The parties have now fully briefed this issue and it is ready for ruling.

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MARICOPA COUNTY

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A. Prosecutorial Misconduct and Rule 16: The Legal Standard

The Defendant alleges that the Prosecutors engaged in misconduct and acted vindictively and/or in bad faith. These are all terms of art which may be conflated at times but form independent and sometimes related bases for relief.

The due process clauses of the United States Constitution and Arizona Constitution ensure that defendants receive a fair trial. Where a prosecutor's conduct operates to defeat that fairness, a trial court must impose sanctions. U.S. Const., Amend. V; Ariz. Const. Art. 2, § 10. Moreover, where that conduct violates the double jeopardy clause, dismissal with prejudice may be warranted. *Pool v. Superior Court*, 677 P.2d 261, 272-73 (Ariz. S.Ct. 1984).

Prosecutorial misconduct is a broad concept. For example, misconduct arises when the prosecutor knows her actions are improper and prejudicial and not the result of legal error, negligence, mistake or insignificant impropriety. *Id.* Further, actionable misconduct occurs if a prosecutor knows her "conduct is improper and prejudicial and either intends or is *indifferent to [the danger] of resulting mistrial or reversal.*" *See id.*; *State v. Jorgenson*, 10 P.3d 1177, 1178 (Ariz. S. Ct. 2000) (emphasis in the original). *See Pool* at 272 (noting that a prosecutor's indifference to her duty to see that all defendants receive a fair trial is sufficient for relief). This is especially true where the indifference is pervasive and the stakes are high. (*See Furman v. Georgia*, 408 U.S. 238 (1972) and *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (noting that "death is different").²

"Prosecutorial vindictiveness" is a type of prosecutorial misconduct with a precise and limited meaning. *United States v. Meyer*, 810 F.2d 1242, 1245 (D.C. Cir. 1987). Vindictive prosecution arises in a "situation in which the government acts against a defendant in response to the defendant's prior exercise of constitutional or statutory rights" and more commonly attaches to a prosecutor's charging decision. *See generally Id.*; *see also United States v. LaDeau*, ___ F.3d ___, 2013 WL 5878214 (6th Cir.) (October 3, 2013) ("[p]rosecutorial discretion is restrained by the Due Process Clause which prohibits the prosecution from punishing a defendant from exercising a protected statutory or constitutional right.") *LaDeau* at p.3.

² Only after the Prosecutors, through improper means, convicted the Defendant of first degree murder, only after a mistrial was granted on other grounds, and only after the Prosecutors re-indicted the Defendant adding new and more charges, *see discussion infra*, did the Prosecutors withdraw the notice of death. This withdrawal could be viewed as a tactic used by the Prosecutors to draw attention away from their misconduct. By reducing the stakes, their conduct might appear less blameworthy.

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Arizona courts have held that there are two ways in which a defendant can demonstrate prosecutorial vindictiveness. “First, a defendant may show *actual* vindictiveness, i.e., he ‘may prove through objective evidence that a prosecutor acted in order to punish him for standing on his legal rights.’” *See State v. Mieg*, 239 P.2d 1258, 1260 (Ariz. Ct. App. 2010) (emphasis in original). “Second, because [the prosecutor’s] motives are complex and difficult to prove, [] a defendant may rely on a presumption of vindictiveness, if the circumstances establish a realistic likelihood of vindictiveness.” *Id.* at 1261 (citation omitted). Once a defendant makes a *prima facie* showing that a charging decision is more likely than not attributable to vindictiveness, the burden shifts to the prosecutor to overcome the presumption “by objective evidence justifying the prosecutor’s action.”³ *Id.*

The Rule 16 issue on remand implicates these concepts. More specifically, Rule 16.6(a) of the *Arizona Rules of Criminal Procedure* provides that a court may dismiss a prosecution only upon motion of the prosecutor showing good cause and a finding that the purpose of the dismissal is not to avoid Rule 8 (Speedy Trial rights).⁴ Here, the Prosecutors seek dismissal of the prosecution for the specific purpose of re-indicting the Defendant.

The Court acknowledges that the State has broad discretion in making charging decisions. Often, prosecutors make “their initial charging decisions prior to gaining full knowledge or appreciation of the facts involved in a given case. In addition, officials often make charging decisions before analyzing thoroughly a case’s legal complexities.” *Meyer*, 810 F.2d at 1247. However, when the State moves to dismiss an indictment following a mistrial (after the defendant has exercised a constitutionally protected right), the Court will scrutinize the decision more closely. Indeed, the good cause standard under Rule 16 requires the Court to examine whether the State has acted in bad faith or vindictively. Stated another way, the good-cause requirement “implicitly requires that the motion to dismiss not be made in ‘bad faith.’” *Memorandum Decision* at p. 9.

The timing of a charging decision is a “significant factor” in the Court’s consideration. *Mieg*, 239 P.3d at 1261. It is not surprising therefore, that a State’s motion to dismiss made after a trial “is much more likely to be improperly motivated than is a pretrial decision. This is so because the ‘institutional bias inherent in the judicial system against the retrial of issues that have

³ “Because ‘a certain amount of punitive intent . . . is inherent in any prosecution,’ a claim of vindictive prosecution presents ‘the delicate task of distinguishing between the acceptable ‘vindictive’ desire to punish [a defendant] for any criminal acts, and ‘vindictiveness’ which violates due process.” *Mieg*, 239 P.3d at 1261 (citation omitted).

⁴ Rule 8 of the *Arizona Rules of Criminal Procedure*, in turn, provides, in relevant part:

New Trial. A trial ordered after mistrial or upon the motion for a new trial shall commence within 60 days of the entry of the order of Court.

Ariz. R. Crim. Proc. 8.2(c) (2013).

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already been decided,' gives the prosecutor and the court a stake in avoiding 'to do over what it thought it had already done correctly.'" *Id.* (citations omitted).

To be clear, in this case the alleged misconduct and bad faith involve allegations of pre-trial acts, trial acts, post-trial acts and charging decisions and, therefore, does not fit neatly within any specific paradigm. The Court finds that the best approach is to examine the totality of circumstances in order to determine the prosecutor's intent and/or bad faith. *Accord Mieg*, 239 P3d at 1262 (citing *Blackledge v. Perry*, 411 U.S. 21 (1974); *United States v. Goodwin*, 457 U.S. 268 (1982); *Alabama v. Smith*, 490 U.S. 794 (1989)).

This Court will "measure" what the Prosecutors knew or intended by objective factors which include: (1) the situation which the Prosecutors found themselves in; (2) evidence of their actual knowledge and intent; (3) any other factors which may give rise to an appropriate inference or conclusion; and (4) the Prosecutors' own explanations of their "knowledge" and "intent" and the extent that such explanation can be credible in light of the minimum requirements expected of all lawyers. *Pool*, 677 P.2d at 272, n. 9.

Under this broad approach, the Court benefits from hindsight. Thus, the Court's failure to sustain objections and/or overrule defense motions during or directly after trial is irrelevant. *See State v. Minnitt*, 55 P.3d 774, 782 (Ariz. S. Ct. 2002) ("The protections afforded by the due process clause do not turn on whether the state's overreaching is apparent during trial.")

The Court finds that the Prosecutors in this case intentionally and willfully engaged in misconduct. Further, the Court finds that the Prosecutors violated Rule 16 by acting in bad faith.

B. Prosecutorial Misconduct and Rule 16: The Facts

1. Overview

The Court finds that the Prosecutors committed misconduct by purposefully pursuing an alternate theory of culpability for which the defendant had not been charged. As more fully described in this ruling, the Prosecutors charged the defendant with felony murder but also sought to convict him of intentional murder, an uncharged theory. This conduct violates the Defendant's Federal and State Constitutional rights. *See State v. Martin*, 679 P.2d 489 (Ariz. Sup. Ct. 1984).

The *Martin* Court explained:

Few constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is accused. *Dunn v. United States*, 442 U.S. 100, 106, 99 S. Ct. 2190,

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2194, 60 L.Ed.2d 743 (1979). The Arizona Constitution sets out certain rights of the accused in criminal prosecutions. Consistent with these guarantees, Ariz. Rule of Crim. Proc. 13.2(a) states that an indictment ‘shall be a plain, concise statement of the facts sufficiently definite to inform the defendant of the offense charged.’

...
These rules seek to give substance to the constitutional guarantees that an accused stand trial with clear notice of the crime with which he is charged.

Martin, 679 P.2d at 494 (footnote omitted citing to Ariz. Const., art. 2 §§24 & 30).⁵ This type of misconduct is not susceptible to a harmless error analysis. *Martin*, 679 P.2d at 472 (Where “the jury returned a verdict of guilty after the prosecution had argued a theory of guilt based on acts not charged. It is inconceivable that such an error could be harmless.”). Moreover, it is impossible to know upon what charge the jury convicted the Defendant. *Id.* Finally, this misconduct violates a defendant’s constitutional right to a unanimous verdict. *See* Ariz. Const. art. II, § 23.

Furthermore, the Prosecutors repeatedly violated this Court’s orders to stop pursuing an uncharged intentional-murder theory of prosecution. When viewing the totality of circumstances, the Court finds that during trial the Prosecutors engaged in a pattern and practice of misconduct designed to secure a conviction without regard to the likelihood of reversal.

Following a conviction at trial, the Defendant successfully obtained a mistrial based on other grounds. The Prosecutors responded by engaging in even more obvious misconduct. What has become clear is that the Prosecutors viewed Defense counsels’ vigorous representation as a roadblock to conviction. They similarly viewed this Court’s rulings about the uncharged intentional-murder theory as a roadblock. Accordingly, the Prosecutors relentlessly sought to remove defense counsel and the assigned judicial officer specifically to avoid the risk of acquittal during any retrial. The Court views this post-trial misconduct as part of the totality of the circumstances that support the Court’s findings of prosecutorial misconduct and bad faith.

⁵ The *Martin* Court’s citation to *Dunn* underscores the Federal Due Process rights implicated. (“[i]t is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made.”) *Dunn*, 442 U.S at 107 (citing *Cole v. Arkansas*, 333 U.S. 196, 201 (1948)).

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Additionally, the State moved to dismiss an 8-year-old Indictment (“2004 Indictment”) in order to pursue new charges (“2012 Indictment”). Their motion followed the Defendant’s exercise of his constitutionally protected right to challenge the first trial based on juror misconduct. Because the first trial was infected with prosecutorial misconduct, the Court finds that the State sought to profit from the misconduct in seeking the 2012 Indictment and, in so doing, acted in bad faith.

2. More Specific Fact Findings

A totality of circumstances analysis requires that the Court objectively examine the relevant facts to determine whether the Prosecutors engaged in misconduct and/or acted in bad faith. In this case, an exhaustive analysis of the facts and sequence of events substantiates the Courts findings. Those more specific findings are:

- On September 8, 2004, the State sought and the grand jury returned an indictment charging the Defendant with one count of first degree murder. The State also charged one count of child abuse.
- The State alleged that Defendant unlawfully killed his five-year-old son during the course of a felony, specifically, child abuse.
- The State charged felony murder and sought the death penalty.
- Under Arizona law, a person commits child abuse if he *intends to injure* the child under circumstances likely to produce death or serious physical injury. *See* Ariz. Rev. Stat. Ann. §13-3623(A)(1) (emphasis added); *see also State v. Payne*, 306 P.3d 17 (Ariz. S. Ct. 2013); *State v. Styers*, 865 P.2d 765 (Ariz. Sup. Ct. 1993); *see also State v. Milke*, 865 P.2d 779 (Ariz. S. Ct. 1993).
- Notably, intent to kill is not an element of the statute. *Styers, Milke*. The Prosecutors repeatedly advised this Court that the State not did charge first degree murder with an intent-to-kill theory and advised the Court that it had no evidence to support that theory. *See, e.g.,* RT 8/9/11, 17:13-18.
- By charging the Defendant with felony murder--with child abuse as a predicate--Arizona law necessarily precluded the State from offering evidence of intent to kill and/or arguing that the Defendant intended to kill the victim. *See State v. Styers; see also State v. Milke*.

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- The State's charging decision foreclosed the possibility of the Defendant asking for and/or the jury finding any "lesser-included" offenses on the first-degree-murder charge.
- The State filed its first notice of intent to seek the death penalty on October 22, 2004, and notice of aggravating circumstances.
- On December 29, 2005, the State filed an amended notice of its intent to seek the death penalty and notice of aggravating factors.
- In both instances, among other aggravators, the State alleged that the murder was committed in an especially heinous, cruel or depraved manner pursuant to Ariz. Rev. Stat. Ann. § 13-703(F)(6) ("F(6) Aggravating Factor"). This aggravator, if found, requires the jury to make factual findings consistent with the charge of felony murder relying on child abuse as the predicate. Indeed, the State alleged that the death penalty was appropriate due to the senselessness of the murder or the helplessness of the victim.⁶ Under this aggravator, a murder "is senseless only if it is unrelated to the defendant's goal." *State v. Carlson*, 488 P.3d 1130 (Ariz. S. Ct. 2002). Thus, by alleging senselessness as an aggravator, the State acknowledged its understanding of Arizona law, that is, a defendant's *intent to kill* cannot not form the basis for a felony-murder charge that relies on child abuse as the predicate.
- Further underscoring the State's knowledge and understating of *Styers*, *Milke* and *Carlson*, the State requested aggravation-phase jury instructions citing these cases.
- Pretrial proceedings spanned the course of the next 7 years. During that lengthy period, defense attorneys changed, judicial officers changed, but the lead Prosecutor remained the same.⁷
- On March 11, 2009, the case was assigned to this judicial officer.

⁶ The Court notes that these two factors alone cannot meet the F(6) standard. The State must also provide evidence of a special relationship between the defendant and the victim. *State v. Styers*, 865 P.2d 765 (Ariz. S. Ct. 1993).

⁷ The lead prosecutor attended the Victim's autopsy. The Court's does not intend to imply that a prosecutor should not attend an autopsy or that the Prosecutor's presence was somehow inappropriate. Rather, the Court is looking at all objective facts that bear upon the Prosecutor's intent.

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- With an October 5, 2009 trial date looming, the State filed its 404(b) notice. Without explanation, the State sought to introduce evidence to support an improper theory: intent to kill. See "State's Notice of Intent to Use Defendant's Other Crimes, Wrongs or Acts, Pursuant to Rule 404(b), Arizona Rules of Evidence" (June 5, 2009). The State failed to cite or distinguish *Styers* in the Notice, a case of which it was plainly aware.
- Unfortunately, the impact of this important change went unnoticed by then-assigned defense counsel and this newly assigned judge. The State clearly exploited the constantly shifting landscape of defense counsel and judicial officers. While the Court and defense counsel are presumed to know the law, their oversight does not excuse the State's advancement of this impermissible theory, especially when the record demonstrates the State's knowledge of the law. Even after the Court ordered briefing on the admissibility of the 404(b) evidence following the evidentiary hearing, the Prosecutors persisted in their efforts to exploit this oversight by continuing to advance the improper intent-to-kill theory without citing or distinguishing *Styers*.
- By December 2010, the Court had appointed current defense counsel to represent the Defendant.
- On July 28, 2011, the legal problems created by the State championing inconsistent and untenable legal theories crystalized for the Court. With jury selection underway, before jeopardy attached, the Court held an oral argument on the propriety of the F(6) Aggravating Factor. During the hearing, the State properly cited *Styers* to support its position, that senselessness was a consistent aggravator for a felony murder charge with child abuse as it predicate. The problem was that the State was improperly pursuing the inconsistent theory of intent-to-kill, as reflected in the 404(b) notice and memoranda. Alarmed about the inconsistency, the Court pressed the Prosecutors about the State's theories. Referring to the State's prosecution theory, the Court observed:

And, I'm still not clear what the argument's going to be. You're arguing both, that he intended to kill the child and/or [the death] was inflicted as an unintended consequence? I--I still am trying to figure out what horse the State is riding.

RT 7/28/11, 10:8-15.

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- With Court's concern now heightened, the following day (and still before jeopardy attached) the Court called an impromptu conference to discuss the State's theory of prosecution. The Court expressly pointed out that the State had inconsistent theories. Defense counsel supported the Court in its effort to ferret out the State's theory of prosecution.
- Despite having cited and argued *Styers* repeatedly, the Prosecutors deliberately evaded the Court's inquiry. The lead Prosecutor stated she needed a lot of time to research the issue. Evaluating the circumstances objectively, it is now clear that the Prosecutors feigned confusion and concealed their actual knowledge of the law.
- What did the State have to gain by this strategy? The Court has concluded that presenting evidence of the impermissible theory of intent to kill a child victim was simply too tempting for the State. The Prosecutors wanted to incite the passion of jurors. The State's tactic created the risk that: (1) the jury would convict the defendant on an uncharged theory; and (2) the jury would return a non-unanimous verdict. The State sought to "win-by-any means" by advancing an intent-to-kill theory. *See State v. Jorgenson*, 10 P.3d at 1178.
- On August 1, 2011, the Court again directed the Prosecutors to review *Styers* and *Milke* and again they refused to clarify the State's position. Plainly, the Prosecutors continued to advance the impermissible theory even after the Court placed them on notice. It is unimaginable that seasoned prosecutors, who previously cited *Styers et. al.* correctly, can be objectively viewed as innocently confusing the law and its application to the case.
- Trial began and jeopardy attached on August 8, 2011.
- Defense counsel urged the Court to require the State to steer clear of an intentional murder theory. The Court agreed. Nonetheless, the State (employing the Court's metaphor) refused to ride the horse it picked—felony murder with child abuse as the predicate. *See, e.g.*, RT 8/8/11, 5:17-6:16; 7:10-8:15.
- On August 9, 2011, during opening statements, the State marshaled facts in a manner designed to draw the inference of intent-to-kill rather than intent-to-injure. The defense moved for a mistrial. RT: 8/9/11, 49:10-20. The Court improvidently denied the motion.

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- Before denying the motion, the Court found itself wrestling with the State again over the meaning of *Styers*.
- The Court's frustration is apparent from the record. The Court emphasized that creating an inference of an intentional killing was prejudicial. The Court warned the Prosecutors that it would not tolerate "a pattern and practice of using that type of evidence" to create an improper "atmosphere in the courtroom." That "cloud," noted the Court, would allow the jury to convict the Defendant on the basis of the uncharged theory of intent to kill. See RT: 8/9/11, 53:13-54:9.
- During this colloquy, the lead Prosecutor finally articulated the State's contrived interpretation of *Styers*. The State posited that *Styers* permitted an intentional murder theory and only precluded a premeditation theory. The lead Prosecutor asserted:

Now, the difference is we can't say that up until the moment when he decided to commit the intentional child abuse, he thought this out, he planned it, that it occurred to him beforehand, so we cannot charge him with premeditated murder, and we've never represented this case as premeditated murder. RT: 8/9/11, 17:13-18.⁸

- Thus, only after jurors were seated and trial was underway did the Prosecutors' obfuscation end. It bears emphasizing that these experienced Prosecutors' revelation about how to apply *Styers* came 7 years after presenting the case to the grand jury, 7 years after filing the State's notice of aggravating circumstances, 5 years after filing the State's first requested aggravation phase jury instructions and only after having been pressed by the Court to declare the State's theory of prosecution. This was no accident.
- The Court immediately rejected the State's position: "[I]ntent to kill is not a theory [upon] which the State can operate in this trial." RT 8/9/11, 40:4-7.

⁸ The State argued that it could present evidence of intent-to-kill when the State alleges that a defendant's acts toward the victim--at some point--convert from an intent-to-injure to an intent-to-kill but without premeditation. The Court stated that "there is no spectrum here. You lost that opportunity when you didn't charge premeditated murder." The Court's use of the term "spectrum" was an effort to characterize the State's argument. Notably, the *Styers* Court analogized child abuse to assault and rejected the State's position. *Styers*, 865 P.2d at 771.

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- The Court could not have been clearer:
So, I'm now warning the State. This is a warning to the State, okay?
...
You may disagree with my reading of [the] *Styers Milke* decision and line of cases, but that's how I read them.
...
So, you're warned. That's my warning to you. Proceed knowing where I think the line is. The line is the italics in the *Styers* decision.
See RT 8/9/11, 53:13-54:9,55:5-12.
- In fact, the Court read portions of *Styers* on the record. RT 8/9/11:20: 4-21:22.
- Thus, if there came a time to stop advancing the impermissible theory, August 9, 2011, establishes a bright line. By then, the State's win-by-any-means strategy should have stopped.
- Undeterred, the Prosecutors used every opportunity to challenge the Court's *Styers* ruling and present evidence of intent to kill.
- What is now apparent from the record is that the Prosecutors were attempting to "avoid an acquittal, prejudice the jury, and obtain a conviction with indifference to the danger of mistrial or reversal." *Minnitt*, 55 P.3d at 781 (*citing Pool*, 677 P.2d at 272).
- Rather than accepting the *Styers* evidentiary limitation, ("[I]ntent to kill is not a theory [upon] which the State can operate in this trial."), RT 8/9/11, 40:4-7), the Prosecutors violated the Court's ruling on *Styers*. The Prosecutors wanted to secure a conviction without regard to whether the jury convicted based on an intent to kill or felony murder.
- The record is replete with examples of the Prosecutors' efforts to circumvent the Court's *Styers* ruling, including but not limited to:

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- On August 25-26, 2011, the Prosecutors introduced a lengthy videotape of Defendant's interrogation that, in hindsight, had no place in this trial. *See* "Defendant's Motion to Dismiss: Prosecutorial Misconduct/Double Jeopardy," p.10 (filed February 1, 2013). The interrogation was laden with innuendo and questions designed to provoke the Defendant's admission that he intended to kill the victim. For example, the detective asked:
 - ❖ "did you do this because you hate him?";
 - ❖ "is this something you planned out?";
 - ❖ "so, you don't have any remorse for killing your son at all?"; "why did you kill your son?";
 - ❖ "did you do this because you hated him?";
 - ❖ "is this something you planned out?";
 - ❖ "Why did you kill your little boy Jeffrey? Why did you kill him?";
 - ❖ "Jeffrey, you killed him and you know it."

While an isolated comment may be viewed as relevant when considering whether the Defendant intended to injure the victim, the sequence and context of these questions reveals that the Prosecutors' only purpose was to raise an inference of intent to kill.

- The State introduced plastic garbage bags found in the laundry room and the Defendant's bedroom. Forensic analysis of hair and DNA found in the bags did not connect the victim to the evidence. Nonetheless, the State asked questions for the sole purpose of having the jury draw the improper inference that the Defendant intentionally asphyxiated the victim with garbage bags. This evidence is particularly susceptible to retrospective analysis for the simple reason that that the Court could only appreciate in hindsight the implication of all of the evidence taken together.
- Having succeeded in introducing the garbage-bag evidence, the State next attempted to bolster its intent-to-kill theory with evidence that the victim had a small abrasion on his inner lip. The medical examiner, Dr. Hu, became the vehicle through which the Prosecutors continued to advance the intent-to-kill theory.

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➤ The abrasion, according to the State, supported its theory that the Defendant suffocated the victim. On September 13, 2011, the Court held an evidentiary hearing outside the presence of the jury. The Court ruled that the evidence was inadmissible because: (1) Dr. Hu conceded that he lacked the proper foundation to opine that smothering or suffocation was the cause of death; and (2) the evidence violated the Court's earlier ruling on *Styers*.

➤ At that hearing, the Prosecutors heard the following colloquy between defense counsel and Dr. Hu:

Q: Now, when someone is smothered to death, the blocking of the air supply must last longer than a period of unconsciousness; am I right?

A. That's correct.

...

Q. When all is said and done, you don't have quite enough information to conclude that the cause of death was smother or – cause of death was smother or suffocation; you just can't eliminate it?

A. That's correct.

...

Q. And that's the importance of the picture of the lip and the garbage bag?

A. Yes.

See RT 9/13/11, 87:25-89:1.

➤ The following day, purportedly testifying about foundation, Dr. Hu testified that he reviewed a law enforcement report that mentioned that "the decedent may have been overdosed or suffocated by his father in the homicide attempt." RT 9/14/11, 16:15-20. This line of questioning, coyly disguised as foundational evidence, was intended to draw an inference of intent to kill. It had no other purpose.

➤ Not available on consecutive days, Dr. Hu resumed his testimony on September 20, 2011. At that time he testified that the cause of the death was "acute carisoprodol toxicity." RT 9/20/11, 10:12-13.

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Notwithstanding the Court's earlier ruling that the evidence was inadmissible under *Styers* and notwithstanding Dr. Hu's own admission that he lacked the foundation to testify that asphyxiation or suffocation was the cause of death, the Prosecutors elicited the following testimony:

Q: Were there any on other pathological diagnoses that you couldn't rule out as being a component?

A: Asphyxia due to smothering or suffocation, I cannot rule these two out.

Q: And what about that and what couldn't—what indications did you have that you couldn't rule that out?

A: The presence of abrasion on inner surface of upper lip and suspicious circumstance.

Q: Explain to me why you can't rule out a component of asphyxiation or smothering when you've got a drug, a possible drug overdose situation?

...

Q: Are the findings the findings--how are the findings for a drug overdose similar to what you might see if there was a component of asphyxia or suffocation?

...

RT 9/20/11, 10:23-11:18.

- The Prosecutors knew exactly what they were doing. The Court had established a clear line not to cross with respect to the Medical Examiner's testimony. The Prosecutors, yet again, crossed that line. Piece by piece, they relentlessly introduced evidence of intent to kill.

- When the lead detective testified, the Prosecutors elicited testimony about text messages that the Defendant exchanged with a former girlfriend that read "we'll miss you." The detective testified about her interview of the former girlfriend. The Prosecutor elicited testimony from the detective about the girlfriend's interpretation of the text. RT 9/15/11, 32:124. Notably, the Court had expressly precluded any testimony by the girlfriend regarding the Defendant's intent. See "Defendant's Motion in Limine to Preclude Introduction of Improper Testimony and Argument," pp.6-9 (filed 5/27/11); *Minute Entry*, (6/15/11). The Court also precluded the detective from testifying regarding the Defendant's intent. *Id.* The

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only purpose for this evidence was to present more evidence of intent to kill.

- The detective, who sat with Prosecutors at counsel table throughout trial, knew or should have known of the limitations the Court placed on the evidence. She too employed a win-by-any-means strategy, working in concert with the Prosecutors. On direct examination:

Q: At that point in time [at the scene], did you already have an opinion on what was going on in the inside of that house.

A: I kind of suspected what might have occurred.

RT. 9/15/11, 14:13-16. The detective's opinion testimony was not only suggestive, but it was irrelevant. Moreover, the testimony prompted an unpredictable and totally improper outburst on cross examination. Based on the testimony about the detective's suspicions, defense counsel asked the detective whether these suspicions precipitated her failure to process the scene more carefully. Rather than answering "yes" or "no," as called for by the question, the detective advanced the Prosecution's agenda:

Q: In fact, you made up your mind before the report came back for carisprodol. You've told us that already.

A: **Yes, I had decided he had been murdered.**

RT: 9/30/11, 90:23-91:2 (emphasis added.)

- When the Defendant called an expert witness, Dr. Cunningham, to testify about sudden trauma's impact on memory as well as suicidal ideation arising from a parent's loss of a child, the Prosecutors again shifted the focus on intent to kill. The Defendant testified that his child drowned in the bathtub and he responded by attempting suicide. The Prosecutors asked the doctor about intentional "murder" theories involving the attempted suicide. *See R.T. 9/28/13, 112:23-117:24.*
- When the defense introduced evidence of its grief expert, Dr. Wortman, the Prosecution attempted to elicit testimony that Dr. Wortman was currently writing a book about *murdered children*:

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Q: Now, I think you mentioned on direct you don't usually do these type[s] of cases, but you happened to be writing a book about murdered children?

A: Oh, no. I'm not writing a book about murdered children. I'm writing about traumatic bereavement, and it is designed to help therapists focus in and do a better job than they may do now in treating somebody who has experienced sudden traumatic loss.

...

Q: Now, I want to talk to grief response. I think you mentioned that there are various factors that will impact on the level of somebody's grief response, if I understand that correctly?

A: Yes.

Q: Okay. In kind of broad categories, its family relationships, whether there was an only child, whether there was a young child, what kind of investment there's been in that child and *whether the child was murdered* as opposed to died from a long illness?

...

Q: Okay. And there are no studies regarding grief response in a murder suicide or murder attempted suicide situation?

A: There are studies on those, but not on grief response.

Q: And that's what I'm asking specifically, because you're talking about grief response, so there are no studies regarding grief response as it relates to the murder suicide or murder attempted suicide question.

A: I don't believe so.

RT: 10/19/11, 88:15-22; 10/19/11, 96:5-14; *see also* 10/19/11, 104:24-105:8 (emphasis added).

The State was fully aware that the only relevant grief response to "murder" would have been to felony murder. A proper inquiry would have focused on the Defendant's grief response to an *intent-to-injure* the victim under circumstances likely to cause serious physical injury or death---not the Defendant's *intent to kill* the victim. Indeed, during a pretrial interview the prosecutor explained the difference between felony murder and intentional murder to Dr. Wortman. Yet, in front of the jury, the Prosecutors were sure to leave out that critical distinction. This omission left the jury with the impression that Dr. Wortman's answers referred to intentional murder thereby encouraging the jury to view intent to kill as a proper basis upon which to convict the Defendant. This

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sequence of questions prompted another admonition from the Court. *See* RT: 10/19/11, 106:7-18.

- On November 3, 2011, Counsel presented their closing arguments to the jury. The State focused on motive draped in intent to kill imagery, which allowed the jury to convict based on an uncharged theory.
- While the arguments could also support a felony-murder conviction, the Prosecutor deliberately left the jury with the impression that it could convict on the additional theory of intent to kill. Even though the Prosecutors repeatedly argued that they were adhering to the Court's *Styers* ruling, they painted a dual image for the jury. The Court is reminded of the famous perceptual illusion of the "Young Girl-Old Woman," from an anonymous German postcard where the observer can see two equally clear but different images.⁹



- The Court finds that the Prosecutors planned the dual imagery.
- Prosecutors may undertake their best efforts to obtain a conviction, however, they may only do so lawfully.¹⁰
- As the Arizona Supreme Court has observed: "It is the prosecutor's duty to refrain from improper methods calculated to produce a wrongful conviction just as it is his duty to use all proper methods to bring about a just conviction." *See Pool v. Superior Court*, 677 P.2d at 266 (quoting, in part, *Berger v. United States*, 295 U.S. 78, 88 (1935)). The *Pool* Court further observed:

Our system represents a rule of law based upon the principle that officers of the law are bound by and must act within the law, even

⁹ See <http://mathworld.wolfram.com/YoungGirl-OldWomanIllusion.html> (1888).

¹⁰ Prosecutors have special ethical responsibilities to ensure that an accused receives a fair trial. *See generally Rules of the Supreme Court of Arizona*, 42 (E.R. 3.8) (2013).

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though the necessity of so doing may put them at a disadvantage in dealing with criminals or those accused of crime. Any other system is a step which will inevitably lead us, as it has led others, to a society where the worst criminals are often those who govern and administer law. Thus, to paraphrase the words of Justice Sutherland, the 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." Thus, "while he may strike hard blows, he is not at liberty to strike foul ones."

Id.

- The cumulative effect of the Prosecutors' misconduct became apparent immediately after the jury started deliberating on guilt. The jury foreperson sent a note to the Court:

I have a juror who is refusing to focus on the charges as presented instead wants to focus on premeditation and murder 1. We're not doing that right?

See Docket, CR 20004-124662-001 (11/9/2011).

- Although the Court answered the question "no", the juror's confusion persisted even *after* deliberations began for the aggravation phase of the Trial. The Court received another juror note:

The instructions state we can change our opinion if we believe it is wrong. Does this apply to our previous decision on count 1, First Degree Murder?

See Docket, CR 20004-124662-001 (11/28/11). Plainly, the jury was attempting to retreat from its guilt finding. Clearly, the jury could not shake the optical illusion created by the Prosecutors' misconduct.

- After the jury found the presence of aggravators, the penalty phase began and the perceptual dual imagery persisted. By now, the Prosecutors knew there were jurors who believed that intent to kill was a proper theory to consider. Like the

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Court and the Defendant, the Prosecutors saw the jury's notes. Undaunted, the Prosecutors' continued to pursue a death sentence using the same improper tactic they previously employed. During penalty-phase closing arguments, the Prosecutors argued facts supporting the intent-to-kill theory:

Prosecutor: What does it mean to you as juror that *a biological father takes the life of his own son? Not in a shaking in a moment of rage, in a blow to the abdomen, as the defense described, [but rather] with the administration of drug that by all evidence was up in a medicine cabinet.* You, as jurors, must evaluate that.

See RT 12/19/11, 87:24-88:5 (emphasis added). What conceivable purpose, other than implying intent to kill, could the Prosecutors have desired through this argument? There is no proper purpose.

- The case proceeded through the penalty phase and the jury hung, 10-2 for life. Thereafter, the Court declared a mistrial on the penalty phase of the proceedings.
- On November 22, 2011, the Defendant moved for a mistrial on all phases of the trial. The Defendant alleged, among other things, that a juror lied during *voir dire* in order to secure a seat on the jury and then, as foreperson, improperly affected the outcome of the proceedings.
- The Court held an evidentiary hearing on Defendant's motion for a mistrial on all trial phases based on Juror misconduct.¹¹
- On March 28, 2012, the Court granted the Defendants' motion.¹²
- The evidentiary hearing on juror misconduct had the unintended consequence of exposing that the Prosecutors had convinced at least some jurors that the Defendant intended to kill the victim. At that hearing, some jurors testified they had voted to convict the Defendant based on an intent-to-kill theory, including at least one juror who convicted based on premeditation. The fact the Prosecutors succeeded in convincing jurors to convict the Defendant based on an intent-to-kill theory demonstrates the very prejudice warned of in *Martin, supra*. Moreover, the evidentiary hearing exposed the lack

¹² The Court, *sua sponte*, added a second ground for the mistrial based on the scope of the medical examiner's testimony. See *State v. Sosnowicz*, 270 P.3d 917 (Ariz. Ct. App. 2012).

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of unanimity of the verdict, a risk intentionally created by the Prosecutors' disregard for the Court's rulings.

- On April 12, 2012, the Court had set a new trial date for July 16, 2012, which was continued until October 1, 2012.
- The events following the Court declaring a mistrial based on juror misconduct are inextricably intertwined with the totality of circumstances analysis that objectively establishes that the Prosecutors engaged in intentional misconduct. These events also have a direct bearing on whether the Court finds the State acted in bad faith under Rule 16.6 of the *Arizona Rules of Criminal Procedure* when it moved to dismiss the 2004 Indictment, the subject of the appellate remand. These events include:
 - On April 12, 2012, the Court ordered the parties to participate in a mandatory settlement conference and to attempt to reach settlement in good faith.
 - On April 27, 2012, the parties failed to reach settlement. Defense counsel immediately sent the Prosecutors a letter discussing settlement terms. Foreshadowing what was to follow, the Defense counsel also warned the Prosecutors that they should not attempt to remove defense counsel. Defense counsel also filed a "Motion of Determination of Bad Faith Participation for Settlement and for Sanctions" heard by the Criminal Presiding Judge. On May 8, 2012, the Criminal Presiding Judge denied that motion. While the Criminal Presiding Judge denied the Motion to seal both the letter and that motion, it appears that that the Motion was sealed.
 - On May 10, 2012, the Court held a status conference and affirmed the trial date of July 16, 2012.
 - On June 5, 2012, the Prosecutors returned to the Grand Jury and obtained the 2012 Indictment for: (1) First Degree Premeditated and/or Felony Murder; and (2) two counts of child abuse which require mandatory consecutive sentences to be served day for day. *See* Indictment, CR 2012-007335-001 (June 5, 2012) ("2012 Indictment.") *See* Ariz. Rev. Stat. Ann. § 13-705(M) (2013).
 - On June 7, 2012, the Lead Prosecutor appeared at the Defendant's initial appearance on the 2012 Indictment and allowed the Court Commissioner

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to assign a new judge in violation of the Local Rules of the Maricopa County Superior Court, R.4.1(d) (“[a]ll cases pertaining to the same defendant shall be assigned to one division whenever possible”) and assign new attorneys in violation of Defendant’s constitutional rights.

- On June 7, 2012, the same prosecutors appeared before the Court at a scheduled status conference in the 2004 case and advised the Court that she had just attended the Defendant’s initial appearance. She further advised that: (1) a new judge had been assigned to the 2012 case; (2) new defense attorneys had been appointed; and (3) the 2004 case had been dismissed.
- At that same hearing, the Lead Prosecutor announced that the Commissioner had appointed the Legal Defender’s Office. The Lead Prosecutor knew that the Legal Defender’s Office had previously been conflicted off the case and was not eligible to serve as counsel for the Defendant. As a seasoned prosecutor, she also knew that a new indictment should not disrupt the attorney-client relationship that already existed, yet she chose to say nothing to the Initial Appearance Commissioner. When the Court raised the conflict with the Prosecutors, the Lead Prosecutor revealed that her strategy included removing the assigned judicial officer. She wanted to have all matters regarding the appointment of counsel referred to the Presiding Criminal Judge, prompting the following colloquy:

The Lead Prosecutor:

Well, as it stands right now, Your Honor, the IA Court has appointed the Legal Defenders’ Office. She was aware there was a pending case, but under the circumstances did not know if it would go to the assigned attorneys. A million dollar cash bond was set.

...

I assume that what we would do next is go before the presiding criminal so that he could make all those decisions.

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The Court: Well, I don't I don't know that it requires that it go before the presiding criminal. I think I'd be making those decisions in terms of determination of counsel. At present, it's still my case . . .

Lead Prosecutor: I would respectfully request the Court make--

The Court: Okay.

Lead Prosecutor: --presiding make those decisions, because I don't want overstep.

The Court: I can take care of those issues, but is the 2004 case dismissed?

Lead Prosecutor: It is, your honor.

The Court: Okay, so this matter is dismissed, okay.
...

RT 6/7/12, 4:25-6:10-11.

- The Court vacated the 2004 trial date based on the Prosecutor's representations. The Court accepted the statements made by the Prosecutor assuming that the Prosecutor had somehow involved another judicial officer (the Presiding Criminal Judge or Associate Criminal Judge) in the dismissal of the case.
- The Court did not *initiate* the dismissal nor would it have done so absent the misrepresentation. To suggest otherwise strains all credibility. Indeed, the Court would not have granted an oral motion on an issue of this magnitude without briefing and without making findings under Rule 16.6 of the *Arizona Rules of Criminal Procedure*. The Court would have been far more deliberative about dismissing a long-standing capital prosecution on the eve of a second trial. In addition, defense counsel most assuredly would have reacted differently if they thought the State was orally moving to dismiss the case rather than announcing its dismissal.

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- Furthermore, the June 7, 2012 transcript does not reflect the Prosecutor's inflection and tone of voice when she announced that the case had been dismissed. The Prosecutor did not move for dismissal of the 2004 case. Rather, she announced its dismissal as a *fait accompli*. To suggest otherwise tortures the facts and distorts reality.
- After the hearing, the Court examined the docket and found no evidence of the dismissal represented by the Lead Prosecutor. Believing that the docket did not reflect the events that had occurred just hours earlier,¹³ and relying on the Lead Prosecutor's representations, the Court included the dismissal in the June 7, 2012 Minute Entry.
- The Court finds that the Lead Prosecutor intentionally and falsely misrepresented that the case had been dismissed to avoid: (i) providing a good-cause basis for dismissal; (ii) addressing the Defendant's objections; (iii) moving forward with the impending trial, which was just weeks away; and (iv) questioning by the Court regarding the basis for dismissal.
- On June 26, 2012, the Court explained its understanding of the June 7th discussion and reinstated the case. Incredibly, the Prosecutor immediately challenged the Court's veracity and orally moved for recusal.¹⁴ The Prosecutor accused the Court of misrepresenting the record. The Court denied the oral motion.
- Having reinstated the 2004 case, the Court set both cases for trial on October 1, 2012.
- The Prosecutors then embarked upon an aggressive and systematic effort to remove the Court and defense counsel:

¹³ For reasons unknown to this Court, the Clerk did not file the Initial Appearance Packet until September 19, 2012, more than three months later. See "IAD-Initial Appearance Document" (filed September 19, 2012).

¹⁴The Lead Prosecutor was not present for the June 26, 2012 hearing but both assigned Prosecutors attended the June 7, 2012 hearing.

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Chart of Attempts to Remove the Court and Counsel

Date	Attempts to Remove the Court	Attempts to Remove Counsel	Comments
June 26, 2012	State's Oral Motion for Court to Recuse itself (2004 and 2012 cases)		Denied by Court, June 26, 2012
July 24, 2012	State's Notice of Change Case under Rule 10.2(a) (2012 case)		Denied by Criminal Presiding Judge on July 25, 2012
July 24, 2012		State's Motion to Determine Counsel in 2012 case	Denied by Criminal Presiding Judge on September 18 2012 after State withdraws motion
July 24, 2012	State's Request for Court to Recuse Itself		Denied by Court on July 31, 2012
August 3, 2012	State's Motion to Reconsider State's Notice of Change of Judge under Rule 10.2(a) (2012 case)		Denied by Criminal Presiding Judge on August 6, 2012
September 4, 2012	State's Request to Remove Judge Duncan in 2012 case for Cause under Rule 10.1 (2004 case)		Denied by Criminal Presiding Judge on September 6, 2012

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September 4, 2012	State's Request to Remove Judge Duncan in 2012 case for Cause under Rule 10.1 (2012 case)		Denied by Criminal Presiding Judge on September 12, 2012
September 13, 2012	State's Notice of Change in 2012 Case under Rule 10.2(a)		State withdraws Notice after questioning by Criminal Presiding Judge on September 18, 2012

➤ As demonstrated above, the Prosecutors baselessly sought to remove the Court 7 times and to remove defense counsel.

- On August 6, 2012, the State finally filed a written motion to dismiss the 2004 Indictment.
- On September 10, 2012, Defendant moved to dismiss the 2012 Indictment.
- On September 19, 2012, the Court granted the Defendant's Motion to Dismiss the 2012 Indictment.¹⁵ The State withdrew its Motion to Dismiss the 2004 Indictment.
- The Court affirmed the October 1 trial date and ordered jury selection to commence on October 2, 2012.
- On September 27, 2012, the State renewed its motion to dismiss the 2004 Indictment.
- On October 1, 2012, the Court denied the State's motion to dismiss the 2004 Indictment and found that the prosecutor had not shown good cause pursuant to Rule 16.6(a). The State appealed and the Court of Appeals remanded for further findings on whether the State acted in bad faith in seeking to dismiss the 2004 Indictment.

¹⁵ The State did not appeal this ruling.
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C. Conclusions of Law and Remedy

The Court finds that the Prosecutors engaged in misconduct and acted in bad faith. From the outset, the Prosecutors deliberately attempted to secure a conviction based on an uncharged theory. They persistently violated this Court's *Styers* ruling and secured a conviction relying on a win-by-any-means strategy. Furthermore, they escalated their misconduct by attacking the Defendant for exercising his constitutionally protected right to seek a mistrial and compounded their misbehavior by groundlessly attacking the Court and defense counsel.

The Prosecutors' securing of the 2012 Indictment bolsters the Court's finding of misconduct. The Court can now see the lengths to which the Prosecutors went to avoid the possibility of acquittal. Frustrated by the Court's *Styers* ruling and by defense counsel's spirited representation, the Prosecutors attempted to wipe the slate clean. They incorrectly believed that new charges would lead to the assignment of a new judge and the appointment of new counsel. The delay occasioned by their misconduct has extended the proceedings an additional 13 months, leaving the Defendant with no valid conviction and in custody for more than 9 years.

The State relies heavily on *Mieg* as a basis for having sought the 2012 Indictment. The Court acknowledges that prosecutors may evaluate their cases following mistrial. *See Mieg; see also LaDeau*. With good cause, prosecutors may seek additional charges, add parties and increase penalties in a new indictment. However, the Prosecutors' reliance on *Mieg* is misplaced because *Mieg* bears no resemblance to this case. *Mieg* involved a pre-verdict mistrial based on an unanticipated court ruling. This case involves prosecutorial misconduct and vindictive prosecution, the combination of which occurred during pretrial proceedings, trial and post-trial proceedings.¹⁶

¹⁶ Specifically, in *Mieg* the defendant was charged with one count of possession of dangerous drugs. As trial commenced, the judge precluded evidence that the defendant had possessed a scale. The trial judge granted a mistrial after a prosecution witness violated that ruling.

Following the mistrial, the prosecutor obtained a new indictment charging the defendant with not only possession of dangerous drugs but also possession of drug paraphernalia, the scale. After undertaking a "totality of the circumstances" analysis, the *Mieg* court reversed the trial court's dismissal of the second indictment.

The *Mieg* court noted that "the trial ended before a verdict was reached" and "the State was not required 'to do over what it thought it had done correctly.'" *Mieg*, 239 P.3d at 1262. Second, the timing of the trial court's evidentiary ruling "prevented the State from reassessing its original charging decision before proceeding to trial." *Id.* "Third, and perhaps more importantly, the State is permitted to respond to an adverse evidentiary ruling by changing strategy in an effort to strengthen its case when doing so does not violate a defendant's procedural rights." *Id.* The *Mieg* court further noted that "the State's decision to pursue an indictment adding the drug paraphernalia charge to ensure that the evidence explaining defendant's arrest would be admissible at his retrial was a reasonable and legitimate response to the court's pretrial ruling." *Id.* In *Mieg*, neither the defense counsel nor the court questioned the prosecutor's motive. *Id.* at 1263.

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Having found grave prosecutorial misconduct and bad faith, the Court turns to the remedy. In doing so, the Court is mindful of what is at stake in this case. The allegations against the Defendant are very serious. Our community demands justice for the victim who deserves justice. The Court is equally mindful of its unyielding duty to apply the laws of this State equally to all persons and examine the Prosecutors' unique role in that process.

The decision the Court faces is whether to grant or deny the State's motion to dismiss the 2004 Indictment, whether to grant the Defendant's Motion to Dismiss all charges based on prosecutorial misconduct, or both. Upon finding that the Prosecutors engaged in misconduct, vindictive prosecution, and acted in bad faith, the Court evaluated all possible remedies including: (1) disqualifying the Prosecutors which will inexorably lead to prejudicial delay; (2) requiring the State to proceed on the 2004 charges--which also involves prejudicial delay; (3) combining remedies number 1 and number 2; and (4) dismissing the case with prejudice.

The Court seriously considered disqualifying the Prosecutors and denying the State's Motion to Dismiss the 2004 Indictment. Arguably, this remedy would disgorge the State from gaining any advantage based on its misconduct. However, the scope and extent of the misconduct in this case leave the Court with no alternative but to dismiss the case with prejudice. The Arizona Supreme Court has instructed its trial courts that the remedy must reflect the magnitude of the misconduct.

In *Jorgensen*, the Arizona Supreme Court upheld the trial court's dismissal of a first degree murder prosecution where the State had "overwhelmed" the defendant's insanity defense not with evidence but with prosecutorial misconduct. The Court found that the "prosecutor deliberately risked a mistrial or reversal to win the case and prevent an acquittal." *Jorgenson*, 10 P.3d at 1178. In *Minnitt*, also a first-degree-murder prosecution, the trial court found that the prosecutor had engaged in misconduct but rejected the defendant's double jeopardy argument

In this case, the Prosecutors engaged in pervasive misconduct. First, the objective evidence demonstrates the Prosecutors' intentional violation of the Court's *Styers* rulings was prejudicial because jurors returned a verdict based on an intent-to-kill theory. Second, the Court's *Styers* rulings did not result in the preclusion of otherwise admissible evidence. Rather, the rulings were an attempt to confine the State to trying the case it had charged. Third, the Prosecutors repeatedly violated the Defendant's due process right to be tried only on the specific charges of which he had been accused. *See Martin*, 679 P.2d at 494; *cf. Styers*. Fourth, the 2012 Indictment was not the product of the Prosecutors' reaction to an adverse court ruling; but, in reality, the new indictment represents their undaunted efforts to convict the Defendant based on an unsupportable legal theory. *Cf. State v. Payne*, 306 P.3d 17 (Ariz. S. Ct. 2013). (*Payne* demonstrates how a prosecution may properly proceed where child abuse has occurred and the State also has a basis to file intentional murder charges. Child abuse charges focus on the defendant's intent to injure the child whereas murder charges focus on when a defendant's intent changes from an intent-to-injure to intent-to-kill. The Prosecutors' 2012 Indictment charging both intentional murder and/or felony murder continues to violate the holding in *Styers*.)

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and denied the defendant's motion to dismiss. The Arizona Supreme Court reversed and noted that "[t]here are circumstances, however, in which the double jeopardy clause will bar re-prosecution." *Minnitt*, 55 P.3d at 781. More specifically, the Court observed that dismissal with prejudice is the appropriate remedy when there is "[i]ntentional and pervasive misconduct on the part of the prosecution to the extent that the trial is structurally impaired. . . ." *Id.* Finally, in *Pool*, after considering the cumulative and prejudicial effect of the misconduct, the Arizona Supreme Court held that jeopardy barred re-prosecution. Notably, *Pool* involved allegations of both vindictive prosecution and prosecutorial misconduct.

Here, the misconduct is so egregious that the Double Jeopardy Clause protects "[the] [D]efendant from multiple attempts by the government, with its vast resources, '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. . ..'" *Minnitt*, 55 P.3d at 780 (citations omitted.) Ultimately, the Prosecutors' misconduct prejudicially impacted the integrity and fundamental fairness of the proceedings and requires imposition of the ultimate sanction. The Court does not take this action lightly but with a somber and well-considered belief that the public's confidence in the integrity of its criminal prosecutions requires no less.

Accordingly,

IT IS ORDERED dismissing this case with prejudice.


IT IS FURTHER ORDERED that all other motions are denied as moot.

IT IS FURTHER ORDERED releasing the Defendant immediately.

IT IS FURTHER ORDERED staying this order until Tuesday, November 26, 2013, at 12:00 p.m.

ISSUED: Order of Release (Tuesday, November 26, 2013, at 12:00 p.m.)

Dated: 11/19/2013



HON. SALLY SCHNEIDER DUNCAN
JUDICIAL OFFICER OF THE SUPERIOR COURT