Clerk of the Superior Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2021-002041-001 DT 01/04/2024

HONORABLE BRUCE R. COHEN

CLERK OF THE COURT
S. Afzal
Deputy

STATE OF ARIZONA

DANIEL FISHER
KIRSTEN VALENZUELA

v.

EDDIE R VAUGHN (001)

DAVID K LE LIEVRE
RHONDA ELAINE NEFF

JUDGE BRUCE COHEN

CASSIDY L BACON

DENIAL OF MOTIONS TO DISMISS

On September 11, 2023, Defendant filed two separate motions to dismiss, one entitled "Motion To Dismiss Matter For Outrageous Government Misconduct and/or Phoenix Police Department's Violation of Defendant's Due Process Rights" and the other entitled "Motion To Dismiss For Egregious Prosecutorial Misconduct." They are addressed jointly herein.

General Statement of the Case

Defendant is charged with ten felony counts, including First Degree Murder. The case has been pending since September, 2021.

Former Detective Jennifer DiPonzio of the Phoenix Police Department (hereinafter referred to as "DiPonzio") was involved in the investigation that led to or furthered the pending charges against Defendant. While she was the case agent at the outset, Detective Reese was the scene investigator and became the case agent when DiPonzio went on leave. Evidence was presented that DiPonzio's involvement in the *Vaughn* case was somewhat limited, but that is relevant for trial and not for these proceedings.

On or about July 28, 2021, DiPonzio went on leave from her position with Phoenix PD. She returned to work for one day in late August, 2021 but then immediately went back on leave.

In early 2022, Defendant sought to interview DiPonzio regarding her role in the investigation. It was then disclosed that she was on leave and not available. According to defense counsel, no other information was then provided.

A motion to compel was then filed by Defendant in August, 2022, seeking to interview DiPonzio. Months of litigation followed, which included requests for disclosures and supplemental information relating to DiPonzio and her alleged unavailability for an interview. When the issue was bought to the Court, Judge Korbin Steiner conducted an *in camera* review of records and information relating to DiPonzio. The Court found that DiPonzio was "unavailable" as a witness in this matter.

Within days thereafter, DiPonizio retired from the Phoenix Police Department. Since that time, there has been extensive and protracted litigation as to the discovery of information that placed at issue whether DiPonzio had engaged in misconduct before she went on leave. Part of the focus of issues raised by Defendant was who knew about DiPonzio's circumstances (misconduct, omissions, etc.) and when they knew it. The "flow" of information that resulted from the efforts has been piecemeal in nature. It is fair to say that if not for the unwavering and diligent efforts of defense counsel, the level of information now known and disclosed may not have been fully developed.

This Court assumed management of this case in July, 2023 and since then, there have been numerous hearings conducted and orders issued. Recently, this Court found that DiPonzio is no longer "unavailable" as a witness and has authorized Defendant to conduct interviews. This, along with other orders, allows defense counsel to develop his trial preparation, albeit long after he commenced the preparation process.

Defense counsel detailed the evolution of the issues now before the Court in his motions. Rather than the Court's own recitation of the events, the Court generally accepts the procedural timeline developed by defense counsel (set forth on pages 2-18 therein) but does not adopt the interpretation of or inferences made as to what was behind that timeline.

Prefatory Comments

Having presided over serial hearings and having reviewed voluminous pleadings, this court must comment upon the work of Mr. Le Lievre. While he, no different than other advocates, may

be prone to hyperbole, his efforts in this matter have evidenced the finest of what the legal profession has to offer. But for his diligence and unwavering commitment to his client, there is uncertainty as to what would have been learned and when it would have come to light.

As for Mr. Fisher, who has served as the lead prosecutor in this matter, he has remained steadfast in his commitment to his ethical and professional obligations. To the extent there were disclosure concerns and *Brady* issues, those were a function of actions or suspension of actions by Phoenix PD, and certainly not Mr. Fisher. He was timely in his disclosures and diligent in his efforts. While there are possible questions raised about how *Brady* material is collected and disclosed, those questions do not rest at the door of Mr. Fisher. If there are legitimate issues raised by this case, they appear to be systemic in nature. Lastly, Mr. Fisher has been nothing less than forthright in his efforts in this matter.

There is a reason why these comments are included herein. This Court loathes attacks on professionals, who are competently and ethically performing their duties, under the guise that it is a natural consequence of representing opposing interests. Among others, Mr. Le Lievre and Mr. Fisher have been the subject of critical comments about their conduct and truthfulness. But they lack a forum in which they can defend themselves from such unsustainable attacks. It is only through this proceeding that their record can be clear. And this Court hopes that these comments serve that goal.

Relief Sought

Defendant asserts that that the Maricopa County Attorney's Office engaged in repeated Rule 15 violations and such violations, which then gives rise to dismissal based upon "prosecutorial misconduct." He further asserts that the Phoenix Police Department engaged in a cover-up as to Detective DiPonzio and her work in this case and overall as a homicide detective. That forms the basis for the dismissal based upon "outrageous government misconduct."

Question Presented and Applicable Law

1. What must a defendant establish to justify dismissal with prejudice based on prosecutorial misconduct as a Rule 15.7 sanction for a disclosure violation?

Selecting a Sanction: Discretionary but Must Minimize Effect on Evidence and Merits

Selecting an appropriate sanction for a disclosure violation begins with consideration of the factors enumerated by Rule 15.7 itself: "the significance of the information not timely

disclosed, the violation's impact on the overall administration of the case, the sanction's impact on the party and the victim, and the stage of the proceedings when the party ultimately made the disclosure." Ariz. R. Crim. P. 15.7(c).

The sanction must be proportional to the violation and have a "minimal effect on the evidence and merits." *State v. Naranjo*, 234 Ariz. 233, 242 ¶ 30 (2014). The Superior Court has broad discretion over selection of a sanction, which selection will not be disturbed on review unless "no reasonable judge would have reached the same result under the circumstances," *Id.* at 242 ¶ 29. In *State v. Castaneda*, for example, the Superior Court continued a trial to allow a defendant time to respond to tardily disclosed evidence, and the Court of Appeals affirmed the sanction, noting that continuing the trial as opposed to precluding the evidence—as the defendant requested—did not prejudice the defendant, 111 Ariz. 264, 609–10 (1974).

The primary function of the Rule 15.7 sanctions is curative rather than retributive. First, although the rule mandates Courts to order disclosure and impose a sanction whenever it finds a Rule 15 disclosure violation, Ariz. R. Crim. P. 15.7(b), it excepts from this requirement findings of harmless noncompliance, Ariz. R. Crim. P. 17.7(b)(1). This approach is consistent with our Supreme Court 's stated reluctance to reverse convictions as a method to deter future prosecutorial misconduct and generally not reversing convictions in cases of harmless error—i.e., where the error did not affect the verdict. *See State v. Towery*, 186 Ariz. 168, 185 (1996). Second, the proportionality requirement ensures maximum remediation of a disclosure violation while preventing the Court from advantaging either side, regardless of fault.

Rule 15 does not account specifically for "prosecutorial misconduct."

There may be conflation herein as to the remedies available for a *Brady* violation *after* a trial with the curative sanctions regime of Rule 15 in advance of trial. "The usual remedy for serious *Brady* violations is a new trial." *Milke v. Mroz*, 236 Ariz. 276, 284 P 21 (App. 2014). But when Rule 15 is applied to this matter, a new trial cannot be the basis for relief as there has not yet been a trial: there still exists the opportunity to avoid the prejudicial impact of an alleged *Brady* violation in the first place.

Rule 15 incorporates the holding of *Brady* by requiring the State to disclose all evidence tending to mitigate the defendant's guilt or reduce his punishment. Ariz. R. Crim. P. 15(b)(8). *Brady* held nondisclosure of material mitigating evidence violated due process "irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Correspondingly, Rule 15.1 requires ongoing disclosure of *Brady* evidence, Ariz. R. Crim. P.

15(b)(8), and its accompanying sanctions regime applies independently of the presence or absence of prosecutorial misconduct. *See* Ariz. R. Crim. P. 15.7(c).

Prosecutorial misconduct does create a ground to grant a defendant a new trial. Ariz. R. Crim. P. 24.1(c)(2). This result follows logically from a defendant's right to a fair trial and the possibility of prosecutorial misconduct—through disclosure violations or otherwise—denying a defendant that right. Once the trial is over, that right cannot be vindicated without a new trial. But if the Court finds a disclosure violation during the proceedings, there exists the possibility its effects may be remedied, so consideration of the stage of the proceedings in selecting a sanction, *see* Ariz. R. Crim. P. 15.7(c), contributes to the remedial effect of the rule.

A Court May Still Dismiss a Case as a Rule 15.7 Sanction for a Disclosure Violation

No reported decision reviews a Superior Court 's dismissal of a case as a Rule 15.7 sanction for a disclosure violation, but at least one reviews a Court's selection of sanction when the defendant requested dismissal.

In *State v. Pickett*, 121 Ariz. 142 (1978), our Supreme Court reviewed a Superior Court decision to deny a defendant's motion to dismiss. The prosecutor in that case failed to disclose its list of witnesses until ten days before the trial. *Id. at 144*. The day before trial, the defendant moved to dismiss the case, claiming that he could not adequately prepare for trial because of the prosecutor's delayed disclosure. The Supreme Court recognized the motion was properly denied because it was untimely under Rule 16 but also noted, citing *Castaneda*'s discussion of Rule 15, the trial judge "could still have granted the motion or some other sanction if, in his discretion, he concluded that [the defendant] was so prejudiced by the nondisclosure that he was denied a fair trial." Although *Pickett*'s suggested standard is *dicta*, it accords with Arizona Courts' due process analysis as in its application of *Brady* and Rule 24.1 to grant new trials—again, when a verdict has already been rendered—and fundamental error review generally. *See, e.g.*, *State v. Fowler*, 101 Ariz. 561 (1967) (reversing conviction based on prosecutor's suppression of material mitigating evidence); *see generally State v. Escalante*, 245 Ariz. 135 (2018) (setting standard of fundamental error review).

The State cites the Court to *U.S v Davenport*, 753 F.2d. 1460 (1985). The Court finds one of its principles to have direct application herein. "Disclosure, to escape the *Brady* sanction, must be made at time when the disclosure would be of value to the accused." *Id at 1462.*

Commonly, a motion for a new trial on *Brady* grounds looks back on an allegedly unfair *completed* trial to request relief. A Rule 15 sanction, on the other hand, must minimally affect the evidence and merits in *ongoing* proceedings. By its nature, a request for pre-trial dismissal on the

ground of a Rule 15 disclosure violation would have to apply the denial-of-fair-trial standard prospectively, depending on the stage of the proceedings. Thus, a movant must show irremediable prejudice for the upcoming trial for him to succeed on a motion to dismiss as a sanction for a Rule 15 disclosure violation.

2. What must a Defendant establish to justify a dismissal with prejudice for "outrageous governmental misconduct?"

Unlike the motion that asserts prosecutorial misconduct, Defendant's claim for dismissal based upon outrageous governmental misconduct is not based upon any cited rule violation. Rather, it is asserted to be a due process or other fundamental constitutional right violation.

US v Russell and the Potential for Violation of Fundamental Rights

To support this extraordinary relief, Defendant cites the Court to *US. v Russell*, 411 U.S. 423 (1973). In *Russell*, an undercover agent for the Federal Bureau of Narcotics and Dangerous Drugs ("Agent Shapiro") met with the suspects, which included Defendant Russell. The agent offered to supply the defendants with one "essential ingredient in the manufacture of methamphetamines, in return for one-half of the drug produced. This offer was made on the condition that Agent Shapiro be shown a sample of the drug which they were making and the laboratory where it was being produced." *Id. at 425*. Later, Agent Shapiro provided the ingredient and Russell, along with his cohorts, produced the methamphetamines. Agent Shapiro was then provided with one-half of the methamphetamines produced.

Following a trial, Russell was convicted. He appealed.

On appeal, Defendant Russell maintained that he was entrapped. His alternative theory was based upon a 9th Circuit decision (*Green v U.S*, 454 F.2d. 783 (9th Cir, 1971)) where the agent involved was "so enmeshed in the criminal activity that the prosecution of the defendants was held to be repugnant to the American criminal justice system." *Id at 428.*

Defendant Russell failed in these claims. For the Court, Justice Rehnquist wrote:

> While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, cf. *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952), the instant case is distinctly not of that breed. Shapiro's contribution of propanone to the criminal enterprise already in process was scarcely objectionable. The chemical is by itself a harmless substance and its possession

> is legal. While the Government may have been seeking to make it more difficult for drug rings, such as that of which respondent was a member, to obtain the chemical, the evidence described above shows that it nonetheless was obtainable. The law enforcement conduct here stops far short of violating that 'fundamental fairness, shocking to the universal sense of justice,' mandated by the Due Process Clause of the Fifth Amendment. *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 246, 80 S.Ct. 297, 304, 4 L.Ed.2d 268 (1960).
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> *Id at 431-432*.

The dissent in *Russell* also appears to limit dismissal as the necessary relief when based upon due process or other constitutional violations. Justice Douglas wrote:

> "The obstacle to the prosecution lies in the fact that the alleged crime was instigated by officers of the government; that the act for which the government seeks to punish the defendant is the fruit of their criminal conspiracy to induce its commission. The government may set decoys to entrap criminals. But it may not provoke or create a crime and then punish the criminal, its creature."
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> *Id at 437.*

Therefore, both the majority and dissent appear to be in agreement that a dismissal of the case based upon "outrageous governmental misconduct" is limited. For that relief, law enforcement must have engaged in "outrageous" conduct, such as joining and perhaps instigating in the criminal activity.

Arizona's treatment of Russell v U.S.

Defendant cites the Court to *State v Williamson*, 236 Ariz. 550 (2015), as Arizona's adoption of the general principles that were raised as concerns in *Russell*. To establish a claim of outrageous government conduct:

> …a defendant must show either: (1) the government " 'engineer[ed] and direct[ed] a criminal enterprise from start to finish,' " *United States v. Williams*, 547 F.3d 1187, 1199 (9th Cir.2008), *quoting United States v. Gurolla*, 333 F.3d 944, 950 (9th Cir.2003), or (2) the government used "excessive physical or mental coercion" to induce the defendant to commit the crime, *United States v. McClelland*, 72 F.3d 717, 721 (9th Cir.1995). The defense is "often raised but is almost never successful." *United States v. Gamble*, 737 F.2d 853, 857 (10th Cir.1984). "[I]t is not outrageous for the

> government to induce a defendant to repeat or continue a crime or even to induce him to expand or extend previous criminal activity." *Mosley,* 965 F.2d at 911. In inducing a defendant to repeat or expand his criminal activity, it is not improper for the government to suggest the illegal activity and provide supplies and expertise. *Id.* at 911–12. And, "coercion of any type must be particularly egregious before it will sustain an outrageous conduct defense." *Id.* at 912. " '[G]overnment agents may employ appropriate artifice and deception in their investigation,' " "make 'excessive offers,' " and "even utilize 'threats or intimidation [if not] exceeding permissible bounds.' " *Id., quoting United States v. Lambinus,* 747 F.2d 592, 595 (10th Cir.1984), *and United States v. Biswell,* 700 F.2d 1310, 1314 (10th Cir.1983) (alterations in *Mosley*). "In short, a defendant must meet an extremely high standard." *United States v. Smith,* 924 F.2d 889, 897 (9th Cir.1991).
>
> There is no single test for resolving a claim of outrageous government conduct. "Rather, the inquiry appears to revolve around the totality of the circumstances in any given case." *Mosley,* 965 F.2d at 910.
>
> *Id at 556.*

Relevant Factual Findings

To apply properly the law, the Court must make findings from the evidence presented. It must be noted, however, that the findings made herein are limited to this case and are from the facts developed by stipulation or through the evidentiary hearing. These findings do not extend beyond this matter, particularly as it relates to DiPonzio. She did not participate in these proceedings. Further, as this Court has warned on numerous occasions, this is not DiPonzio's case; it is Defendant's case.

With that understanding, the Court makes the following findings:

DiPonzio joined the homicide unit of Phoenix PD on or about October, 2020. Within her first few months on this assignment, there was a finding of misconduct relating to her failure to return fingerprint cards within a timely fashion. A report of the investigation (Exhibit 13) established that there were other concerns about DiPonzio beyond the fingerprint card issue. A formal reprimand was then issued on January 27, 2021.

Sgt. Barker testified in this matter. The Court considered not only his testimony, but also Exhibits 58 and 60 (Defense counsel's interviews of June 7 and August 30, 2023). During the first interview of Sgt. Barker, he did not disclose to defense counsel that there had been prior allegations

of misconduct on the part of DiPonzio, referring to it only as a "rumor." He said he was not directly involved. Yet in the second interview, it was revealed that Sgt. Barker had provided DiPonzio with the findings of misconduct.

Defense counsel asserts that this is further evidence of the failures by Phoenix PD to disclose. He maintains that it evidences untruthfulness on the part of Sgt. Barker. That is a plausible hypothesis under the circumstances. Sgt. Barker testified that when he said he was not directly involved, he was referring to the fact that he did not participate in any of the investigation that led to the finding of misconduct. This testimony is also a plausible explanation for the discrepancy between his answers in the serial interviews. At a minimum, his reference to a "rumor" about DiPonzio may have been his efforts to "dance around the issue" while being questioned by a defendant's attorney. For the purpose of these proceedings only, the Court will assume that the failure to disclose during the June 7, 2023 interview raises questions about how forthcoming Sgt. Barker was with defense counsel.

During the months that followed the January, 2021 violations by DiPonzio, there were growing concerns regarding her work performance. As testified to by Sgt. Barker and as reflected in Exhibits 10 and 18, these concerns were addressed with her by Sgt. Barker. Early on, he offered overtime authorization to allow DiPonzio to catch up on her backlog. He further offered to remove her from the "queue" so that she would not be assigned new cases. She was also afforded other opportunities to take corrective actions and to answer for her apparent derelictions of her assigned duties.

DiPonzio made "excuses" as to why things were not completed but, per the testimony of Commander Lopez (who reviewed reports that included her excuses), her explanations did not excuse her dereliction of responsibilities. This is consistent with observations made by Sgt. Barker, with his concluding that she did not take responsibility or accept the concerns. She was evasive and provided excuses. She also made claims of having completed work that she had not completed.

In context, Sgt. Barker's observations and experiences with DiPonzio from the Fall of 2020 through the summer of 2021 portray a scathing outline of DiPonzio's derelictions while serving as a homicide detective. Separate from how this may impact the motions pending before this Court, it clearly supports the Court's operating presumption in this matter---that DiPonzio's derelictions were sufficient to trigger a *Brady* notice (as is detailed at the end of this "Findings" section below).

As noted above, DiPonzio went on leave in late July, 2021 and but for one day in late August, 2021, never returned to work at Phoenix PD. In September, 2021, two separate events occurred that are relevant. First, Sgt. Barker notified Jon Eliason of the Maricopa County Attorney's Office ("MCAO") of DiPonzio's medical leave status. Second, MCAO communicated

its concerns with Phoenix PD about DiPonzio failing to respond to discover requests for as long as one year.

In October, 2021, Sgt Barker initiated a misconduct investigation against DiPonzio. It was referred to the Professional Standard Bureau ("PSB") and assigned to Sgt Steinberger. She testified that in that capacity, it was her responsibility to "find the facts" and provide a summary of the PSB investigation through the chain of command at Phoenix PD.

The pertinent standards that came under review were from Operations Order 3.18 and 3.19 (Exhibits 7 and 9). After an investigation is conducted, if violations are found, they fall within one of three categories. A Class 1 violation is the least significant whereas a Class 3 violation could result in termination of employment.

Sgt. Steinberger testified that an investigation of this nature includes a review of all documentation. Here, Sgt. Steinberger relied upon reports from Sgt. Barker (Exhibits 19 and 20). Further, an investigation includes an interview of the subject of the investigation ((Exhibit 9). This affords the officer the opportunity to be heard regarding the concerns or allegations. Sgt. Steinberger was unable to interview DiPonzio since DiPonzio was on medical leave. Sgt. Steinberger therefore suspended her investigation.

As part of this analysis, this Court must also consider pertinent statutory provisions. The Arizona Legislature codified the Arizona Officer's Bill of Rights (ARS Section 38-1101, et seq.). Under the code, there are clear notice requirements to an officer who is under investigation. Written notice of the investigation must be provided to the officer, to include: (a) facts alleged to be the basis for the investigation, (b) all known allegations of misconduct, and (c) information regarding rights, including having a representative present for the interview. *See* ARS Section 38-1104(A)(2). Lastly, the investigation cannot be concluded and final action taken until the basic summary or file copies are provided to the law enforcement officer. *See* ARS Section 38-1104(D).

As established in Exhibit 47, the investigation remained "open" but suspended as of December 13, 2022. Two weeks later (December 27, 2022), DiPonzio retired from Phoenix PD. In order to close the investigation, Sgt. Steinberger began working on her report in February, 2023.

As stipulated to by the parties, Lt. Hester did not provide notice of the PBB investigation to DiPonzio. This was not the result of an oversight or failed processing by Phoenix PD. It was a function of the fact that from the investigation's initiation through its "conclusion," DiPonzio was on medical leave and then retired.

Sgt. Steinberger continued to receive additional reports, including findings from the "desk investigation" of DiPonzio that was conducted in July, 2022 (received by her in March 2023). This

Court has had concerns about the delay in conducting this desk investigation. Given the prior finding of misconduct involving evidence at her desk, one would have expected that an inventorying of her desk would have been called for when she went on leave. After all, her prior conduct was indicative of her not employing the proper level of care with evidence or tangible items associated with an investigation in which she was engaged.

It is noteworthy that Sgt. Barker had made a timely request for authority to conduct the inventorying of the contents at her desk. His request was denied by HR of Phoenix PD. This denial does not appear to have been a function of anything more than concerns about protecting DiPonzio's privacy rights by not "searching" the contents of her desk while she was on leave. The Court is satisfied that this explains the delay in the inventorying of the contents of DiPonzio's desk, although the Court takes issue with the reason for the delay imposed by HR of the City of Phoenix. On balance, the impact that DiPonzio's leave had on investigations, including this case, far outweighs any concern about DiPonzio's privacy rights as to the contents of her desk.

In the end, Sgt. Barker opined that DiPonzio had committed at least four separate policy violations: OPS 3.13.2(A), [completion of assigned duties], OPS 8.1.5(T) [impounding of recording evidence], OPS 4.19(2)(B) {assisting in prosecution], and OPS 4.45.6 [Investigative management and follow-up. *See* Exhibit 20. These opinions are consistent with all of the other evidence and testimony in this matter.

Sgt. Steinberger completed her draft report in early April, 2023. She included therein a finding that the allegations against DiPonzio were "sustained." It was then forwarded to Lt. Dick, who appears to have made changes to the report. In the amended version, the sustaining of the alleged misconduct violations that was part of Sgt Steinberger's draft report was deleted. And while Defendant maintains that this was part of a possible cover-up, there is no evidence to support this allegation. Rather, as noted throughout the findings above, DiPonzio had never been given notice of the investigation (at no fault of Phoenix PD) and, by law, no final finding could be made.

Of note is also what was NOT "removed" from the draft report. Consistent with the testimony of Sgt. Steinberger (who this Court found to be highly credible in every aspect) that "changes were not made to cast DiPonzio in better light," as well as the testimony of Sgt. Barker, the following are examples of what remained within the final report: (1) facts that supported a finding of misconduct or dereliction committed by DiPonzio; (2) her history of a previous misconduct finding along with other dereliction concerns that were addressed with her by her supervisor; and (3) a recommended finding that the violations would fall under a Class 3 category, the most serious of violation classifications. This is supported by Exhibit 25. Had this been a "whitewashing" exercise, one would reasonably expect these "findings" would have been tempered or deleted. They were not.

The final report was then issued on or about June 16, 2023. Consistent with Exhibit 44 (an e-mail from Tom Van Dorn of MCAO to Phoenix PD wherein he confirms what was verbally communicated to him), there was to be no ultimate finding of misconduct since the investigation was never completed. Again, this was because throughout the investigation, DiPonzio was on leave and then retired.

There is a second set of events covered during the hearing that must also be addressed. It began with a report issued by Channel 15 News regarding DiPonzio in late March, 2023. The Channel 15 report opens an entirely different set of concerns regarding the DiPonzio issues at Phoenix PD.

It must be noted that the Channel 15 report was published long after MCAO had made disclosures about DiPonzio's alleged misconduct, which occured as far back as November, 2022. Therefore, what occurred after the Channel 15 report was aired relates more to allegations Defendant has made against Phoenix PD than it does or can apply to MCAO.

Channel 15 uncovered information to suggest that DiPonzio was engaged in outside activities inconsistent with the basis for finding her to be medically unavailable and inconsistent with Judge Korbin Steiner's finding that DiPonzio was "unavailable" for medical reasons (late Dececmber, 2022). DiPonzio's outside activity appears to have involved sale of candles and eventually led to some form of esthetician or related services. In its reporting, Channel 15 challenged to truthfulness of DiPonzio's health-related claims and her alleged unavailability to participate in this matter or the numerous other cases in which she was involved before she went on leave.

The report was published at the very end of March, 2023. Commander Lopez was informed of the report on March 29, 2023. Since he had only recently assumed leadership of the Violent Crimes Bureau of Phoenix PD and had never supervised DiPonzio, he sought a detailed briefing from those who had knowledge of her work and the new allegations. He was briefed on March 30, 2023 by Lt. Hester and Sgt Barker and he created the timeline that is Exhibit 10. Commander Lopez testified that the timeline accurately summarized what he was told by Sgt. Barker. He then briefed Chief Sullivan who, similar to Commander Lopez, was not in his current position when the events involving DiPonzio unfolded. In total, appropriate actions were taken by Phoenix PD leadership in late March, 2023 in addressing Channel 15's allegations against a retired detective.

This report from Channel 15 also gained the attention of the offices of Arizona Peace Officer Standards and Training ("AzPOST"). This entity is statutorily created under Article 8 of Title 41 and employs a number of compliance specialists, including Michael Deltenre, who testified at the hearing.

There was a great deal of evidence presented as to why this caught the attention of Mr. Deltenre and AzPOST and the concerns that existed, including what appeared in Exhibit 28. Contextually, the Channel 15 report triggered issues that are regulated by AzPOST and as are statutorily covered by ARS Section 41-1828.01 (Exhibit 33). It provides that a law enforcement agency may report any misconduct of an officer but is required to make such a report on termination or separation of the officer.

Here, no report of misconduct was issued by Phoenix PD to AzPOST when DiPonzio retired in late December, 2022. When Mr. Deltenre learned of the Channel 15 report, he made contact with Phoenix PD seeking further information regarding DiPonzio (see, for example, Exhibit 35). He testified that he sought this information because he thought the allegations against DiPonzio were "egregious."

In his capacity as a compliance specialist, Mr. Deltenre initiated a case within AzPOST. An "SOI" was assigned, which stands for "Situation of Interest." This can be likened to assigning a case number to a criminal case.

Mr. Deltenre noted several areas of concern raised by the Channel 15 reporting and through subsequent disclosures. They included: (a) DiPonzio appeared not to be meeting standards from near the start of her assignment with VCB in the Fall of 2020; (b) She had a Class 1 finding against her from misconduct found in January 2021; (c) There was no inventorying of DiPonzio's desk for one year after she went on leave; (d) No report of misconduct was made to AzPOST upon DiPonzio's termination in late December, 2022; and (e) draft report from Sgt. Steinberger concluded that there was sustained misconduct that was deleted in the final report.

He opined that there were several potential violations of AzPOST rules by DiPonzio. He characterized one to be "non-feasance in office" from her not doing what should have done as an investigating officer and a "pattern of conduct" that would diminish public trust. Much of his concerns are set forth in Exhibit 30, which he referred to as the "charging document."

As part of his assignment, he contacted DiPonzio's attorney in July, 2023. He noted his concerns and communicated that from what he had learned thus far, it could result in a revocation of her law enforcement certification.

Mr. Deltenre was questioned extensively by defense counsel about any norms in reporting from agencies. Mr. Deltenre testified that based upon his experience, law enforcement agencies generally do not report to AzPOST the opening of investigations against an officer. If a report is made it is at the conclusion of the investigation. He further testified that if an officer leaves employment before the investigation is completed, it is not uncommon for the termination report submitted to AzPOST not to include a finding of misconduct.

The issue that Defendant focused on most was the Termination Notice ("TN") submitted by Phoenix PD after DiPonzio retired. There is a section on the form where the submitting agency is asked to check a box if there was "misconduct" as part of the termination of the officer. Here, Phoenix PD did not check that box. Defendant maintains that this was part of a much larger plan of action on the part of Phoenix PD to minimize the impact and perhaps conceal the level of misconduct by DiPonzio. And while that is a valid hypothesis among many to be tested, it is not supported by the totality of the evidence.

This Court does not disagree with Defendant that the "misconduct box" perhaps should have been checked when the TN was submitted. This conclusion is a function of applying Az Admin Code R 13-4-109(A)(1-9). The Code suggests that the misconduct box should be marked "yes" if it is an open investigation at the time of termination and the agency is aware of conduct that may violate AzPOST rules. However, this is not a hearing relating to AzPOST and Phoenix PD. It is a proceeding about alleged prosecutorial or governmental misconduct that would rise to the level of infringing on the constitutional rights of Defendant.

Did the Phoenix PD failure to mark the misconduct box on the TN form submitted to AzPOST serve to prejudice Defendant? No, disclosure of the DiPonzio issues had been disclosed by MCAO many months before AzPOST ever became involved. Did that same failure, among other issues that have sequentially come to light over the past 18 months of litigation, create significant additional work on the part of defense counsel? Undoubtedly, yes. But, in the end, the question for the Court that is most relevant is how these transpiring events impacted Defendant's constitutional rights to a fair trial or caused him to suffer prejudice.

As a final relevant finding, this Court must confirm what was expressed during the proceedings. Whether or not DiPonzio would have been found to be derelict in her duties following a full and complete investigation, this Court has been presented with more than ample evidence to conclude that what was known or believed about the issues with DiPonzio was sufficient to trigger a *Brady* notice from the State. The issue for the Court is when a *Brady* notice would have been required and whether it was provided or sufficiently addressed. To the extent that it was incomplete or untimely, the impact thereof has been remediated through the proceedings that have since been conducted and the curative orders that this Court has issued.

Conclusions and Order

As this Court has stated repeatedly over the most recent months of litigation, DiPonzio and the Phoenix PD are not parties to these proceedings. Rather, their respective conduct and actions, as detailed above, are relevant in determining whether they caused irreparable prejudice to Defendant in being able to defend against the charges pending against him. They did not.

Was there a Brady Violation by MCAO sufficient to constitute Prosecutorial Misconduct?

To succeed on a motion for dismissal of a case as a Rule 15.7 sanction for the State's disclosure violation—whether or not prosecutorial misconduct was involved—the defendant must show the disclosure violation irremediably prejudiced him to the extent that he cannot receive a fair trial.

The disclosure of DiPonzio's misconduct was made within a reasonable timeframe of their receipt of notice when the details were being developed. Mr. Fisher made those disclosures at least by November, 2022 and Defendant did not suffer any irreparable prejudice as a result of the timing. Further, there were on-going disclosures, even if only as a result of tenacious actions by defense counsel, that ensures that Defendant is fully prepared for trial. Even if this Court were to conclude that there was some form of prosecutorial misconduct (a finding that cannot be reached from this evidence and is not made herein), any prejudice that could have been suffered by Defendant has been remedied.

Defense counsel argues that dismissal is the only means by which Phoenix PD will take corrective action of the kinds of issues raised herein. This Court must disagree. The DiPonzio-related issues have been the subject of a great deal of attention and there appear to have been corrective measures taken by Phoenix PD in the aftermath thereof. Further, MCAO has changed its policy regarding circumstances that require Brady notice to be given. While that change (made in 2021) appears not to have been made because of DiPonzio, the current policy would have required that the prior finding of misconduct against her would have been disclosed (where a Brady notice disclosure may not have been triggered under the prior policy). The bottom line is that the extreme punitive measure of dismissal of the charges against Defendant is not required to address systemic concerns that have been raised..

What was the governmental conduct of the Phoenix Police Department and does it rise to a level of outrageous conduct?

Defendant asserts that the Phoenix Police Department intentionally withheld information. This Court cannot reach that conclusion from the information, documentation and evidence presented. For example, Defendant asserts that the deletion of the finding of misconduct against Detective DiPonzio in a draft report was part of a cover-up. This Court believes that there is another conclusion that can reasonably be reached from the deletion.

The author of the draft report (Sgt. Steinberger) included her conclusion of wrongdoing. But in reaching that conclusion, DiPonzio had not participated in the review. While she was on leave, Phoenix Police Department was precluded from interviewing her or directing her to

participate in the investigation. Once DiPonzio retired, there was no need for the further investigation. Therefore, while Defendant is entitled to his belief that the deletion of the wrongdoing finding was part of a cover-up, it is far more reasonable to conclude that the deletion of any finding of wrongdoing on the part of DiPonzio was in recognition of her due process rights to be heard and required procedures.

But, for these purposes only, the Court will analyze the claim using Defendant's conclusions about alleged misconduct by Phoenix PD. Even if that version were accepted, it falls well short of violating that "fundamental fairness, shocking to the universal sense of justice" referenced in *Russell (*411 U.S. at 432*)* to sustain a claim of outrageous government conduct. Even if there was a cover-up by Phoenix PD of wrongdoing on the part of DiPonzio (a conclusion NOT reached by this Court), no one could reasonably conclude that defendant cannot now receive a fair trial, or that he has been so prejudiced that proceeding with the trial goes against all concepts of justice and fairness. Any alleged prejudice he may assert to have been suffered has since been remediated by the trial not proceeding until all of these issues have been addressed, particularly with this Court finding that Detective DiPonzio is now available as a witness.

In conclusion, do the actions of Phoenix PD constitute "outrageous government conduct" that would justify dismissal of the charges? Absolutely not. For this Court, it is not even a close question, particularly when considering the evidence in its totality.

IT IS ORDERED DENYING Defendant's two separate motions to dismiss.

Nothing contained herein shall serve to deny Defendant the right to delve reasonably into the investigative conduct or misconduct of DiPonzio in this matter, if she testifies. This latitude is limited to relevance to these proceedings, whether in assessing her specific work on this matter or as reflective of her overall performance as a homicide detective. Allowing leeway in this fashion is part of this Court's overall effort to ensure fundamental fairness to Defendant.