

Petition Appendix



SCOTT BALES
CHIEF JUSTICE

JANET JOHNSON
CLERK OF THE COURT

Supreme Court

STATE OF ARIZONA
ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON STREET, SUITE 402
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August 30, 2017

RE: STATE OF ARIZONA v JEFFREY RICHARD MARTINSON

Arizona Supreme Court No. CR-16-0429-PR

Court of Appeals, Division One No. 1 CA-CR 13-0895

Maricopa County Superior Court Nos. CR2004-124662-001,

CR2012-007335-001

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on August 30, 2017, in regard to the above-referenced cause:

ORDERED: Petition for Review of a Published Appellate Decision Following Appeal by the State = DENIED.

Justice Gould did not participate in the determination of this matter.

Janet Johnson, Clerk

TO:

Gerald R Grant

Michael Terribile

Treasure L VanDreumel

Colleen Clase

Paul G Cassell

Amy M Wood

ff

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellant/Cross-Appellee*,

v.

JEFFREY RICHARD MARTINSON, *Appellee/Cross-Appellant*.

No. 1 CA-CR 13-0895
FILED 9-22-2016

Appeal from the Superior Court in Maricopa County

Nos. CR 2004-124662-001 SE

CR 2012-007335-001

The Honorable Sally Schneider Duncan, Judge

VACATED AND REMANDED

COUNSEL

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OPINION

Judge Margaret H. Downie delivered the opinion of the Court, in which Acting Presiding Judge John C. Gemmill (Retired) and Judge Samuel A. Thumma joined.

D O W N I E, Judge:

¶1 The State of Arizona appeals an order dismissing with prejudice first degree felony murder and child abuse charges against Jeffrey Richard Martinson on the basis of prosecutorial misconduct. Martinson cross-appeals from the denial of his motions for judgment of acquittal.

¶2 Because the State was erroneously precluded from suggesting at trial that Martinson intentionally killed his son, the fundamental underpinnings for a finding of prosecutorial misconduct sufficient to warrant dismissal with prejudice are not present. We therefore vacate the dismissal with prejudice order and remand to the superior court with instructions to grant the State's motion to dismiss the pending indictment without prejudice. Treating Martinson's cross-appeal as a cross-issue, we deny his requested relief.

FACTS AND PROCEDURAL HISTORY

¶3 Martinson and K.E. are the parents of J.E.M., who was born in July 1999. After their relationship ended in 2000, K.E. obtained legal custody of J.E.M., as well as an order of protection against Martinson. Martinson was awarded visitation with J.E.M.

¶4 In August 2004, J.E.M. was with Martinson for a scheduled weekend visit. When Martinson failed to return the child on Sunday evening or return telephone calls, K.E. contacted the police. Police officers entered Martinson's apartment to conduct a welfare check and found him in the master bedroom, unresponsive, with cuts on his wrists. J.E.M. was discovered dead in another bedroom, with a frothy substance coming from

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his nose. Toxicology tests revealed carisoprodol (a muscle relaxant) and a related metabolite in J.E.M.'s blood. The medical examiner concluded J.E.M.'s death was caused by acute carisoprodol toxicity.

¶5 In September 2004, a grand jury returned an indictment (the "2004 Indictment"), charging Martinson with one count of first degree felony murder and one count of child abuse pursuant to Arizona Revised Statutes ("A.R.S.") section 13-3623(A)(1) (A person commits child abuse if, acting knowingly or intentionally, the person, "[u]nder circumstances likely to produce death or serious physical injury . . . causes a child . . . to suffer physical injury."). Child abuse was the predicate felony for the felony murder count. See A.R.S. § 13-1105(A)(2) (a person commits felony murder if he commits child abuse in violation of A.R.S. § 13-3623(A)(1) and "in the course of and in furtherance of the offense" causes death). The State sought the death penalty.

¶6 Trial began in July 2011. After the jury was sworn, but before the State's opening statement, defense counsel moved to preclude evidence that Martinson intentionally killed J.E.M. The superior court granted the motion, reasoning that under *State v. Styers*, 177 Ariz. 104 (1993), alleging child abuse as the predicate felony for felony murder barred the State from arguing that Martinson had intentionally killed J.E.M.

¶7 The jury returned guilty verdicts as to both felony murder and child abuse. Jurors could not reach a unanimous decision during the penalty phase, though, resulting in a mistrial for that phase. Martinson moved for a judgment of acquittal based on insufficiency of the evidence or, in the alternative, for a new trial as to his guilt, asserting juror misconduct and trial error. Martinson also alleged prosecutorial misconduct, claiming prosecutors repeatedly violated the court's order precluding evidence of an intent to kill J.E.M.

¶8 In March 2012, the superior court denied Martinson's motion for judgment of acquittal but granted his motion for new trial based on juror misconduct and error in admitting expert testimony. In ordering the new trial, the court specifically rejected Martinson's claims of prosecutorial misconduct.

¶9 In June 2012, the State obtained a new indictment against Martinson in Maricopa County Case No. CR 2012-007335-001 (the "2012 Indictment"). In addition to alleging felony murder, the 2012 Indictment charged Martinson with premeditated murder. After obtaining the 2012 Indictment, the State moved to dismiss the 2004 Indictment without

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prejudice.¹ Martinson objected and moved to dismiss the 2012 Indictment instead. The superior court granted Martinson’s motion to dismiss the 2012 Indictment and denied the State’s motion to dismiss the 2004 Indictment.

¶10 The State filed a special action petition challenging the denial of its motion to dismiss the 2004 Indictment. *State ex rel. Montgomery v. Duncan*, 1 CA-SA 12-0217, 2012 WL 5867379 (Ariz. App. Nov. 20, 2012) (mem. decision). This Court accepted jurisdiction and granted relief, concluding the State had established good cause for dismissing the 2004 Indictment without prejudice. *Id.* at *5, ¶ 20. We did not, however, “reach the issue of whether good cause would have been lacking if the trial court had determined the State attempted to dismiss the 2004 Indictment in bad faith or to avoid the speedy trial provisions of Rule 8.” *Id.* at ¶ 21. We ruled the superior court could “amend its findings or hold further hearings” if it intended to rely on bad faith. *Id.*

¶11 The superior court subsequently ordered additional briefing and held a hearing to consider whether the State acted in bad faith by seeking to dismiss the 2004 Indictment. The court ultimately ruled that the State had engaged in prosecutorial misconduct and bad faith by, among other things, “deliberately attempt[ing] to secure a conviction based on an uncharged theory” and by “persistently violat[ing] this Court’s *Styers* ruling.” Based on its findings of prosecutorial misconduct, the court dismissed the 2004 Indictment with prejudice.

¶12 The State timely appealed, and Martinson timely cross-appealed.²

DISCUSSION

I. Dismissal with Prejudice

¶13 We review the superior court’s dismissal order for an abuse of discretion. *See State v. Moody*, 208 Ariz. 424, 448, ¶ 75 (2004) (appellate

¹ At the same time, the State successfully moved to dismiss the notice of intent to seek the death penalty.

² K.E. filed a “crime victim’s notice of appearance” in this Court, as well as a “Crime Victim’s Brief Pursuant to A.R.S. § 13-4437(A),” arguing the dismissal with prejudice order violated her constitutional rights as a victim. Martinson moved to strike K.E.’s filings. Given our determination that the dismissal should have been without prejudice, we need not resolve K.E.’s standing or her constitutional claims, and we deny Martinson’s motion to strike K.E.’s filings.

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court reviews rulings on motions to dismiss criminal charges for abuse of discretion). A court abuses its discretion if it commits an error of law in reaching its decision. *State v. Cowles*, 207 Ariz. 8, 9, ¶ 3 (App. 2004). We defer to the superior court’s factual findings unless clearly erroneous but are not bound by its legal conclusions. *State v. O’Dell*, 202 Ariz. 453, 456–57, ¶ 8 (App. 2002).

¶14 The bad faith and prosecutorial misconduct findings that caused the superior court to dismiss the charges with prejudice are, at their core, premised on the determination that prosecutors ignored the holding in *Styers* and the corresponding court order in this case that they not pursue an intent to kill theory at trial.³

¶15 The superior court ruled that because the State had charged “felony murder --with child abuse as a predicate -- Arizona law necessarily precluded the State from offering evidence of intent to kill and/or argu[ment] that [Martinson] intended to kill” J.E.M. The court based this conclusion on what it viewed as the central holding of *Styers*: because a person cannot intentionally kill a child without also intentionally causing physical injury, the crime of child abuse necessarily merges into felony murder if based on an intent to kill. The court reasoned, though, that *Styers* permits child abuse to serve as a predicate felony if it is based on an intent to *injure* a child; under these circumstances, it concluded, child abuse constitutes a separate and independent offense from felony murder, and the two offenses do not merge. Based on this analytic framework, the court precluded the State from presenting evidence or argument that Martinson intended to kill J.E.M.

A. Merger

¶16 Applying *Styers* to the facts of this case is not a straightforward proposition.

³ 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.”

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¶17 Styers shot a child in the back of the head and was convicted of first degree murder, conspiracy to commit first degree murder, child abuse, and kidnapping. 177 Ariz. at 108–09. The fatal gunshot wounds were the only evidence of child abuse. *Id.* at 110. The jury received separate verdict forms for premeditated and felony murder. It returned guilty verdicts on both theories. *Id.* at n.1.

¶18 On appeal, Styers challenged the sufficiency of the evidence for the child abuse conviction, arguing he could not be convicted of both murder and child abuse. The Arizona Supreme Court agreed, holding that the “separate child abuse conviction cannot stand on the facts of this case.” *Id.* at 110. The court drew an analogy to aggravated assault-murder, where the convictions merge into one offense, reasoning: “If a defendant cannot be convicted for an intentional aggravated assault that necessarily occurs when there is a premeditated murder, it logically follows that he also cannot be convicted for an intentional child abuse that necessarily occurs when there is a premeditated murder of a child victim.” *Id.* The court emphasized, though, that its decision was limited to premeditated murder and child abuse convictions. Indeed, anticipating charges like those against Martinson, the court added that its decision did not apply to child abuse as a predicate felony for felony murder:

We emphasize that nothing in this opinion should be read as suggesting that child abuse may not still be a predicate felony for felony murder. If a person intentionally *injures* a child, he is guilty of child abuse under A.R.S. § 13-3623(B)(1);⁴ if that injury results in the death of the child it becomes a first degree *felony* murder pursuant to A.R.S. § 13-1105(A)(2). *See State v. Lopez*, 174 Ariz. 131, 141–43, 847 P.2d 1078, 1088–90 (1992) Although felony murder is first degree murder, it is arrived at differently than premeditated murder. The first degree murder statute, A.R.S. § 13-1105(A)(1), not the child abuse statute, applies when a person intentionally *kills* a child victim.

Id. at 110–11 (footnote added).

¶19 The supreme court underscored the limited holding of *Styers* in the companion case of *State v. Milke*, 177 Ariz. 118, 123 (1993), stating:

⁴ This statutory section was later re-designated as A.R.S. § 13-3623(A)(1). *See* 2000 Ariz. Sess. Laws, Ch. 50, § 4 (2nd Reg. Sess.).

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In the companion case involving co-defendant Styers, we have today held that, under the facts of this case, a separate child abuse offense under A.R.S. § 13-3623(B)(1) did not occur when [the victim] was murdered *with premeditation*. . . . We emphasize, as we did in *Styers*, that our holding has no effect on the use of child abuse as a predicate offense for felony murder.

¶20 The holding in *Styers* is limited to premeditated murder and child abuse convictions and does not address or govern the use of child abuse as a predicate felony for felony murder. In contrast, our supreme court squarely addressed whether child abuse merges into felony murder in *State v. Lopez*, 174 Ariz. 131 (1992). The defendant in *Lopez* was convicted of felony murder based on the predicate felony of child abuse. *Id.* at 136. Relying on *State v. Essman*, 98 Ariz. 228 (1965), *Lopez* challenged the conviction, arguing that child abuse, like assault, cannot serve as a predicate felony because it merges into felony murder. *Id.* at 141; *see Essman*, 98 Ariz. at 235 (“[A]cts of assault merge into the resultant homicide, and may not be deemed a separate and independent offense which could support a conviction for felony murder.”). The supreme court rejected that argument, holding that “if the legislature explicitly states that a particular felony is a predicate felony for felony-murder, no ‘merger’ occurs.”⁵ *Lopez*, 174 Ariz. at 142; *see also State v. Miniefield*, 110 Ariz. 599, 602 (1974) (arson does not merge into felony murder because it is designated a predicate felony under felony murder statute).

¶21 Neither *Styers* nor other precedent stands for the proposition that a predicate felony committed with the intent to kill merges into felony murder. Indeed, the defendant in *Styers* was charged with felony murder predicated on child abuse and felony murder predicated on kidnapping. *Styers*, 177 Ariz. at 110, 112. *Styers* argued that kidnapping could not serve as a predicate felony because it was committed pursuant to a plan to kill and therefore merged into the felony murder charge. *Id.* at 112. The court disagreed, holding that, “[a]lthough the jury findings in this case clearly demonstrate that the kidnapping was [committed] pursuant to a plan to

⁵ In distinguishing *Essman*, *Lopez* noted that when *Essman* was decided, assault was not included as a predicate felony under the felony murder statute. *Id.* at 141. Assault is not listed as a predicate felony under the current felony murder statute, whereas child abuse is. A.R.S. § 13-1105(A)(2).

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kill, that does not mean that only one crime was committed.” *Id.* As a result, “the merger doctrine would not apply,” and “Defendant was appropriately convicted of both kidnapping and murder.” *Id.*⁶

¶22 The court reached a similar conclusion in *Miniefield*, where the defendant threw a bottle of flammable liquid into a house, causing a fire that killed a nine-month-old child. 110 Ariz. at 601. The defendant was charged with felony murder based on arson as the predicate felony. *Id.* He argued arson could not serve as a predicate felony because it was, like a knife or a gun, “merely the use of fire to attempt to kill the victim,” and “not so distinct as to be an ingredient of an independent offense.” *Id.* Rejecting this contention, the court held that because arson is identified as a predicate felony under the felony murder statute, when “arson results in a death it is first degree murder.” *Id.* at 602. The court further held that under the felony murder statute, there is no “distinction between a person who intends to kill another by fire” and a person who commits arson by only intending “to burn down a dwelling house and accidentally kills one of the occupants.” *Id.*

¶23 More recently, in *State v. Moore*, 222 Ariz. 1, 13, ¶ 57 (2009), the defendant was convicted of felony murder predicated on burglary. The burglary charge was based on entry into the victim’s home with the intent to commit murder. *Id.* at 12, ¶ 50. Defendant challenged his conviction, arguing burglary based on an intent to kill merges into felony murder. The court disagreed, holding that under Arizona’s felony murder statute, a predicate felony is not required to be separate or independent from homicide. *Id.* at 14, ¶ 62; *see also State v. Hardy*, 230 Ariz. 281, 287, ¶¶ 21–26 (2012) (felony murder may be predicated on burglary and kidnapping undertaken with intent to murder the victim).

¶24 The superior court’s order dismissing the charges with prejudice was also based, in part, on the fact that felony murder only requires proof of the specific mental state for the predicate felony, and proof of an intent to kill J.E.M. was not required. *See State v. McLoughlin*, 139 Ariz. 481, 485–86 (1984); A.R.S. § 13-1105(A)(2). By definition, though, proof of a *more* culpable mental state proves a *less* culpable mental state. *See* A.R.S. § 13-202(C). Indeed, given that crimes are designated predicate felonies because they create a grave risk of death, and felony murder requires a close causal connection between the predicate felony and the resulting death, it

⁶ The court did not address Styers’ same argument regarding child abuse as a predicate felony because it had “reversed the child abuse conviction on other grounds.” *Id.* at 117 n.3.

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logically follows that much of the evidence used to prove a predicate felony may also prove an intent to kill. *See Miniefield*, 110 Ariz. at 602 (Offenses are designated predicate felonies because they are “committed with such a wanton disregard for human life that there is no need to prove the elements usually necessary for a conviction for first degree murder.”); A.R.S. § 13-1105(A)(2) (under felony murder statute, death must occur “in the course of and in furtherance of” a predicate felony).

¶25 Although the predicate felony of child abuse required the State to prove only that Martinson intentionally injured J.E.M., much of the evidence establishing an intent to injure also demonstrated an intent to kill. *Cf. State v. DePiano*, 187 Ariz. 41, 43, 45 (App. 1995) (sufficient evidence of intent to commit child abuse where prosecution presented theory defendant wanted to kill herself and her children as part of a “suicide gesture”), *vacated in part on other grounds, State v. DePiano*, 187 Ariz. 27 (1996). Evidence proving an intent to kill necessarily proves an intent to injure, as it is impossible to kill a person without causing physical injury. *See State v. Barrett*, 132 Ariz. 88, 90 (1982) (“It cannot be seriously argued that death does not involve serious physical injury as defined by [statute].”), *overruled on other grounds by State v. Burge*, 167 Ariz. 25 (1990).

¶26 For the foregoing reasons, the State was entitled to pursue a theory that Martinson committed the predicate felony of child abuse with an intent to kill J.E.M., not merely injure him. The superior court’s contrary ruling was therefore legally erroneous.

B. Prosecutorial Misconduct

¶27 Federal and state double jeopardy protections prohibit multiple prosecutions for the same offense. *State v. Minnitt*, 203 Ariz. 431, 437, ¶ 27 (2002). Additionally, “[a]s part of the protection against multiple prosecutions, the clause protects a defendant’s valued right to have his or her trial completed by the tribunal first assigned.” *Id.* These constitutional protections, though, “are not absolute.” *Id.* at ¶ 28. In determining whether double jeopardy principles bar retrial, we consider whether there was “[i]ntentional and pervasive misconduct on the part of the prosecution to the extent that the trial [was] structurally impaired” and whether the misconduct “is so egregious that it raises concerns over the integrity and fundamental fairness of the trial itself.” *Id.* at 438, ¶¶ 29-30. We review *de novo* whether double jeopardy principles bar retrial of a defendant. *Moody*, 208 Ariz. at 437, ¶ 18.

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¶28 Although as a matter of substantive law, the State was entitled to pursue an intent to kill theory, as counsel for the State conceded at argument before this Court, attorneys are ethically bound to abide by court rulings — even those with which they disagree. Thus, to the extent prosecutors violated the superior court’s *Styers*-based orders, such conduct was improper.⁷ In discussing the appropriate sanction to impose, the superior court stated:

[T]he 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. . . . 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.

¶29 Assuming, without deciding, that prosecutors knowingly pursued an intent to kill theory at trial in contravention of the court’s order, as a matter of law, Martinson cannot establish the requisite prejudice arising from that conduct that would bar retrial on double jeopardy grounds. See *State v. Aguilar*, 217 Ariz. 235, 238–39, ¶ 11 (App. 2007) (rejecting claim that prosecutorial misconduct barred retrial on double jeopardy grounds and holding there must be “intentional conduct which the prosecutor knows to be improper *and prejudicial*”) (emphasis added); see also *State v. Towery*, 186 Ariz. 168, 185 (1996) (where there has been misconduct but no error, or the error is harmless, the proper remedy is generally not reversal but affirmance followed by appropriate sanctions against the offending actor). Because the law permitted the State to prove

⁷ The record does not suggest that the State was placed on notice during trial that it was violating a court order, yet continued doing so unabated. Martinson made several motions for mistrial on the basis that prosecutors were violating the court’s order by offering evidence and argument suggesting an intent to kill. Each time, the court denied the mistrial request. We leave to the superior court’s discretion the question of whether lesser sanctions are appropriate on remand.

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the felony murder charge with evidence that Martinson intended to kill J.E.M., to the extent such evidence and argument was presented at trial, Martinson suffered no cognizable prejudice.

¶30 For the foregoing reasons, we vacate the order dismissing the 2004 Indictment with prejudice and remand with instructions to grant the State's motion to dismiss that indictment without prejudice.

II. Cross-Appeal

¶31 The sole issue Martinson raises on cross-appeal is whether the superior court erred by denying his Rule 20 motions for judgment of acquittal. According to Martinson, even if we set aside the order of dismissal with prejudice, double jeopardy principles bar further prosecution due to insufficiency of the evidence. *See Burks v. United States*, 437 U.S. 1, 11 (1978).

¶32 We lack appellate jurisdiction to consider Martinson's argument as a cross-appeal. A criminal defendant may appeal only from: (1) a final judgment of conviction; (2) an order denying a new trial; (3) an order made after judgment affecting the substantial rights of the party; or (4) an illegal or excessive sentence. A.R.S. § 13-4033(A); *see also Campbell v. Arnold*, 121 Ariz. 370, 371 (1979) (court of appeals' jurisdiction is dictated by statute). Martinson was successful in having all charges against him dismissed with prejudice. Consequently, his appeal does not fall within a statutorily recognized category over which this Court has appellate jurisdiction.

¶33 However, Martinson's challenges offer an alternative basis for affirming the superior court's order of dismissal with prejudice. *See State v. Cañez*, 202 Ariz. 133, ¶ 51 (2002) (appellate court will uphold trial court's ruling if legally correct for any reason), *abrogated on other grounds by State v. Valenzuela*, 239 Ariz. 299 (2016). His contention that the court erred by denying the Rule 20 motions does not necessitate a cross-appeal with an independent showing of appellate jurisdiction; it is simply a cross-issue that Martinson may raise in response to the State's appeal. *See Town of Miami v. City of Globe*, 195 Ariz. 176, 177 n.1, ¶ 1 (App. 1998) ("When a successful party seeks only to uphold the judgment for reasons supported by the record, but different from those relied upon by the trial court, its arguments may not be raised by a cross-appeal, as it is not an 'aggrieved' party, but are more properly designated as cross-issues."). Accordingly, we consider the merits of Martinson's argument.

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¶34 We review claims of insufficient evidence *de novo*. *State v. West*, 226 Ariz. 559, 562, ¶ 15 (2011). Our assessment is limited to whether substantial evidence supports the verdicts. *State v. Scott*, 177 Ariz. 131, 138 (1993); *see also* Ariz. R. Crim. P. 20(a) (requiring trial court to enter judgment of acquittal “if there is no substantial evidence to warrant a conviction”). Substantial evidence is evidence that, viewed in the light most favorable to sustaining the verdict, would permit a reasonable person to find a defendant guilty beyond a reasonable doubt. *State v. Roseberry*, 210 Ariz. 360, 368–69, ¶ 45 (2005). “Evidence may be direct or circumstantial, but if reasonable minds can differ on inferences to be drawn therefrom, the case must be submitted to the jury.” *State v. Landrigan*, 176 Ariz. 1, 4 (1993).

¶35 The State presented substantial evidence from which jurors could conclude, beyond a reasonable doubt, that Martinson was guilty of child abuse and felony murder.

¶36 J.E.M. died while in Martinson’s sole care. When K.E. left the boy with Martinson on Friday evening, he was in good health. Post-mortem toxicology tests revealed carisoprodol and a related metabolite in J.E.M.’s blood. The medical examiner who performed J.E.M.’s autopsy testified that the cause of death was acute carisoprodol toxicity.

¶37 There was also circumstantial evidence that Martinson administered the drug to J.E.M. *See State v. Murray*, 184 Ariz. 9, 31 (1995) (probative value of evidence is not reduced because it is circumstantial). To counter the suggestion that the child ingested the carisoprodol by himself, the State presented evidence that J.E.M. did not take pills easily and that K.E. never gave him medication in pill form. Moreover, an empty bottle of carisoprodol pills – prescribed for Martinson – was found on the top shelf of a medicine cabinet with the child-resistant cap intact. And the autopsy revealed a recent abrasion on J.E.M.’s upper lip that the medical examiner testified could have been caused by forcible administration of the drug.

¶38 The State also presented circumstantial evidence that Martinson gave the drug to J.E.M. as a means of retaliating against K.E. *See State v. Routhier*, 137 Ariz. 90, 99 (1983) (“Criminal intent, being a state of mind, is shown by circumstantial evidence.”). Trial evidence established acrimony between Martinson and K.E. dating back to 2000, when K.E. called the police and had Martinson forcibly removed for assaulting her. After K.E. obtained legal custody of J.E.M. and an order of protection against Martinson, Martinson violated the protective order and visitation schedule, resulting in renewal and expansion of the protective order, and ultimately including a requirement that he participate in domestic violence

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counseling and undergo a psychological assessment. There was also evidence that, at the time of J.E.M.'s death, Martinson was upset because K.E. had recently filed a motion to reinstate supervised visitation exchanges. Martinson expressed fear that having to bear the expense of supervised exchanges would mean he would not be able to see J.E.M. Indeed, when officers questioned Martinson about J.E.M.'s death, he accused K.E. of wanting to limit his involvement with the child.

¶39 During police interviews, Martinson claimed he could not remember what happened to J.E.M. However, post-mortem lividity on the child's body indicated he had been moved and placed on the bed after his death. Additionally, Martinson sent a text message around 8:00 p.m. on Saturday to a friend who was close to J.E.M. The text read: "We love you and will miss you." When the friend called around 9:45 p.m., Martinson spoke of legal paperwork he had received about the motion for supervised exchanges. He complained that he received a letter from K.E. or her attorney every week and that K.E. would just not go away. He also told the friend J.E.M. did not care about him and only wanted to talk about and be with his mother. When the friend asked about J.E.M., Martinson responded that the boy was in his bedroom with the lights out, and he did not know whether he was awake or asleep. Yet at trial, Martinson testified that he had discovered J.E.M. dead hours earlier.

¶40 The State also presented evidence that Martinson tried to commit suicide by taking pills, cutting his wrists, and attempting to suffocate himself with garbage bags. Reasonable jurors could find such conduct indicative of consciousness of guilt and/or acts undertaken as part of a murder-suicide plan.

¶41 Martinson argues there was no evidence the child abuse occurred under "circumstances likely to produce death or serious physical injury." Proof of this element requires "objective evidence of the existence of such circumstances." *State v. Payne*, 233 Ariz. 484, 506, ¶ 70 (2013). But the fact J.E.M. died as a result of the child abuse is "objective evidence" permitting the jury to conclude the abuse occurred under circumstances likely to produce death or serious physical injury. Martinson's claim of insufficient evidence of "physical injury" also fails. The evidence showing that Martinson caused J.E.M.'s death necessarily established that he caused physical injury. *Barrett*, 132 Ariz. at 90 (death necessarily involves serious physical injury).

¶42 Martinson also asserts there was insufficient proof of a causal link between ingestion of carisoprodol and J.E.M.'s death. Specifically, he

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argues that, “[a]side from the fact that the court erroneously admitted Dr. Hu’s testimony that carisoprodol caused death, the testimony admitted at trial failed to establish the ‘independent causation requirement’ necessary to prove felony murder.” But even if Dr. Hu’s causation testimony was erroneously admitted, we may still consider it in determining whether retrial is barred by double jeopardy principles. See *State v. May*, 210 Ariz. 452, 459, ¶ 26 (App. 2005) (“[R]etrial is permitted even though evidence is insufficient to sustain a verdict once erroneously admitted evidence has been discounted, and for purposes of double jeopardy all evidence submitted at the original trial may be considered when determining the sufficiency of the evidence.” (quoting *People v. Olivera*, 647 N.E.2d 926, 931 (Ill. 1995))).

¶43 Considered in totality, the trial evidence was sufficient to support a finding of guilt beyond a reasonable doubt for knowing or intentional child abuse under circumstances likely to produce death or serious physical injury and for felony murder based on that predicate felony. As a result, double jeopardy principles do not bar retrial of Martinson.

CONCLUSION

¶44 We vacate the order dismissing the 2004 Indictment with prejudice and remand to the superior court with instructions to grant the State’s motion to dismiss the indictment without prejudice.



AMY M. WOOD • Clerk of the Court
FILED: AA

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

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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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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Ø 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:

- v "did you do this because you hate him?";
- v "is this something you planned out?";
- v "so, you don't have any remorse for killing your son at all?"; "why did you kill your son?";
- v "did you do this because you hated him?";
- v "is this something you planned out?";
- v "Why did you kill your little boy Jeffrey? Why did you kill him?";
- v "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.

Ø 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.

Ø 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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Ø 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*.

Ø 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.

Ø 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.

Ø 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.

Ø 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.

Ø 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.

- Ø 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 carisoprodol. 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.)

- Ø 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.
- Ø 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.

- Ø 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.
- Ø 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:

Ø 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.

Ø 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.

Ø On May 10, 2012, the Court held a status conference and affirmed the trial date of July 16, 2012.

Ø 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).

Ø 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.

- Ø 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.
- Ø 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.

Ø 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.

Ø 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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- Ø 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.
- Ø 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.
- Ø 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.
- Ø 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.
- Ø Having reinstated the 2004 case, the Court set both cases for trial on October 1, 2012.
- Ø 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

Ø 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." *Jorgensen*, 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

/ s / HON. SALLY SCHNEIDER DUNCAN

HON. SALLY SCHNEIDER DUNCAN
JUDICIAL OFFICER OF THE SUPERIOR COURT

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HON. SALLY SCHNEIDER DUNCAN

CLERK OF THE COURT
J. Bower
Deputy

STATE OF ARIZONA

FRANKIE LYNN GRIMSMAN
STEPHANIE DANICA LOW
KELI B LUTHER

v.

JEFFREY RICHARD MARTINSON (001)

MICHAEL TERRIBILE
TREASURE L VANDREUMEL

CAPITAL CASE MANAGER
EXHIBITS-SE
VICTIM SERVICES DIV-CA-SE

RULING

The court has received and reviewed the legal memoranda, motions, exhibits, court file, relevant trial and post-verdict evidentiary hearing transcripts and the argument of counsel related to Defendant's motion for new trial. The court has also received and reviewed the court-ordered briefing on the impact, if any, that Division One of the Court of Appeals recent ruling in State v. Sosnowicz, 2012 WL 749984, may have on the verdicts in the case.

During the guilt phase of this trial, the Defendant moved to preclude Dr. Hu from testifying about the manner¹ of death, namely homicide. The court wrestled with this issue when the Defendant raised and argued the motion but, nevertheless, denied the motion. Following the return of the verdicts and while a motion for new trial has been pending, the Court of Appeals, Division One, issued its opinion in State v. Sosnowicz. In Sosnowicz, the trial court, over the Defendant's objection, permitted a medical examiner to testify about the manner of death, homicide. The Court found that when a medical examiner's opinion regarding the manner of

¹ A medical examiner's findings regarding "cause of death" deal with why someone died, i.e., gunshot wound, knife wound, blunt force trauma while "manner of death" findings address how someone died, i.e., suicide, homicide, natural causes.

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death is based on evidence the jury can determine without the aid of expert testimony, an expert's opinion about manner of death is inadmissible. Id. at ¶26. More specifically, in Sosnowicz, the Court ruled that in a circumstance where "the medical examiner's opinion regarding the manner of death is based largely on the testimony of lay witnesses whose credibility the jury can determine without the aid of expert testimony, an expert's opinion regarding the manner of death would normally be inadmissible." Id. The Court further found that "even if the testimony was otherwise admissible, it was apt to mislead or confuse the jury and should have been excluded under Rule 403." Id. at ¶25. While the Court of Appeals found that the trial court erred when it permitted the medical examiner to testify about manner of death, the Court found that the error was harmless based on the overwhelming evidence of the Defendant's guilt. In reaching its decision, the Court of Appeals noted that "the admissibility in a criminal case of a medical examiner's opinion regarding the manner of death depends on the particular facts and circumstances of each case." Id. at ¶22.

Generally, expert testimony is admissible if the testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue." Ariz. R. Evid. 702. An expert may testify to an opinion on an ultimate issue to be decided by the jury if the testimony is otherwise admissible. Further, even if testimony is relevant and admissible, it may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. See Ariz. R. Evid. 403. In Sosnowicz, the State argued that "medical examiners are permitted to testify regarding the manner of death even if such testimony goes to the ultimate issue in the case." Id. at ¶18. The State also argued that the medical examiner was "only stating his opinion 'regarding the cause and manner of death from a medical perspective not in the context of whether [defendant] committed a criminal offense.'" Id. at ¶19. In response to the State's argument, the Court of Appeals noted that the Rules of Evidence do not "invariably permit a medical examiner to testify to the manner of death in a murder case." Id. at ¶18. The Court was more focused on how the medical examiner's testimony would be understood by a "typical juror" than on the "intended meaning" of the testimony. Id. at ¶19.

The threshold question for a trial court is whether an expert's opinion will assist the jury in understanding the evidence or determining a fact in issue and whether, even if admissible, the evidence is apt to mislead or confuse the jury or is unduly prejudicial. See State v. Sosnowicz at ¶25; Ariz. R. Evid. 702 and 403. Following a verdict, the question before a trial court is whether the "court has erred in the decision of a matter of law to the substantial prejudice of a party." Ariz. R. Crim. P. 24.1(c)(1). This court specifically finds that it erred as a matter of law to the substantial prejudice of the Defendant when the court denied Defendant's motion to preclude Dr. Hu from testifying about the manner of death.

Dr. Hu's testimony that the victim died as the result of a homicide went to a key issue in the case. In some murder cases both the cause and manner of death are in dispute. In some

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murder cases it is only one or the other which is disputed. In some, neither is in dispute and the question for the jury is whether the charged defendant committed the murder. In this case, the Defendant challenged Dr. Hu's findings regarding both the manner and cause of death.² In testifying about the manner of death, the court finds that Dr. Hu did not rely on any specialized knowledge in making his findings. Instead, he based his opinion on information that he was no more uniquely qualified to determine than the triers of fact. Specifically, Dr. Hu based his opinion on information he learned from the police, including but not limited to: an "on-going custody battle," "an unfavorable court ruling," information that the Defendant was "upset," the fact that the Defendant failed to call 911, the fact that the Defendant had overdosed on drugs and was found unresponsive, the Defendant's text message to a former girlfriend saying "I love you, miss you," the location of the Carisoprodol when law enforcement officers entered the Defendant's residence and his observation that the victim had an abrasion on the inside of his upper lip. None of these facts required an expert to interpret. None of these facts required specialized training to understand. By allowing Dr. Hu to testify about the manner of death, the court improperly allowed an expert witness to tell the jury how to decide the case. See State v. Sosnowicz at ¶25.

Even if Dr. Hu's testimony was otherwise admissible, the court erred in admitting the testimony because it was apt to mislead or confuse the jury and it caused undue prejudice. As the Defendant has noted in his Post Hearing Supplement to Motion For New Trial that was ordered by the court and filed on March 16, 2012, the error "saturated the trial." Supplement, p. 22. Over the course of three separate days, Dr. Hu testified. His testimony was central to the case and impacted other witness' testimony and how the jury perceived or otherwise analyzed the evidence admitted at trial. In addition, not only did Dr. Hu opine about the manner of death, but he also testified that the Medical Examiner's on-scene investigator believed the manner of death was homicide, thereby compounding the error and allowing another expert or quasi-expert to tell the jury how to decide the case. Id. "Although an expert may 'embrace' an ultimate issue under Rule 704, an expert is not permitted to tell a jury how to decide a case." Id.

By allowing Dr. Hu to testify as to the manner of death and in light of the Court of Appeals' ruling in State v. Sosnowicz, this court erred as a matter of law and caused substantial prejudice to the Defendant. Consequently, the court is granting the Defendant a new trial pursuant to Ariz. R. Crim. P. 24.1(c)(4).

The Defendant has raised numerous grounds for a new trial based on allegations of juror and/or prosecutorial misconduct pursuant to Ariz. R. Crim. P. 24.1(c)(1),(2),(3) and (5). The court finds that juror misconduct did occur and, therefore, an independent basis exists to grant

² The Defendant requested that the court hold an evidentiary hearing pursuant to Daubert v. Merrel Dow Pharmaceuticals, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed. 2d 469 (1993) and Rule 702 et. seq. Ariz. R. Evid. to challenge Dr. Hu's findings and testimony regarding cause of death. The court denied Defendant's request.

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the Defendant a new trial. The court's ruling focuses on the limited grounds that independently and collectively require that relief be granted.³

The court is aware that granting relief on the basis of juror misconduct is rare and limited to specifically enumerated grounds. Ariz. R. Crim. P. 24.1(c)(3)(i)-(vi) and 24.1(c)(5). The need to protect the privacy of the jury room and the mental thoughts of jurors is a cornerstone of our system of justice and courts must guard against unnecessary and baseless intrusion to protect "the finality of verdicts" and to prevent "undue harassment of jurors." State v. Callahan, 119 Ariz. 217, 219, 580 P.2d 355, 357 (App. 1978). The rule "specifically forbids the reception of any testimony or affidavits which inquire into the subjective motive or mental processes which led a juror to his verdict." Id. However, when a juror has been guilty of misconduct, relief is warranted in the form of a new trial. Ariz. R. Crim. P. 24.1.

Juror misconduct occurs when a juror willfully fails to respond fully to a direct question posed during the *voir dire* examination. Ariz. R. Crim. P. 24.1(c)(3)(iii). In this case, jurors participated in a two-part *voir dire* process. First, jurors responded to an extensive written questionnaire that covered topics ranging from jurors' work histories to their views on the death penalty. The questionnaire also included questions about whether jurors had ever been crime victims and whether they or their family members had ever been arrested or charged with, or convicted of any crime other than minor traffic violations. After completing the questionnaire, jurors were then invited back to court in small groups so that counsel and the court, if necessary, could ask jurors follow-up questions based on their questionnaire responses. *Venire* person 184, who was selected for the jury, seated as Juror 14, and later selected as the jury foreperson ("Juror 14"), failed to disclose that she was the victim of a seventeen-count theft indictment prosecuted by the Maricopa County Attorney's Office and that her daughter was the defendant charged in the case. Juror 14 further failed to disclose on the questionnaire and during *voir dire*, that her daughter entered a plea bargain whereby fifteen of the seventeen counts in the indictment were dismissed.

During the small group *voir dire*, Juror 14 *may* have attempted to make this disclosure but her efforts were thwarted. Specifically, when the court posed a question to the jurors asking whether any of the jurors knew the lawyers representing the State or anyone at the Maricopa County Attorney's office, Juror 14 indicated that her daughter had appeared before a court and

³ The court rejects the following grounds as a basis for relief including , but not limited to: 1) The evidence was insufficient and the verdicts are contrary to the weight of the evidence; 2) Allegations that the State engaged in prosecutorial misconduct; 3) The basis for the jurors' decision, i.e., that some jurors appeared to have convicted the Defendant because they found that the Defendant intentionally killed the victim; 4) Whether the jury did or did not discuss and deliberate on lesser-included offenses (only available on Count 2, Child Abuse); 5) Violations of the admonition that did not impact final juror deliberations; 6) Personality conflicts among and between jurors; and 7) Whether there was a valid and separate vote on both counts, each uninfluenced by the other.

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dealt with a prosecutor. RT 7/22/11. She added that the appearance was in Superior Court sometime in the previous eight months. Id. When asked if she would share what the issues were with her daughter, Juror 14 indicated that she “would rather not have that in the court document.” Id. The court advised Juror 14 that “we may talk to you later in private about that” but failed to follow through on arranging a private audience with Juror 14 and counsel. Id. It is unclear from the record what Juror 14 planned to share with the court and counsel. The court fully intended to return to juror 14 and allow for more private *voir dire* than small group *voir dire* permits.⁴

Because the court did not arrange for a more private audience with Juror 14, the Defendant was unable to question Juror 14 on something so personal and troublesome that she willfully failed to share the information in two separate places on her questionnaire. This failure deprived the Defendant of the opportunity to probe Juror 14 regarding any possible bias she might have as a result of her daughter’s contact with the criminal justice system. While this information was unavailable to the Defendant, the State possessed this information because the Maricopa County Attorney’s Office was the prosecuting agency.

Juror 14’s failure to disclose information on her questionnaire and during *voir dire* was not limited to her daughter’s criminal record. Tragically, Juror 14’s husband, who was a federal law enforcement officer, was killed by a fellow officer. Juror 14 did indicate on her questionnaire that her “late husband was murdered by a corrupt police officer/agent in Florida in 1997.” During *voir dire*, however, Juror 14 minimized the impact of her husband’s death, indicated that in the 13 years since her husband’s death she had time to process it, and explained that she could set aside the experience emotionally and make a fair and impartial decision.

In connection with the court-ordered evidentiary hearing on juror misconduct, the following information came to light: Juror 14 had publicly proclaimed that the justice system had let her and her family down, she appeared on an episode of 20/20 and expressed anger over the sentence imposed by the court, and spoke about her husband’s death with her fellow jurors including the ordeal she had endured. By not sharing the true extent of the impact that her husband’s death still had on her, Juror 14 impermissibly deprived the Defendant of the opportunity to explore her true biases, the very purpose for which the *voir dire* process exists.

Finally, while Juror 14 disclosed that her husband not only had served as a federal law enforcement officer and as a Maricopa County Probation Officer, she failed to disclose that he had also previously served as a Maricopa County Sheriff’s officer. Juror 14 explained this omission by pointing out that he had served as a Sheriff’s Deputy before the two had met.

⁴ Juror 14 disclosed in her questionnaire that her daughter had been “arrested for drug violations and probation violation.” Whether Juror 14 would have limited herself to this answer during individual *voir dire* or otherwise disclosed the full extent of her daughter’s criminal history is unknown, and at this point, unknowable.

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The record is clear that Juror 14 engaged in a pattern and practice of withholding material information from the court and counsel during the *voir dire* process. The question then for the court is whether these omissions and falsehoods undermine the impartiality of the jury. See Dyer v. Calderon, 151 F.3d 970, 973 (9th Cir. 1998).

The post-verdict evidentiary hearing revealed that during an early stage of the trial, Juror 14 shared with other jurors that the Defendant was a “piece of sh_t,” repeatedly shared her own experiences as a victim calling the defendant’s expert’s presentation on grief “bullsh-t,”⁵ indicated to other jurors that “police don’t lie” based on her late husband’s law enforcement experience, commented to other jurors that it was the defense’s job to mislead and/or confuse the jurors, and represented herself to have more legal experience as a paralegal than her qualifications and work experience justified in order, it appears, to gain other jurors’ confidence in her legal expertise. The fact that Juror 14 was selected as the foreperson provides evidence of the success of her efforts. The inference that can be drawn from Juror 14’s pattern of misconduct is that she first sought to secure a seat on the jury and then successfully sought to position herself to be selected as its foreperson.⁶ See e.g., Dyer v. Calderon, 151 F.3d 970 (9th Cir. 1998). At bottom, Juror 14 was not indifferent to jury service. Juror 14 frustrated the *voir dire* purpose and process by concealing her personal biases which ultimately, as the record plainly reveals, blossomed into prejudice that infected the trial to the Defendant’s substantial prejudice. It is not relevant whether Juror 14 intended to subvert the process. That fact remains that she did. Id.

“The Sixth Amendment guarantees criminal defendants a verdict by impartial, indifferent jurors. The bias or prejudice of even a single juror would violate [Defendant’s] right to a fair trial. See, e.g., United States v. Hendrix, 549 F.2d 1255, 117 (9th Cir. 1977); United States v. Mitchell, 568 F.3d 1147, 1150 (9th Cir. 2009). “The subjective state of mind [of a juror] is not dispositive when the circumstances create an inference of bias.” Dyer v. Calderon, 151 F.3d 970, 985 (9th Cir. 1998).

⁵ During the post-verdict evidentiary hearing, a number of jurors testified that conversations about the trial were held in violation of the court’s admonition not to discuss the case until the end of the presentation of evidence, closing arguments by both parties and until jurors had received the final instructions on the law. Juror 14 was identified as one of the jurors who participated in these improper conversations or otherwise made comments in violation of the admonition. Even though the court has not found that these comments or conversations form a basis for relief, their content does provide further evidence of Juror 14’s biases and prejudices.

⁶ The court notes that evidence adduced during the post-verdict evidentiary hearing indicates that Juror 14 withheld from the deliberating jury an answer to a juror’s question on “premeditation” and “murder 1.” See Exhibit 1, post-verdict evidentiary hearing. A majority of deliberating jurors testified to this fact. The court places little weight on Juror 14’s denial that she withheld the answer. The court mentions this event because even though such conduct may not provide an independent basis for relief, juror 14’s conduct underscores her bias in the case.

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The court finds that Juror 14 engaged in willful misconduct by improperly concealing her personal biases and that these biases were injected into the jury's deliberative process thereby depriving the Defendant of his Sixth Amendment right to a fair trial.

Accordingly,

IT IS ORDERED granting the Defendant a new trial.

IT IS FURTHER ORDERED setting the last day as May 21, 2012.

IT IS FURTHER ORDERED setting a Status Conference before this Court on April 10, 2012 at 9:15 a.m.

This case is eFiling eligible: <http://www.clerkofcourt.maricopa.gov/efiling/default.asp>. Attorneys are encouraged to review Supreme Court Administrative Order 2011-140 to determine their mandatory participation in eFiling through AZTurboCourt.

STATE OF ARIZONA,)
)
 Plaintiff,) 1 CA-CR 13-0895
)
 v.) CR2004-124662-001 SE
)
 JEFFREY RICHARD MARTINSON,)
)
 Defendant.)
)
 _____)

July 29, 2011

STATUS CONFERENCE

51a

A P P E A R A N C E S

For the Plaintiff:

FRANKIE GRIMSMAN, Deputy County Attorney

STEPHANIE LOW, Deputy County Attorney

For the Defendant:

MICHAEL TERRIBILE

For the Victim:

KELI LUTHER

SUPERIOR COURT
Phoenix, Arizona

1 Phoenix, Arizona
2 July 29, 2011
3

4 (The following proceedings were held in
5 chambers:)

6 THE COURT: Thank you all for being available on no
7 notice. This is the time set for a status conference in
8 CR2004-124662-001 set at the Court's request. I have
9 Mr. Terribile in my office. Is Ms. VanDreumel waiving -- are
10 you waiving her appearance just for purposes --

11 MR. TERRIBILE: She's going to be available on the
12 phone.

13 THE COURT: Ms. VanDreumel, are you on the phone?

14 MR. TERRIBILE: No, on my phone.

15 THE COURT: Oh, on your phone, if need be?

16 MR. TERRIBILE: Yes.

17 THE COURT: All right. Can you waive your client's
18 appearance for purpose of this --

19 MR. TERRIBILE: Yes.

20 THE COURT: -- of this discussion, and if need be, we
21 can re-memorialize this on Monday. Do I have Ms. Low,
22 Ms. Grimsman and Ms. Luther?

23 MS. LOW: Yes.

24 MS. LUTHER: Yes.

25 THE COURT: Okay. Thank you. Yesterday's discussion

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1 about "senseless," really, as you know, I was struggling to
2 understand some theories here. And while the facts of this case
3 or what the allegations are have been made clear to the Court
4 over litigation, I don't always know what the lawyers are
5 thinking in terms of theory of the case. And I then reflected
6 on it and then it caused me to do some research to try to
7 understand why I was struggling. And it happened while we were
8 having the "senseless" discussion as to when senseless is or is
9 not permitted as an aggravating factor in conjunction with
10 custody, parental custody. And the issue went to really a basis
11 for the felony murder and child abuse and whether or not there's
12 a potential merger problem.

13 And so that's one of the reasons -- I hadn't
14 articulated it well because I hadn't really, frankly, figured
15 out in my own mind why I was having questions about the State's
16 theory. So I would like the parties to look at the possible
17 merger issues that may arise with child abuse and felony murder.
18 And I do not say that this is the definitive state of the law,
19 but as a starting point for your inquiry, you can look at
20 *Styers*, which we've talked about in conjunction with the *Milke*
21 line of cases. But in any event, 177 Ariz. 104. In that case,
22 the child abuse conviction was reversed, and the reason for that
23 was, and that's the case, I think we're all familiar with the
24 facts, where the child is killed. It's an intentional killing
25 with the -- with a gun. And in that case, both felony murder

1 and premeditated murder were charged. The jury came back with
2 verdicts as to both, but the court vacated the child abuse
3 conviction for which the jury also convicted the defendant
4 because they treated child abuse like aggravated assault under
5 the common law, where it caused a merger. And, therefore, you
6 can't have the intentional killing, which you can have
7 premeditated child abuse as part of a felony murder charge. The
8 problem was you can't charge that and child abuse and that they
9 merged.

10 So I want you to take a look at that, because I just
11 don't want problems here. And it better articulates some of the
12 questions I was having in my own mind. I am mindful that there
13 are other cases out there. Some of them are not reported
14 decisions on child abuse and felony murder. So, obviously, I
15 want to confine the briefing to what is a reported decision on
16 this issue. But -- now, and I'm looking right now at and
17 I'll -- just so you understand what my concerns are, and I'm
18 trying to find you the pinpoint cite of the page. Just a
19 second. I have the Westlaw printed document. So it's page 11
20 just loosely. But the actual page under the decision is -- the
21 discussion starts on page 110, at the bottom of 109, the top of
22 110. So 177 Ariz. 110. And it goes into a discussion about
23 this child abuse and --

24 MS. GRIMSMAN: That's in *Styers*?

25 THE COURT: That's in *Styers*.

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1 MS. GRIMSMAN: Okay.

2 THE COURT: And the culmination of the discussion
3 about child abuse was, you know, was that they vacated that
4 conviction. So they say, "We therefore set aside the conviction
5 for child abuse. The jury was instructed on both premeditated
6 murder and felony murder. In the felony murder instruction, the
7 jury was told that either kidnapping or child abuse could serve
8 as a predicate felony. In view of the jury's finding of
9 premeditation, we find the instruction on child abuse as a
10 predicate felony to be harmless surplusage." So they didn't
11 reverse on that basis. And they go on and they say, "We
12 emphasize that nothing in this opinion should be read as
13 suggesting that child abuse may not still be a predicate felony
14 for felony murder. If a person intentionally injures a child,
15 he is guilty of child abuse...if that injury results in the death
16 of the child it becomes a first degree felony murder..." I
17 understand that. "Although felony murder is first degree
18 murder, it is arrived at differently than premeditated murder.
19 The first degree murder statute...not the child abuse statute,
20 applies when a person intentionally kills a child victim."

21 And so what they have found was when the argument was
22 that the defendant intentionally killed the child victim, that
23 was okay for both premeditated murder and felony murder, but the
24 child abuse count merged into the felony murder count.

25 Now, I will tell you having done research on this

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1 since I was agitated about -- I couldn't quite wrap my brain
2 around what was bothering me, there are some memo decisions out
3 there that raise additional concerns that if the defendant is
4 found to be guilty of a lesser of child abuse -- there obviously
5 would not be any lessers for felony murder -- but if a lesser of
6 child abuse, then that creates other potential issues, meaning
7 in order to support the predicate for felony murder, it has to
8 be intentional and knowing. It can't be a lesser of child
9 abuse.

10 So there are some legal issues here, and I don't want
11 us to step on a land mine. No one has raised them. But after I
12 got off the bench and I was trying to grapple with the
13 "senseless" issue and trying to get my arms around that issue
14 and whether or not if this was an intentional killing and that
15 was the intention of the child abuse, then senselessness would
16 not be authorized, but otherwise, if it was not intentional
17 killing of the kid as the element of child abuse, then I would
18 allow senseless to go forward. It came up under my analysis of
19 that when I finally struck on part of the problem that I was
20 having. So I didn't want you all to be surprised on Monday when
21 I raised my concern regarding this.

22 MS. GRIMSMAN: Okay.

23 THE COURT: Okay. And I'm not saying I've given you
24 the definitive law on this. I'm telling you I want you to brief
25 it, because I think it's an issue, and I think any potential

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Phoenix, Arizona

1 lessers of child abuse may pose its own separate issue. And it
2 may be that the State has to pick a theory here, or not. I'm
3 not telling lawyers how to lawyer their case. But there are
4 issues here, and I need to understand them better.

5 MR. TERRIBILE: I'm unclear on what you want us to do
6 Monday.

7 THE COURT: Well, I don't know that you have to have
8 an answer on Monday.

9 MS. LOW: I'm sorry. I didn't hear what Mr. Terribile
10 said.

11 THE COURT: He said what did I want you all to do on
12 Monday. I realize it's Friday. I realize you're very steeped
13 in your trial prep. I will want this issue briefed, because it
14 will most definitely impact what goes to the jury. It will most
15 definitely impact jury instructions. And I don't want to
16 unnecessarily open the doors that cause reversible error because
17 arguments are made that end up being inappropriate. So I get
18 that things change and things are subject to change during trial
19 and that it's ultimately the final instructions that count. But
20 I don't want there to be arguments made that if before we seat
21 this jury a week from Monday we know are inappropriate. That
22 would be possible reversible error, and I'm not going to let
23 that happen.

24 MR. TERRIBILE: It's unclear to me, Judge, if you're
25 giving us a deadline to have it briefed.

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1 THE COURT: Well, I want to ask you when you think you
2 can be able to discuss this issue intelligently with me.

3 MR. TERRIBILE: Well, you see, our frustration all
4 along has been, just as yours is, we can't pin the State down on
5 a theory.

6 THE COURT: Well, I don't know that the State
7 necessarily has to be pinned down --

8 MR. TERRIBILE: That's --

9 THE COURT: -- but if they choose not to be pinned
10 down, then it creates some legal peril.

11 MR. TERRIBILE: And --

12 THE COURT: I don't want somebody to step on a land
13 mine unknowingly.

14 MR. TERRIBILE: And my position is until I know where
15 they're going, I don't know how I'm responding.

16 THE COURT: Well --

17 MR. TERRIBILE: So you're talking about briefings. I
18 think that we have to have a start point. The start point is
19 the State has to tell us where they're going. Then we can
20 respond.

21 THE COURT: Okay. Are you all hearing that?

22 MS. GRIMSMAN: A little bit of it. It's hard to pick
23 him up.

24 THE COURT: Okay. I understand that. So I'm having
25 Mr. Terribile step forward. But let me just summarize.

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1 Basically, his bottom line is he -- his bottom line is he wants
2 the State to pick a theory. I don't know that the State is
3 required to do that. However, if the State does not, and these
4 issues are real, then there is legal peril here. And I think
5 you all have appeared in front of me enough to know if I see an
6 issue, and I don't claim to see every issue, but if I see one,
7 I'm going to let you know it, and I see this as a potential
8 issue.

9 MS. GRIMSMAN: I understand.

10 THE COURT: And I don't want arguments to be made that
11 are not supported by the law and that could create error. So
12 there's going to have to be meaningful discussion and briefing
13 on this, or not, depending on what the State chooses to do.

14 MS. GRIMSMAN: Okay.

15 THE COURT: And the reason, I just want to make it
16 clear, and I know the record speaks for itself, and I'm not
17 trying to be too hard on the State. But the State has in
18 various proceedings in front of me offered alternate theories.
19 There has been the theory that the defendant intentionally
20 harmed the child in order to get back at Ms. Eberle. There is
21 the theory that the defendant harmed the child but it was really
22 an inadvertent death because he was despondent and was going to
23 commit suicide. I don't know and I'm not telling you. I'm just
24 saying that sometimes in cases you can argue alternate theories
25 without legal peril and sometimes you can't. And this may be a

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1 circumstance, because if child abuse is treated like aggravated
2 assault under the law, there's a merger problem. And *Styers*
3 seems to indicate that there's a merger issue. And it impacts
4 any lesser-included offenses that go to the jury possibly under
5 child abuse and state of mind. Because the only state of mind
6 that would work to support as a predicate for felony murder
7 would be the intentional and knowing harm to the child. So I'm
8 just saying that, and I like I said, I've only done some
9 preliminary poking around. I'm not telling you that I have
10 given you answers here. I know I've raised a lot of questions.

11 MS. GRIMSMAN: I understand. And honestly, I can't
12 really respond to any of this until I have an opportunity to
13 process it and do a little research on it --

14 THE COURT: I understand that.

15 MS. GRIMSMAN: -- a lot of research.

16 THE COURT: I respect that. I understand that. And
17 so my response to that is know I'm thinking about it and that
18 I'm going to require you all to deal with it. Both --

19 MS. GRIMSMAN: Was this -- and I don't know, you said
20 you've looked at that a little bit. Was this issue addressed in
21 *Chappell*?

22 THE COURT: I haven't had enough time to look at all
23 the cases where this has come up, so I can't answer that
24 question whether it came up in *Chappell*.

25 MS. GRIMSMAN: Okay.

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1 THE COURT: I'm just right now doing my own research
2 on this. But I'm not going to rely on my own research. I'm
3 going to make you all do your work to deal with it. And it
4 could very well have come up in *Chappell*. I don't know.

5 MS. GRIMSMAN: Okay.

6 THE COURT: Okay. All right. Any questions for me?

7 MS. GRIMSMAN: I'm just assuming that Monday we may
8 set some time to get together on this, but we're not supposed to
9 be prepared with an answer on Monday.

10 THE COURT: I am not expecting you to be prepared with
11 an answer on Monday.

12 MS. GRIMSMAN: Okay.

13 THE COURT: But I am expecting you all to be able to
14 engage in intelligent discussions about this so that we can get
15 this issue resolved.

16 MS. GRIMSMAN: Okay.

17 THE COURT: Okay.

18 MR. TERRIBILE: On Monday?

19 THE COURT: No.

20 MR. TERRIBILE: Oh, at some point? Okay. All right.
21 Yeah.

22 THE COURT: At some point --

23 MR. TERRIBILE: Okay.

24 THE COURT: -- but on pretty short order. A week from
25 Monday jeopardy attaches on this. You guys stand up. You give

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Phoenix, Arizona

1 openings. I instruct the jury. So you can understand that
2 notwithstanding everyone's desire to have next week be a dark
3 week, it may not be as dark as you had hoped it would be. Okay.

4 MS. LOW: And, Judge, the problem is that I'm at a
5 conference out of town at the end of the week.

6 THE COURT: So that tells us we'll be talking a lot
7 about this at the beginning of the week. Okay. So I appreciate
8 that. I understand that. All I can tell you is that this is
9 something that is -- it may end up being much ado about nothing.
10 But the fact that I'm concerned about it and I'm the judge means
11 you need to be concerned about it. Fair enough? And maybe you
12 all will bring something to my attention sooner rather than
13 later that tells me, "Stop worrying about this, Judge. This
14 isn't a problem." Okay.

15 MS. GRIMSMAN: Okay.

16 THE COURT: All right. Anything else since we're all
17 together?

18 MS. GRIMSMAN: Not from the State.

19 THE COURT: Okay. Anything from the defense or
20 Ms. Luther?

21 MS. LUTHER: No, Your Honor. Thank you so much for
22 contacting us about this issue.

23 THE COURT: Okay. No problem. Talk to you later.
24 Bye-bye.

25 (Whereupon the proceedings concluded.)

SUPERIOR COURT
Phoenix, Arizona

C E R T I F I C A T E

I, Scott A. Kindle, do hereby certify that the foregoing pages constitute a true and accurate transcript of my stenographic notes, taken at said time and place, all done to the best of my skill and ability.

DATED this 5th day of February, 2014.

____/s/ Scott A. Kindle_____

Scott A. Kindle, RPR
Certified Reporter No. 50711

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,)

vs.)

JEFFREY RICHARD
MARTINSON.)

No. CR 2004-124662-001

1 CA-CR 13-0895

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ATTORNEY APPEALS

Phoenix, Arizona
August 9, 2011

BEFORE: The Honorable Sally Schneider Duncan
Judge of the Superior Court

REPORTER'S TRANSCRIPT OF PROCEEDINGS
(Trial)

COPY

Marylynn LeMoine, RMR, CRI
Certified Reporter #50441

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A P P E A R A N C E S

On Behalf of the State:

Frankie Lynn Grimsman, Esq.

Stephanie Low, Esq.

On Behalf of the Defendant:

Michael Terribile, Esq.

Treasure VanDreumel, Esq.

On Behalf of the Victims:

Keli Luther, Esq.

10:09:09 1 So I'm going to start my question as
10:09:11 2 follows: I note for the record that I have a motion by
10:09:15 3 the defense which I received this morning to compel the
10:09:18 4 State to provide notice of all evidence which it seeks
10:09:21 5 to introduce pursuant to 404(b). We'll get back to
10:09:25 6 that. We'll get back to Joshua's statements.

10:09:27 7 MS. GRIMSMAN: Is that new from this
10:09:31 8 morning?

10:09:32 9 MS. VANDREUMEL: May 27th.

10:09:33 10 THE COURT: It's just being -- my memory
10:09:36 11 is being refreshed. I issued a ruling.

10:09:38 12 MS. GRIMSMAN: We thought it was a new
10:09:40 13 motion.

10:09:42 14 THE COURT: It was waved in front of me
10:09:44 15 this morning. It was filed on May 27th.

10:09:47 16 This whole 404(b) issue is an issue for
10:09:52 17 me, so no bells have been rung that can't be unrung at
10:09:55 18 this point in time. I need to understand because the
10:09:58 19 State told me something in 2009, and I don't know that
10:10:01 20 it's a supportable felony murder position, but child
10:10:06 21 abuse can be a predicate to felony murder, and there can
10:10:10 22 be things that are supportive of child abuse as felony
10:10:14 23 murder.

10:10:14 24 I am concerned about what the State said
10:10:18 25 in 2009. I'm concerned about my 404(b) ruling, and I

10:10:23 1 want to know what the State's position is.

10:10:25 2 MS. GRIMSMAN: Okay.

10:10:26 3 THE COURT: And that's why I recessed the
10:10:27 4 jury because this is bigger than a bread box.

10:10:30 5 MS. GRIMSMAN: Absolutely.

10:10:31 6 Let me back up a little bit and clarify a
10:10:36 7 couple of things that I think may be confused because of
10:10:39 8 some presumptions that have been made.

10:10:41 9 First off, I intentionally in an abundance
10:10:46 10 of caution did not argue anything during my opening
10:10:51 11 statement, so my position as far as why this happened
10:10:55 12 and all of that was not presented in my opening
10:10:59 13 statement in an abundance of caution, so --

10:11:01 14 THE COURT: Stop there.

10:11:03 15 I understand that. But your opening
10:11:06 16 statement is very different than the theories that have
10:11:09 17 been presented to me, and I don't know what was really
10:11:12 18 presented in court to other judges, but the State's
10:11:15 19 theory of the case that fueled my 404(b) ruling is very
10:11:19 20 different than what you presented in your opening.

10:11:21 21 I saw how careful you were in your
10:11:23 22 opening. I agree. You were very careful. You did not
10:11:26 23 argue motive, revenge, killing. You didn't argue that.

10:11:30 24 It's not argument, but you weren't
10:11:32 25 presenting your case that way. Duly noted.

10:11:36 1 It is, though, how it was presented to me
10:11:38 2 in 2009.

10:11:41 3 MS. GRIMSMAN: I don't disagree. Okay.
10:11:42 4 So first off, let's back up to Styers, because the
10:11:47 5 Court's interpretation of Styers, I believe, is
10:11:52 6 incorrect.

10:11:52 7 THE COURT: It may be.

10:11:53 8 MS. GRIMSMAN: And I'll explain why.

10:11:56 9 Styers involved an agreement to kill, a
10:12:02 10 premeditated thought-out plan of how to kill, and it
10:12:09 11 involved him placing a gun at the back of a child's head
10:12:13 12 and pulling the trigger, and in that instant the child
10:12:16 13 died.

10:12:17 14 And Styers specifically said this does not
10:12:22 15 mean that you cannot have felony murder. This does not
10:12:25 16 mean that you cannot commit a child abuse and in the
10:12:28 17 course of that child abuse that you can't have a
10:12:32 18 homicide.

10:12:32 19 The difference is in Styers it was a
10:12:36 20 single instantaneous act that caused a death. There was
10:12:44 21 no time for that child to have suffered any abuse.
10:12:48 22 There was no time during that period for this to have
10:12:55 23 been nothing more than a child abuse.

10:12:57 24 There was no time during the course of
3:01 25 those events for that child to be saved. From the

10:13:09 1 moment the act occurred that child was dead. You can
10:13:13 2 have an intentional and knowing child abuse

10:13:17 3 THE COURT: I agree.

10:13:17 4 MS. GRIMSMAN: That flows forward to a
10:13:20 5 death. And that death can include the fact that the
10:13:25 6 defendant didn't stop that course of events.

10:13:29 7 So when you're talking about a case
10:13:33 8 when -- where Soma is ingested, there is a period of
10:13:40 9 time while that Soma is absorbed into the bloodstream.
10:13:43 10 There is a period of time in this case where child abuse
10:13:48 11 is occurring.

10:13:53 12 That's the basis for felony murder.

10:13:56 13 Now, the difference is we can't say that
10:14:04 14 up until the moment when he decided to commit that
10:14:08 15 intentional child abuse, that he thought this out, that
10:14:12 16 he planned it, that it occurred to him beforehand, so we
10:14:16 17 cannot charge him with premeditated murder, and we've
10:14:20 18 never represented this case as a premeditated murder.

10:14:24 19 We've always represented it as an angry
10:14:26 20 reaction to the situation, of frustration with the
10:14:31 21 situation, that acted out in anger against the mother
10:14:36 22 and the child, which is exactly what I presented the
10:14:39 23 facts to the jury in opening statements.

10:14:44 24 There is a huge difference between giving
10:14:49 25 a child a Soma, becoming despondent, deciding you're

10:14:55 1 going to kill yourself, and letting that Soma either
10:15:01 2 reach a level to where that child died or taking some
10:15:05 3 other steps which the State has never said we're not
10:15:08 4 going to present, that there may have been some
10:15:11 5 additional steps taken by the defendant to end that
10:15:13 6 child's life.

10:15:14 7 All of that amounts to child abuse until
10:15:21 8 the moment when that child stops breathing, and then it
10:15:24 9 becomes a felony murder.

10:15:26 10 And the problem we've got in this case is
10:15:30 11 that because of the circumstances of the crime, there is
10:15:35 12 most definitely a period of time while this child is
10:15:39 13 under the influence of the Soma because it's in his
10:15:42 14 bloodstream and in his stomach contents, so there is a
10:15:47 15 period of time between when that Soma is ingested and
10:15:52 16 when this child dies, so there is absolutely a period of
10:15:57 17 an intentional child abuse or a knowing child abuse.

10:16:05 18 There is also steps taken in furtherance
10:16:09 19 of this child abuse that could also be an attempted
10:16:13 20 child abuse, which is the basis for felony murder.

10:16:16 21 All of those things amount to felony
10:16:19 22 murder. There is no requirement that just because in
10:16:23 23 the end it could have been an intentional killing that
10:16:28 24 says that it can't be felony murder because that
6:31 25 decision can be made anywhere along that plan while that

10:16:35 1 child abuse is transpiring, and the State has no way to
10:16:38 2 know that because of the nature of the acts that we're
10:16:41 3 talking about in this case.

10:16:42 4 So can I tell you with certainty that in
10:16:47 5 the end at the close of the evidence there may not be a
10:16:49 6 merger between the child abuse and the felony murder as
10:16:52 7 far as sentencing purposes, no, because at the close of
10:16:57 8 the evidence the Court may determine that the child
10:17:00 9 abuse has merged into the felony murder and those
10:17:03 10 sentences must be run concurrent, but there is still a
10:17:07 11 period of time for child abuse to be the basis of felony
10:17:12 12 murder, and not all intentional killings -- as we've
7:16 13 explained to the jury countless times -- are first
10:17:21 14 degree murder.

10:17:22 15 Not all intentional killings are
10:17:26 16 premeditated. Just because the defendant acts with some
10:17:30 17 intent does not necessarily make that a premeditated
10:17:33 18 murder.

10:17:34 19 Styers was obviously a premeditated
10:17:38 20 murder. It was also a felony murder because of the
10:17:43 21 kidnapping that was part of the steps taken for the
10:17:47 22 intentional murder.

10:17:48 23 And the Court never said just because you
10:17:53 24 kidnapped him with the intent to kill him that this
7:57 25 wasn't a felony murder

10:17:58 1 THE COURT: Okay. Stop right there. Let
10:17:59 2 me just focus on some language in *Styers*, okay, and to
10:18:04 3 me this is where there may be the difference.
10:18:07 4 You've just said just because it could be
10:18:10 5 something that rises to an intentional killing, does not
10:18:14 6 mean it cannot be felony murder.
10:18:16 7 MS. GRIMSMAN: That's correct.
10:18:17 8 THE COURT: Those were your words,
10:18:19 9 something to that effect.
10:18:21 10 That may be true for other types of felony
10:18:24 11 murder, but in *Styers*, what they say -- and I'll give
10:18:29 12 you the exact language -- and if you want to look at the
10:18:32 13 opinion --
10:18:33 14 MS. GRIMSMAN: I'm pretty familiar with
10:18:34 15 it.
10:18:35 16 THE COURT: Get out *Styers*. Okay.
10:18:36 17 So I'm looking right now at 177 Ariz. 110,
10:18:48 18 bottom of 110.
10:18:48 19 "We emphasize that nothing in this opinion
10:18:53 20 should be read as suggesting that child abuse may not
10:18:56 21 still be a predicate felony from that felony murder if a
10:19:02 22 person intentionally injures" -- and that is
10:19:04 23 italicized -- "a child, he is guilty of child abuse. If
10:19:10 24 that injury results in the death of the child, it
9:15 25 becomes a first degree felony murder."

10:40:07 1 Do we need to deal with that today?

10:40:09 2 THE COURT: I don't think we need to deal
10:40:10 3 with the possible sentencing issue today.

10:40:12 4 MS. GRIMSMAN: I would agree.

10:40:13 5 THE COURT: Not high on my list, okay?

10:40:15 6 But I don't want that to be forgotten
10:40:17 7 because that's still a legal issue about what happens,
10:40:20 8 and the way that got spelled out was if he's convicted
10:40:24 9 as charged, what does that mean?

10:40:27 10 If he's convicted of a lesser of child
10:40:29 11 abuse and there is possible inconsistent verdicts,
10:40:32 12 although I am less concerned about that having read
10:40:37 13 Lemke (phonetic), what does that mean?

10:40:38 14 I gave you the Lemke decision to look at.

10:40:38 15 MS. GRIMSMAN: Correct.

10:40:41 16 THE COURT: But that's still an issue.

10:40:42 17 There also has been an issue that they
10:40:46 18 have been jumping up and down about, which I am now
10:40:51 19 totally finally getting, having put all the pieces
10:40:53 20 together, which is about the theory of the case issue,
10:41:00 21 which we're getting to now.

10:41:02 22 Okay. We're getting to it now.

10:41:04 23 That's the one right now.

10:41:07 24 MS. VANDREUMEL: I liked your former
10:41:09 25 briefing schedule much better.

10:41:10 1 THE COURT: I'm sure you did. We're
10:41:11 2 accelerating the concerns I have about that because
10:41:14 3 that's what's going on now.

10:41:16 4 I need to know what the State's theory of
10:41:18 5 the case is, and I need to understand what people's
10:41:22 6 position is regarding 404(b) and/or intrinsic evidence,
10:41:29 7 okay?

10:41:29 8 MS. GRIMSMAN: Okay.

10:41:29 9 THE COURT: And if you disagree with my
10:41:32 10 reading of Styers and Milke, tell me why I'm wrong
10:41:37 11 because I'm reading it the way I'm reading it.

10:41:39 12 MS. GRIMSMAN: I understand.

10:41:40 13 THE COURT: Intent to injure is the
10:41:41 14 predicate for felony murder, not the intent to kill.
10:41:44 15 That's how I read Styers, okay?

10:41:47 16 So I'm going to recess for five minutes.
10:41:49 17 Discuss amongst yourselves. I'll be right back.

10:41:52 18 MS. GRIMSMAN: Can we have ten? Maybe I
10:41:54 19 need to discuss it with my co-counsel before I discuss
10:41:57 20 it with defense.

10:41:57 21 THE COURT: You all can't sit around in a
10:42:03 22 circle?

10:42:03 23 MS. VANDREUMEL: I can.

10:56:05 24 (Whereupon, a break was taken.)

~9:05 25 THE COURT: Okay you may be seated.

10:56:15 1 It's nice to take a break. We're back on
10:56:18 2 the record. Everyone is present.

10:56:21 3 I love the clarity of thinking that a
10:56:23 4 break brings to me, so here is what my thought is.

10:56:27 5 Okay. And since I'm the judge, I get to
10:56:29 6 do that.

10:56:30 7 We're going to go forward this afternoon
10:56:33 8 at 1:30. You can put Ms. Eberle on. You cannot
10:56:37 9 argue -- and I'm talking to the State right now -- and
10:56:41 10 present a theory that the defendant intended to kill his
10:56:43 11 son, but you can provide any kind of theory that he
10:56:47 12 intended to harm, knowingly harmed his son, and it's
10:56:47 13 child abuse, and it's a predicate for felony murder.

10:56:54 14 There is no spectrum here. You lost that
10:56:57 15 opportunity when you didn't charge premeditated murder.
10:56:59 16 But there is circumstantial evidence that is permitted
10:57:05 17 to be used for intent to harm or knowingly harm.

10:57:07 18 It's the same intent level. It's just
10:57:11 19 that the end result is not intent to kill.

10:57:14 20 So I've reviewed once again my 404(b)
10:57:20 21 ruling in 2009.

10:57:20 22 First of all, I have language that now I
10:57:24 23 think is not, of course, accurate, when I talked on
10:57:28 24 Page 2 of the ruling saying that according to the State
10:57:33 25 the defendant's relationship with Eberle was controlling

10:57:35 1 and abusive, he used their child as a pawn, and his
10:57:38 2 anger and resentment of Eberle eventually caused him to
10:57:42 3 murder Joshua.

10:57:43 4 That's accurate. That's what the State
10:57:45 5 told me, but the motive to murder, to kill, the intent
10:57:50 6 to kill is not a theory under which the State can
10:57:54 7 operate in this trial.

10:57:55 8 Now, with respect to the ruling. I just
10:57:59 9 want to make sure that I've made it clear yesterday, and
10:58:02 10 I'm going to go through it again today.

10:58:04 11 Did I exclude the pillow incident
10:58:07 12 yesterday? Yes. Okay. I'm standing by that, okay? I'm
10:58:10 13 standing by all of my rulings yesterday, so the pillow
10:58:14 14 incident is excluded. And again, on Page 4, No. C,
10:58:22 15 staying out all night, turning off his cell phone and
10:58:25 16 not calling her back is out.

10:58:27 17 On Page 4, the part about the defendant
10:58:32 18 seeing another woman is out. I made that clear
10:58:36 19 yesterday.

10:58:36 20 The pillow incident is out. But when I
10:58:39 21 looked at the rest of my rulings, all of this will be
10:58:41 22 404(b) for intent to injure and/or intrinsic evidence
10:58:46 23 related to their relationship and motive.

10:58:49 24 So the ruling is still good. It's just
10:58:52 25 the purpose for which the State seeks to use it when it

1 originally sought to use it for intent to kill, it's the
2 kill part that's out. The intent to injure is fine.
3 And the State can go that route if that's how the State
4 charged the case and you're allowed to use
5 circumstantial evidence and 404(b) evidence for that
6 purpose. So there is no reason we can't put Ms. Eberle
7 on as long as everyone understands what the argument
8 would be at the end and what the path is for her 404(b)
9 with respect to the notice that was waived in front of
10 me from May 27th where the defense moved to compel the
11 State to provide notice of all evidence of 404(b). I've
12 already ruled on that. We're done.

13 This 404(b) hearing in 2009 and the acts
14 that I ruled on now including the pillow incident, we're
15 done. That's it. That's the 404(b).

16 If there are any other acts out there that
17 the State suddenly wants to use, it's too late.

18 I don't know that there are any, but I've
19 limited it to that. I have a hearing on 404(b),
20 everyone at least knows by notice purposes because there
21 is a transcript and you've all reviewed very carefully,
22 so I'm done hearing about other acts evidence so I think
23 we can go forward and resume this trial at 1:30 today
24 and continue with the trial schedule. That's what we're
25 going to do. Okay?

11:00:14 1 MS. GRIMSMAN: One quick question just for
11:00:17 2 clarify.

11:00:18 3 The September 29th incident, which is in,
11:00:22 4 part of what leads up to that incident, Jeff has his
11:00:25 5 cell phone turned off and doesn't come home, and then
11:00:28 6 that incident transpires at 11:00 that night. I'm
11:00:31 7 assuming with regard to that incident, that information
11:00:34 8 comes in.

11:00:35 9 THE COURT: Yes, because it's intrinsic to
11:00:38 10 the incident.

11:00:38 11 MS. GRIMSMAN: And he's out at a bar
11:00:40 12 drinking.

11:00:40 13 THE COURT: That's what happened.

11:00:41 14 Now, I want to talk about, again,
11:00:45 15 clarifying the rulings yesterday regarding the order of
11:00:48 16 protection applications. Mention of Joshua is out.

11:00:53 17 MS. GRIMSMAN: I understand that.

11:00:54 18 THE COURT: I just want to make sure there
11:00:56 19 is no misunderstanding.

11:00:57 20 Ms. Eberle's concerns that she expresses
11:01:00 21 about her state of mind about Joshua are out.

11:01:04 22 Now, the last thing to talk about is --
11:01:07 23 are the statements that -- of Joshua regarding his fear.
11:01:17 24 I'm going to permit that.

11:01:19 25 The reason I'm permitting that is the same

11:01:21 1 reason I permitted it in the first instance, which is as
11:01:23 2 follows: It goes to her state of mind and why she
11:01:28 3 sought to go back to supervised exchanges. There will
11:01:32 4 need to be a limiting instruction to the jury telling
11:01:34 5 the jury that they are not to consider those statements
11:01:38 6 as true but rather that those statements are the basis
11:01:43 7 that Ms. Eberle used to seek the modification and they
11:01:49 8 go to her state of mind and that's it.

11:01:50 9 But we need to make sure there is a
11:01:53 10 limiting instruction, and it seems to me that that
11:01:55 11 limiting instruction needs to be read to the jury
11:02:00 12 approximately close to when that testimony happens or
11:02:03 13 else the jury will not understand what we're talking
11:02:05 14 about

11:02:06 15 MS. VANDREUMEL: Judge, just so our
11:02:06 16 position is clear on the record, we take the position
11:02:10 17 that under Bruton you can't unring the bell by a
11:02:15 18 curative instruction. We also take the position that
11:02:16 19 Ms. Eberle's state of mind is irrelevant for the reasons
11:02:20 20 and under the case law that we've previously argued.

11:02:24 21 I'm still not sure of the relevance. I
11:02:25 22 think the fact of the order of protection is definitely
11:02:27 23 relevant and it certainly bodes in the State's favor.

11:02:30 24 THE COURT: Well, I thought that it was
11:02:32 25 related to when she was getting -- filing the paperwork

11:02:36 1 related to the supervised exchange modification.

11:02:44 2 MS. VANDREUMEL: No, no.

11:02:45 3 THE COURT: It was related to the orders
11:02:47 4 of protection? It's out. We're done.

11:02:49 5 The statements are not coming in.

11:02:51 6 MS. GRIMSMAN: Your Honor, may I be heard
11:02:53 7 on this?

11:02:53 8 THE COURT: No. And I'll tell you why.
11:02:56 9 I've heard enough about the orders of protection. The
11:02:58 10 child was never placed on the orders of protection, so
11:03:00 11 it's part and parcel of the reasons why statements made
11:03:04 12 about the child are not going to come in.

11:03:08 13 The issues that Ms. Eberle was having with
11:03:10 14 Mr. Martinson I've allowed in under 404(b), related to
11:03:15 15 motive, to injure the child -- not kill the child but to
11:03:20 16 injure the child, but her fears about Joshua, I'm not
11:03:26 17 going to allow that in. That's part of the orders of
11:03:28 18 protection information I'm not allowing in, but go
11:03:31 19 ahead.

11:03:31 20 MS. GRIMSMAN: This is a separate issue
11:03:35 21 from 404(b).

11:03:37 22 THE COURT: Okay.

11:03:38 23 MS. GRIMSMAN: That's where I think there
11:03:38 24 may be some confusion.

11:03:40 25 Statements by Joshua are not 404(b), which

1 is why I stood up and said there's information in this
2 case that is not applicable under 404(b).

3 Statements by Joshua, his excited
4 utterances and his actions leading up to an exchange are
5 not 404(b) of the defendant. They are actions of the
6 victim of this crime that indicate this victim's state
7 of mind with regard to going to defendant's house, which
8 is a totally separate issue than 404(b), and not
9 applicable to a 404(b) analysis.

10 THE COURT: I wasn't applying 404(b) when
11 I was talking about the victim's statements.

12 MS. GRIMSMAN: Well, when we were talking
13 about the victim's statements, you were talking about
14 how they relate to the orders of protection, and I'm not
15 relating them directly to the orders of protection.

16 MS. VANDREUMEL: No. We're talking about
17 them in the context of Rule 803(3). That's state of
18 mind. Obviously, they're hearsay in the document, and
19 so under 805 it has to come in under another exception.
20 It's excludable under 803(3), and that was the basis,
21 and that's why I keep talking about State versus
22 Christianson, State versus Woods, State versus --

23 MS. GRIMSMAN: And I disagree.

24 Again, this is -- this has never been
25 briefed because it wasn't part of the 404(b) hearing.

11:05:20 1 THE COURT: This is not -- we're not
11:05:22 2 talking about 404(b). This has a totally different
11:05:25 3 evidentiary basis.

11:05:27 4 That's why I was talking about state of
11:05:30 5 mind, so let's not talk about the wrong rule of
11:05:36 6 evidence. This has to do with something completely
11:05:36 7 different.

11:05:40 8 MS. GRIMSMAN: But it's the victim's state
11:05:41 9 of mind, not Ms. Eberle's state of mind.

11:05:43 10 THE COURT: But then you fall into the
11:05:46 11 Christianson line of line of cases, so it's out. It's
11:05:48 12 out.

11:05:49 13 MS. VANDREUMEL: We have briefed it. It
11:05:50 14 was in our brief of July 27th, 2011.

11:05:53 15 THE COURT: It's out. I'm not permitting
11:05:55 16 it. Okay.

11:05:56 17 Anything else?

11:05:58 18 MR. TERRIBLE: Yes. Could we make the
11:05:58 19 PowerPoint part of the record?

11:06:03 20 MS. VANDREUMEL: The opening statement.

11:06:03 21 MR. TERRIBLE: The opening statement
11:06:03 22 PowerPoint.

11:06:04 23 THE COURT: Yes, you may.

11:06:06 24 Now, I want to give the defense a choice
11:06:11 25 because the PowerPoint was presented.

11:06:11 1 There were things in the PowerPoint. You
11:06:15 2 can choose to have a curative instruction given to the
11:06:20 3 jury if you would like or you can decide you don't want
11:06:24 4 to ring that bell twice.

11:06:26 5 It's your choice. What do you want to do?
11:06:28 6 MR. TERRIBLE: Judge, we need to think
11:06:29 7 about it over lunch because our third choice is to move
11:06:33 8 for a mistrial.

11:06:34 9 THE COURT: Okay. You can raise that if
11:06:35 10 you'd like as well, but think about what you want to do.
11:06:37 11 We'll see everyone back at 1:30.

11:06:39 12 MR. TERRIBLE: Thank you.

11:06:40 13 MS. VANDREUMEL: Thank you, Judge.

11:06:40 14 (Whereupon, the lunch recess was taken.)
11:06:40 15

13:32:24 16 THE COURT: We're back on the record.
13:32:27 17 Counsel is present. The defendant is counsel.

13:32:28 18 Counsel.

13:32:29 19 MR. TERRIBLE: Your Honor, lawyers have a
13:32:32 20 duty to know the law. Failure to know the law, failure
13:32:36 21 to know the law is misconduct. Where a mistrial becomes
13:32:40 22 necessity because of intentional prosecutorial
13:32:45 23 misconduct, double jeopardy bars a retrial.

13:32:47 24 We'd cite you to Pool versus the Superior
12:48 25 Court, State versus Mannett, State versus Hughes,

13:32:54 1 Jorgenson versus Superior Court (all phonetic).

13:32:54 2 I apologize I don't have the cites. I did
13:32:56 3 this over lunch downstairs.

13:32:58 4 The narrow issue is whether a prosecutor's
13:32:59 5 failure to inform herself of the applicable law
13:33:03 6 regarding a legally cognizable theory of prosecution
13:33:03 7 constitutes intentional or negligent misconduct.

13:33:10 8 If it is the former, jeopardy bars retrial
13:33:13 9 under the double jeopardy clause. If it's the latter,
13:33:17 10 double jeopardy does not bar a retrial.

13:33:19 11 Yesterday before opening statements I made
13:33:21 12 a last ditch effort to caution the State and asked the
13:33:25 13 Court enter an order to prevent the very misconduct that
13:33:28 14 has brought us to this point. Yesterday I said it is
13:33:31 15 our position and we ask the Court to find that
13:33:34 16 introduction of the evidence of smother, suffocation,
13:33:39 17 and any other evidence, suggestion, or argument that
13:33:40 18 would support a theory of intentional or premeditated
13:33:45 19 homicide would be grounds for a mistrial.

13:33:46 20 The State intentionally ignored that
13:33:49 21 warning and proceeded as she planned to.

13:33:51 22 The County Attorney presented a PowerPoint
13:33:56 23 in an opening statement that had not been screened by
13:33:59 24 the defendant. It contained extremely prejudicial
13:40:02 25 evidence supporting an inadmissible theory.

13:34:05 1 That PowerPoint and the opening statement
13:34:08 2 referred to Josh hiding in a closet to avoid going to
13:34:12 3 his dad's house, referred to a pillow being placed over
13:34:15 4 Ms. Eberle's face, referred to Josh's fear of his
13:34:18 5 father, referred to an alleged last statement made by
13:34:21 6 Jeff along the lines of Jeff, I can't see Josh anymore
13:34:27 7 and implying that no one else would be allowed to.

13:34:32 8 At this point, a curative instruction
13:34:33 9 isn't sufficient under Bruton to cure the prejudice.

13:34:36 10 As Bruton recognized, you can't unring the
13:34:44 11 bell. Bruton itself only involved the statement of a
13:34:45 12 co-defendant. This is about the State's theory of the
13:34:48 13 case.

13:34:48 14 So now the defendant faces a Hobson's
13:34:55 15 choice, assuming but not conceding this is negligence
13:34:58 16 rather than intentional misconduct. It's our position
13:35:00 17 that it was, indeed, intentional misconduct because we
13:35:04 18 did everything we could to put the State on notice that
13:35:06 19 they were walking into a mine field yesterday and they
13:35:08 20 proceeded anyway.

13:35:09 21 If the Court doesn't find that it's
13:35:12 22 intentional misconduct our only alternative is to have
13:35:15 23 the Court declare a mistrial effective at 5:00 p.m. today
13:35:19 24 and order a retrial commencing tomorrow morning at 8:00
13:35:24 25 a.m. with all current orders, subpoenas, witness lists

13:35:28 1 to remain the same, the purpose being that the State
13:35:31 2 would not benefit from its misconduct, intentional or
13:35:35 3 negligent, and the defendant would suffer no prejudice
13:35:37 4 as a result of the State's misconduct.

13:35:39 5 If it's done that way, then the State
13:35:42 6 can't claim prejudice either.

13:35:44 7 So our request is to declare a mistrial on
13:35:48 8 the grounds of intentional misconduct, double jeopardy
13:35:51 9 would attach, the case is dismissed with prejudice.

13:35:53 10 If the Court doesn't follow us or agree
13:35:56 11 that it's intentional and finds that the misconduct is
13:35:59 12 negligent, then we'd ask the Court to fashion a remedy
13:36:02 13 that doesn't allow the State to benefit from its
13:36:05 14 misconduct by getting an opportunity to go to the grand
13:36:08 15 jury and reindict.

13:36:09 16 That's not -- if that -- that's the last
13:36:12 17 thing we want to happen. That's our position.

13:36:16 18 THE COURT: Okay.

13:36:23 19 Anybody from the State?

13:36:24 20 MS. GRIMSMAN: Judge, I don't think that
13:36:27 21 there is any portion of what has happened in this court
13:36:30 22 by the State that could be deemed intentional. If the
13:36:34 23 Court deems that this is a situation where a mistrial is
13:36:37 24 appropriate, then so be it, but it is certainly not
13:36:41 25 intentional on my part.

1 I followed the orders of the Court with
2 regard to the 404(b). I understand the Court has
3 changed its position.

4 I understand that there was information
5 presented contrary to the Court's current ruling but
6 that was not the circumstance when I stood up and gave
7 my opening statement, and I think that's been made
8 clear.

9 There was also court rulings that the
10 statements of fear of the victims would come in -- of
11 the victim would come in in a previous hearing. Relying
12 upon that, I mentioned those statements.

13 It's obvious that the State and the Court
14 had a disagreement with regard to how to interpret the
15 case law. I certainly cannot have intentionally
16 violated a ruling that didn't exist, so to say so is
17 ridiculous and goes contrary to the spirit and the
18 letter of the law.

19 Also, the asphyxiation is not necessarily
20 a component of the child abuse that is the basis for the
21 felony murder but may be a secondary act in furtherance
22 and in part of that child abuse.

23 So to mention the asphyxia does not
24 violate the Court's orders either.

25 MR. TERRIBILE: Judge, I didn't claim that

13:38:05 1 the State violated a court order intentionally. I
13:38:07 2 claimed that the State intentionally ignored my warning
13:38:12 3 that they were walking into a mine field if they were
13:38:16 4 going to go with the theory of premeditated intentional
13:38:17 5 homicide having indicted the defendant on a felony
13:38:20 6 murder theory. That's the misconduct.
13:38:22 7 They were put on notice and they proceeded
13:38:25 8 into the mine field despite my warnings.
13:38:29 9 THE COURT: Okay. Anything else?
13:38:32 10 MS. GRIMSMAN: No, Your Honor.
13:38:33 11 MR. TERRIBLE: No, Your Honor.
13:38:34 12 THE COURT: Okay.
13:38:34 13 First of all, I think we all agree, I
13:38:45 14 don't think there was intentional misconduct in this
13:38:46 15 case. I think everyone attempted to follow the orders
13:38:49 16 that I attempted to make clear based on what I thought
13:38:51 17 was my understanding of the case, so it was an effort of
13:38:55 18 everybody I think to be compliant with court orders, so
13:38:57 19 I don't see anything as intentional and I don't think
13:39:02 20 you're claiming that.
13:39:02 21 MR. TERRIBLE: I'm not.
13:39:03 22 THE COURT: I just wanted to make that
13:39:04 23 record.
13:39:05 24 I have obviously changed my orders, and
13:39:05 25 each time somebody takes a look at a case you look at it

13:39:17 1 differently. That's all I have to say. No more on that
13:39:22 2 topic. I wish it were different.

13:39:24 3 I wish some of these issues had been made
13:39:29 4 clearer and litigated in a different way, but we all do
13:39:30 5 the best we can.

13:39:31 6 Now the question is whether or not there
13:39:35 7 is going to be a mistrial based on what happened in
13:39:38 8 opening statements.

13:39:39 9 First of all, in the preliminary
13:39:41 10 instructions, the jury is instructed that lawyers
13:39:45 11 statements are not evidence, so they know that the
13:39:47 12 statements are not evidence.

13:39:48 13 Second of all, with respect to this
13:39:57 14 asphyxiation or suffocation, it will depend, so I'm now
13:39:59 15 warning the State. This is a warning to the State,
13:40:01 16 okay? It depend on how you use it.

13:40:04 17 You may disagree with my reading of this
13:40:07 18 Styers Milke decision and line of cases, but that's how
13:40:11 19 I read them.

13:40:12 20 Those also can be intent to injure a
13:40:15 21 child. If you are consistent with child abuse or any
13:40:19 22 acts that are consistently injuring the child without
13:40:24 23 there being some kind of cloud hovering over this
13:40:27 24 courtroom with intent to kill, you're within Styers and
13:40:32 25 Milke, child abuse can be a predicate felony for felony

13:40:36 1 murder.

13:40:37 2 What would become a problem for the Court,
13:40:41 3 so I'm just going to make it clear, is if there is a
13:40:42 4 pattern and practice of using that type of evidence with
13:40:46 5 this lingering suggestion that's so heavy that even
13:40:50 6 though it's not stated on the record it's clear by the
13:40:53 7 atmosphere in the courtroom that it's an implication
13:40:57 8 that it's an intent to kill, then there is going to be a
13:41:00 9 problem.

13:41:00 10 But absolutely the evidence is allowed to
13:41:04 11 be presented to the jury. This has been charged as
13:41:07 12 felony murder with child abuse. Evidence of child abuse
13:41:11 13 is a permissible evidence, and if there was an intent or
13:41:19 14 knowing injury to this child and then the child died,
13:41:24 15 it's felony murder, which is why in large part my 404(b)
13:41:29 16 ruling remained in tact. It doesn't change the type of
13:41:32 17 evidence that may be permissibly used as intrinsic or
13:41:40 18 404(b).

13:41:40 19 You can have circumstances -- and even
13:41:42 20 though I've excluded it -- an example would be when the
13:41:47 21 allegation is that the defendant took a pillow and
13:41:50 22 covered up Kristin Eberle's face. He didn't kill her.

13:41:55 23 You can have an attempt to suffocate or
13:41:59 24 suggestions of that type of behavior, and I'm just using
'2:02 25 that example because it happens to be one in this case

13:42:05 1 where there are facts that could be consistent with
13:42:08 2 abuse. There was no intent to kill. There was no
13:42:12 3 pursuing of it, but it is an act that could be
13:42:16 4 interpreted as such.

13:42:17 5 I don't know what evidence there is of the
13:42:19 6 suffocation. I don't know what is going to come out.
13:42:23 7 It's how it may be used that's the issue for the Court.
13:42:27 8 So you're warned. That's my warning to you. Proceed
13:42:32 9 knowing where I think the line is.

13:42:34 10 The line is the italics in the Styers
13:42:38 11 decision. That's where I see the line, okay?

13:42:40 12 So you know that. So I'm denying a motion
13:42:43 13 for mistrial.

13:42:44 14 Let me tell you what else I have done.

13:42:45 15 I have a transcript of the opening
13:42:48 16 statement. I've now had a chance to look at the opening
13:42:51 17 statement in written form.

13:42:52 18 Okay. The preliminary instructions
13:42:56 19 indicate that opening statements are not evidence. I'm
13:43:02 20 going to tell the jurors that again before this trial
13:43:05 21 starts up with witnesses. I'm going to remind them what
13:43:09 22 is said in openings is not evidence.

13:43:12 23 I'm going to give the defense an
13:43:14 24 opportunity -- you can either have a curative
13:43:17 25 instruction if you want me to review what specifically

13:43:23 1 is not evidence, or you can decide that draws too much
13:43:25 2 light onto the statements that were made by the State
13:43:29 3 that I have now found to be inadmissible.

13:43:33 4 That's the choice.

13:43:35 5 MR. TERRIBILE: Judge, we anticipated that
13:43:37 6 as a possibility, and we would ask the Court to let
13:43:40 7 us -- give us a couple of days to come up with a
13:43:43 8 proposed curative instruction.

13:43:45 9 Is that okay?

13:43:46 10 THE COURT: With respect to the statements
13:43:48 11 made by the State?

13:43:49 12 MR. TERRIBILE: Yes, the opening
13:50 13 statement.

13:43:50 14 THE COURT: That's fine. That is totally
13:43:52 15 acceptable to the Court.

13:43:53 16 I would like you to show the State your
13:43:55 17 proposal first before it's submitted to the Court.

13:43:57 18 MR. TERRIBILE: That's fine.

13:43:58 19 THE COURT: No matter what you do I am
13:44:00 20 going to say that to the jurors.

13:44:01 21 MR. TERRIBILE: I would ask that you do
13:44:04 22 that, but as far as a curative instruction, I see that
13:44:07 23 differently.

13:44:07 24 THE COURT: Okay.

13:08 25 MR. TERRIBILE: And Judge, just so our

C E R T I F I C A T E

I, Marylynn LeMoine, do hereby certify that the foregoing pages constitute a full, true, and accurate transcript of the proceedings had in the foregoing matter, all done to the best of my skill and ability.

WITNESS my hand this 2nd day of April, 2014.

A handwritten signature in cursive script, reading "Marylynn LeMoine", is written over a horizontal line.

Marylynn LeMoine, RMR, CRI
Certified Reporter #50441

IN AND FOR THE COUNTY OF MARICOPA

A P P E A R A N C E S

For the Plaintiff:

FRANKIE GRIMSMAN, Deputy County Attorney

STEPHANIE LOW, Deputy County Attorney

For the Defendant:

MICHAEL TERRIBILE

TREASURE VANDREUMEL

For the Victim:

KELI LUTHER

SUPERIOR COURT
Phoenix, Arizona

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1 THE WITNESS: Yeah. Yes.

2 THE COURT: Okay. All right. There's a stipulation
3 by counsel that Exhibits 377 through 382 are admitted. Okay.

4 THE WITNESS: Okay. I found the number, um, in the
5 serum, carisoprodol concentration was 36.4 per liter, and
6 meprobamate is 15 milligrams per liter. Now, am I allowed to
7 explain a little further?

8 THE COURT: Right now that's what the question called
9 for. Counsel can follow up with you on that question.

10 THE WITNESS: Okay.

11 THE COURT: All right. Go ahead.

12 MS. GRIMSMAN: Thank you, Your Honor.

13 DIRECT EXAMINATION

14 (CONTINUED)

15 BY MS. GRIMSMAN:

16 Q. Well, let's start with that, Doctor. You wanted to
17 explain that a little bit further?

18 A. Yes. Um, this --

19 MR. TERRIBILE: Your Honor, objection. There's no
20 question.

21 THE COURT: All right. There is. You may ask the
22 question again.

23 Q. (By Ms. Grimsman) You wanted to explain that a little
24 further. Please go ahead.

25 A. Yes. This, um, four-month, I'm sorry,

SUPERIOR COURT
Phoenix, Arizona

1 four-year-ten-month-old child was known to ingest
2 3500 milligrams of carisoprodol. Now, approximately two hours
3 later he was found stuporous, so the caretaker called 911. Then
4 he was transported to hospital. So they immediately, um,
5 intubated the boy, um, and tried to resuscitate him. And so the
6 blood, the blood was drawn some four and a half hours after the
7 alleged ingestion of the drug. Now, without the treatment, I
8 mean the assisted ventilation, would the boy die earlier, well,
9 that's --

10 MR. TERRIBLE: Objection, Your Honor. Now we're
11 getting into speculation.

12 THE COURT: Sustained.

13 Q. (By Ms. Grimsman) The blood levels that you're
14 discussing in that, is that taken while the child was still
15 alive and in the hospital?

16 A. Yes.

17 Q. Now, Doctor, I wanted to go back to where we ended and
18 pick up there. And I wanted to touch base with you about some
19 of the things that you discussed in your autopsy. With regard
20 to cause of death, you already went over the findings you had
21 from your autopsy, but I don't think we had discussed with you
22 cause of death. What findings did you think were significant
23 when you started to look at cause of death?

24 A. The foam or frothy fluid coming from the nose, which
25 is indication of lung edema; the presence of the carisoprodol

1 and meprobamate in his blood and also in his stomach; um, being
2 five-year-old, apparently healthy, in good health. Um, these
3 are the fact that I consider when I make the determination.

4 Q. And I don't know if this was a factor or not, but was
5 cerebral congestion or cerebral edema a factor?

6 A. This is a very nonspecific finding.

7 Q. What about those things -- or let's back up. What
8 indications did that make to you; did you come to any conclusion
9 as far as cause of death?

10 A. Cerebral edema?

11 Q. No, all of the things you just listed.

12 A. Yeah. With all these finding, I determined the cause
13 of death is acute carisoprodol toxicity.

14 Q. How did those things factor in coming to that
15 conclusion? What's the significance of them?

16 A. First of all, the presence of carisoprodol, that a
17 drug is designed for adults, and its metabolite, meprobamate, is
18 also very toxic, the presence of that drug in the blood of this
19 boy. And also, um, lung edema, which indicate -- well, lung
20 edema, again, it's a nonspecific finding, but often time you can
21 see a person die of respiratory depression or, um, central
22 nervous system depression.

23 Q. Were there any other pathological diagnoses that you
24 couldn't rule out as being a component?

25 A. Asphyxia due to smothering or suffocation, I cannot

1 rule these two out.

2 Q. And what about that and what couldn't -- what
3 indications did you have that you couldn't rule that out?

4 A. The presence of abrasion on the inner surface of upper
5 lip and suspicious circumstance.

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

9 A. Well, a person may have more than one causes of death
10 sometimes. The person might have toxicity of certain drug at
11 the same time as sustained a heart attack, for example. So in
12 this case, you have to determine which one played a primary role
13 in the death, so one being the cause of death, the other being
14 contributory. Or if both are important, you call both as --
15 both causes a cause of death.

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

19 A. Asphyxia almost has no specific finding from autopsy.
20 But there is supportive evidence that you can see from a, let's
21 say, smothering. Any injury around oral/nasal cavity, around
22 the cheek area, might be considered possible smothering, when
23 the circumstances is suggestive.

24 Q. Was there anything about the abrasion on the upper lip
25 that you considered when you were looking at the possible drug

1 overdose?

2 A. Because of the presence of drug in his system?

3 Q. Yes.

4 A. Could you repeat your question again?

5 Q. Sure. Was there anything about the abrasion on the
6 upper lip that you also considered when you were looking at it
7 in conjunction with the drug overdose?

8 A. Oh, yes. Um, carisoprodol is a big pill. Um, for
9 some reason if the pill was forced into his oral cavity and
10 sometimes during the process abrasion might be inflicted on the
11 lip.

12 Q. Now, when we talk about the amount of drug that was
13 found in the postmortem femoral blood, is there any way for you
14 to derive an amount that would have been given to this child?
15 Can you determine that at all?

16 A. No.

17 Q. Can you explain generally what the symptoms would be
18 of someone who has a lethal amount of carisoprodol in their
19 system and what the transition would be or what you would see as
20 far as symptoms between ingesting and death?

21 MR. TERRIBILE: Foundation, Your Honor.

22 THE COURT: Sustained.

23 MS. GRIMSMAN: May we approach, Your Honor?

24 (Whereupon the following discussion is held at
25 the bench:)

SUPERIOR COURT
Phoenix, Arizona

C E R T I F I C A T E

I, Scott A. Kindle, do hereby certify that the foregoing pages constitute a true and accurate transcript of my stenographic notes, taken at said time and place, all done to the best of my skill and ability.

DATED this 21st day of January, 2014

_____/s/ Scott A. Kindle_____

Scott A. Kindle, RPR
Certified Reporter No. 50711

1 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

2 IN AND FOR THE COUNTY OF MARICOPA

3
4 - - -

5
6 THE STATE OF ARIZONA : CR2004-124662 001

7 - vs -

8 JEFFREY RICHARD MARTINSON : 1-CA-CR-13-0895

9
10
11 - - -

12 October 19, 2011
13 Courtroom 904, Central Court Building
14 Phoenix, Arizona

15
16
17 - - -

18 BEFORE: HONORABLE SALLY SCHNEIDER DUNCAN, J.
19 and a Jury

20
21
22 - - -

23 JURY TRIAL - DAY 41

APPEARANCES

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- - -

I N D E X

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
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DR. CAMILLE WORTMAN				
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1 interference in being able to do good problem-solving
2 and to think things through and make good decisions.
3 So, that could certainly interfere with somebody's
4 ability to perform CPR or anything else that needed to
5 be done for that matter.

6 Q. But that's in terms of the grief response?

7 A. No, that -- well, here's what that would be
8 about. If you think, say, your child in this case might
9 be dead, then all of those abilities to problem solve
10 would be impaired certainly.

14:45:51

11 Q. Now, when you did your assessment here and you
12 talked to the defendant and to his family and friends,
13 did you go in with the assumption that this child was
14 not killed based on anything that the defendant did?

15 A. I went in with absolutely no assumptions at all.
16 Mr. Terribile wouldn't even let me -- he said, don't you
17 dare read anything about this in the newspapers or
18 whatever. I wanted to just go in very fresh to make my
19 own judgments.

14:46:27

20 Q. Okay. Now, um, you mentioned to us, however,
21 that there are no studies regarding grief response if a
22 person is even accidentally responsible for a death?

23 A. I'm not aware of studies on that.

24 Q. Okay. And there are no studies regarding grief
25 response in a murder suicide or murder attempted suicide

1 situation?

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

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

8 A. I don't believe so.

9 Q. Okay. So, would it be fair to say there are no
10 studies regarding grief response as it relates to
11 somebody who may have perpetrated the actual traumatic
12 death?

13 A. No, not in this situation.

14 MR. TERRIBLE: Excuse me, Your Honor. Can
15 I approach, please?

16 THE COURT: Yes.

17 (Whereupon, a discussion was held at the
18 bench.)

19 MR. TERRIBLE: Twice now Miss Low just
14:47:34 20 referred to murder suicide situations. I renew my
21 motion for mistrial.

22 THE COURT: Okay.

23 MS. LOW: I have no idea what the basis
24 would be. This is a murder case and it's -- I'm asking
25 her, generally, because murder suicide as opposed to

1 murder attempted suicide may be related topics, and I
2 want to make sure my question is thorough and asks both
3 of those things.

4 THE COURT: Well, here's the problem, and
5 the motion for mistrial is denied. I view this as
6 unartful questioning now that the objection has been
7 raised. The issue here is felony murder, not
8 premeditated, not second degree, so it has a different
9 connotation. So, you need to clarify that whether it's
10 accidental or not, whether it's -- but the problem is
11 trying to characterize it in a way that would be
12 intentional murder intent to harm then later turns into
13 a death may be a different situation, but the way that
14 the question was asked, you referred to a perpetrator
15 which has a connotation that I have found, according to
16 Milke and Styers, is not a permissible theory. Yes, the
17 State's objection to my interpretation is noted for the
18 record. Okay. So, rephrase the question.

19 MR. TERRIBILE: Judge, I think she referred
20 to it twice, so the last one -- the one before that,
21 immediately before that.

22 THE COURT: Well, the only way I would know
23 that is by having the court reporter read it out loud,
24 and I don't think you want me to do that.

25 MR. TERRIBILE: No. Well, we can clear up

1 that part later, but please know that I'm moving to
2 strike all of it, all reference to murder suicide.

3 THE COURT: Well, I can't disagree with that
4 necessarily. I think it has to do with
5 characterization, so what do you want me to say?

6 MR. TERRIBILE: I'd like you to strike any
7 reference to murder suicide.

8 THE COURT: Well, but this is felony murder.

9 MR. TERRIBILE: I understand that, but
10 that's a legal term. The jurors don't understand the
11 difference. When you use the term murder suicide, the
12 jurors think that that is as lay people.

13 THE COURT: Therein lies the problem with
14 the way the questions were asked.

15 MR. TERRIBILE: That's my point. That's my
16 point.

17 MS. LOW: If I may make a record, we
18 actually did address this in the interview when it was
19 originally explained to the witness. She understood
20 murder as only being an intentional murder and she's
21 like, I don't know how you could not intend to do that,
22 but we explained to her under the law what felony murder
23 was. So, when I'm asking her the question, I understand
24 that she knows what felony murder and that this jury
25 does as well, because that's what's charged.

1 THE COURT: The way you asked the question,
2 I don't disagree with you. I think you're assuming
3 that's the way the jury is thinking by asking the
4 question.

5 MS. LOW: I respectfully disagree, but I'll
6 rephrase it.

7 THE COURT: I understand that. Your
8 objection is noted for the record. I'm just trying to
9 figure how to strike. I'm just going to strike the last
10 two questions and answers.

11 (In the courtroom as follows:)

12 THE COURT: Ladies and gentlemen, the last
13 two questions and answers are stricken from the record.
14 You are not to consider them for any purpose.

15 There's more?

16 (Whereupon, a discussion was held at the
17 bench.)

18 MR. TERRIBLE: I thought we were done.

19 MS. GRIMSMAN: Can we take our afternoon
20 break? I need the restroom.

21 THE COURT: How much longer do you have?

22 MR. TERRIBLE: She's questioning.

23 THE COURT: I apologize.

24 MS. LOW: Almost done, but I don't know how
25 badly Miss Grimsman needs a break.

C E R T I F I C A T I O N

I, ROBIN G. BOBBIE, Registered Professional Reporter, Registered Merit Reporter, Certified Realtime Reporter, Certified Court Reporter, Certificate No. 50851, in and for the State of Arizona, do hereby certify that the foregoing pages constitute a full, true, and accurate transcript of all proceedings had in the foregoing matter, all done to the best of my skill and ability.

I FURTHER CERTIFY that I am not related to nor employed by any of the parties hereto, and have no interest in the outcome.

WITNESS my hand this 16th day of December, 2011.

Robin G. Bobbie, RMR, CRR, CR
Arizona CCR No. 50851

1 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

2 IN AND FOR THE COUNTY OF MARICOPA

3
4 - - -

5 IN RE:

6 THE STATE OF ARIZONA : CR2004-124662 001

7 :

7 - vs -

:

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8 JEFFREY RICHARD MARTINSON : 1-CA-CR-13-0895

9
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11 - - -

12 January 17, 2012
13 Courtroom 703, Central Court Building
14 Phoenix, Arizona

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23 BEFORE: HONORABLE SALLY SCHNEIDER DUNCAN, J.

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25 - - -

26 POST-TRIAL EVIDENTIARY HEARING - DAY 1

APPEARANCES

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I N D E X

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
ROBERT CARON (Juror No. 1)				
By The Court:	17, 50			
	30	38	48, 67	65
PAUL A. BENSEMA (Juror No. 2)				
By The Court:	75			
	89			
NICOLE KANUHO (Juror No. 3)				
By The Court:	92			
	108	121	145	
RON RODRIQUEZ (Juror No. 5)				
By The Court:	153, 189			
	158	160	173, 189	185
LAURA FERNANDEZ (Juror No. 6)				
By The Court:	192			
	212			

- - -

1 THE COURT: Did it ever come up again by
2 her?

3 THE WITNESS: I'm trying to remember if at
4 some time, oh, during my husband's trial or the trial of
5 him, you know, this is what we did next. I remember us
6 saying -- because I thought after we had found the
7 guilty verdict, my understanding was we were going into
8 the aggravated circumstances phase. Her understanding
9 was we were going directly to the murder case -- I mean,
10 the death penalty phase.

10:48:40

11 THE COURT: Okay.

12 THE WITNESS: And I said I didn't think so,
13 because I didn't remember that as being your
14 instructions. And she says, if I remember correctly,
15 she said something about, no, when my husband, we went
16 right to the death phase.

17 THE COURT: Okay. All right.

18 Counsel, any followup based on my followup
19 questions?

10:48:58

20 MR. TERRIBILE: Yes, Your Honor, I have one.

21 THE COURT: Okay.

22 BY MR. TERRIBILE:

23 Q. I'm still confused. I thought -- let me get my
24 note -- I thought you told me that you reached your
25 verdict because you believed this was an intentional

1 homicide?

2 A. I told you I thought it was because it was a
3 murder suicide.

4 Q. Yes.

5 A. Yes.

6 Q. And/or an intentional homicide?

7 A. I think he intentionally did it, yes.

8 MR. TERRIBILE: Thank you.

9 THE COURT: All right. That's leaving me
10 confused, so let me follow up.

11 MR. TERRIBILE: I should leave.

12 THE COURT: You better not leave, Mr.
13 Terribile. Before I turn it back over to the State,
14 Miss Grimsman, let me just indulge myself here because
15 I'm a little confused. All right. I had thought I
16 asked questions clearly, apparently not. So, let me try
17 again.

18 On what basis did you reach a verdict as to
19 count 1.

10:49:52 20 THE WITNESS: That he intentionally gave him
21 a pill or pills, not a pill, and that caused his death.

22 THE COURT: Okay. And when Mr. Terribile
23 asked questions, he said you reached a verdict because
24 you felt that the defendant intentionally killed the
25 victim.

1 THE WITNESS: Right. That's what I think I
2 just said, yes.

3 THE COURT: Okay. And when I asked you the
4 question, I thought I heard something a little bit
5 different, so I'm just trying to clarify. And I'm in no
6 way trying to place myself in your position.

7 Did you understand that intentionally
8 killing the victim could not be a basis for a guilty
9 verdict on count 1?

10:50:33 10 THE WITNESS: No, I did not understand that.

11 THE COURT: Was that the basis of your
12 verdict?

13 THE WITNESS: The basis of my verdict was
14 that he intentionally gave him the pill, if that
15 answers --

16 THE COURT: Okay. All right. Let me parse
17 this out. He intentionally gave him the pill. That
18 supported your verdict, correct?

19 THE WITNESS: Yes.

10:50:49 20 THE COURT: For what reason did you find
21 that he intentionally gave the victim the pill?

22 MS. GRIMSMAN: Objection, Your Honor. Not
23 necessary.

24 THE COURT: Overruled, but thank you.

25 MS. GRIMSMAN: I need to preserve it for the

1 record.

2 THE COURT: I understand that.

3 MS. GRIMSMAN: Thank you.

4 THE COURT: And let me explain. Let me try
5 this a little bit differently.

6 The definition of felony murder with child
7 abuse if the predicate felony to support felony murder
8 is as follows: A defendant intentionally causes
9 physical injury, not intentionally kills, intentionally
10 causes physical injury under circumstances likely to
11 cause serious physical injury or death.

12 THE WITNESS: Um-hum.

13 THE COURT: Do you understand that
14 definition?

15 THE WITNESS: Yes.

16 THE COURT: Do you remember that definition?

17 THE WITNESS: I do now that you repeated it
18 to me.

19 THE COURT: I have refreshed your
20 recollection.

21 THE WITNESS: There you go.

22 THE COURT: So, my question to you is: You
23 said you convicted the defendant because he
24 intentionally gave the victim the pill, correct?

25 THE WITNESS: Correct.

1 THE COURT: Okay. On what basis then did
2 you convict?

3 THE WITNESS: We convicted --

4 THE COURT: Not we. I'm talking just you.

5 THE WITNESS: I convicted on child abuse 1
6 resulting in the death of a child.

7 THE COURT: Okay. Did you understand that
8 you could not return a verdict of guilty on count 1 if
9 you found that the defendant intended to kill the child,
10:52:18 10 meaning intentionally gave the medicine to the child
11 with the intent to kill?

12 MS. GRIMSMAN: Objection, Your Honor.

13 Same --

14 THE COURT: Sustained. Overruled. But,
15 yes, your objection is noted for the record. All right.
16 And you can continue to make your record.

17 MS. GRIMSMAN: Thank you, Your Honor.

18 THE COURT: Okay. Did you understand that?

19 THE WITNESS: No, I can't say I understood
10:52:40 20 that if he intentionally gave him the pill to kill him
21 we could not find him guilty.

22 THE COURT: Okay. Was that the basis on
23 which you returned your verdict?

24 THE WITNESS: I returned my verdict based on
25 him intentionally giving the child the pill which caused

1 the death.

2 THE COURT: Okay. That part I have.

3 THE WITNESS: Right.

4 THE COURT: But for what purpose did you
5 find he had given -- what the intention was when he gave
6 the pill?

7 THE WITNESS: My own supposition, which is
8 not necessarily a hundred percent correct or not correct
9 was that he did it, kill the child and himself.

10:53:18 10 THE COURT: Okay. That's just what I wanted
11 to clarify. Go ahead.

12 Any further questions, Mr. Terribile? I'm
13 sure Miss Grimsman has some. She's already standing.
14 Poised to pounce.

15 MR. TERRIBILE: I just want to make sure I'm
16 thinking about it, if I understood.

17 Treasure is telling me I have no further
18 questions.

19 THE COURT: Miss Grimsman, have you talked
10:53:39 20 to Miss Low?

21 MS. GRIMSMAN: I just want to put on the
22 record that we have a standing objection based on our
23 previous motions with regard --

24 THE COURT: Totally noted. Totally noted.

25 RECROSS-EXAMINATION

1 THE WITNESS: No.

2 THE COURT: Phase 3?

3 THE WITNESS: No.

4 THE COURT: Okay. Did anyone interfere with
5 anything you might have wanted to do during trial as a
6 juror with your responsibilities or during your
7 deliberations?

8 THE WITNESS: All except at work they wanted
9 to know when it was going to be over. That's it.

14:20:41 10 Nobody else.

11 THE COURT: Okay. All right. I'm going to
12 turn you over to the lawyers, okay.

13 DIRECT EXAMINATION

14 BY MR. TERRIBILE:

15 Q. Good afternoon.

16 A. Good afternoon, sir.

17 Q. Um, I'm trying to understand if your verdict was
18 based on your belief that the defendant intentionally
19 killed his son.

14:21:06 20 A. That verdict, during deliberation, came during
21 deliberation more than anything else.

22 Q. No, I understand that. I'm saying, but during
23 the deliberations, whenever you reached your verdict,
24 was it based on the theory that you believed the
25 defendant intentionally killed his son?

1 A. I believe it was, yes.

2 Q. That was your finding?

3 A. That was my finding, personally, yes.

4 Q. Sorry I forgot something important. My
5 understanding is that there was one vote, it was on
6 count 1 felony murder?

7 A. During the first part of deliberation you mean?

8 Q. Well, I understand that there's a number of votes
9 during the course of deliberation, but the final vote
10 that led to the verdicts coming into the courtroom,
11 there was one last vote on felony one -- on felony
12 murder count 1. Did I get that right?

13 A. There was one vote.

14 Q. Yes.

15 A. Are you talking about the child abuse felony 1,
16 you mean?

17 Q. Count 1 felony murder.

18 A. Count 1.

19 Q. In the beginning, and when you finally came to a
20 unanimous decision --

21 A. Right, okay.

22 Q. -- you found the defendant guilty of count 1
23 felony murder, correct?

24 A. I did, yes.

25 Q. Yes. And other jurors all agreed, am I right?

1 A. I believe they did, yes.

2 Q. Was there -- what I'm trying to understand is
3 after you did that, was there then a formal vote on
4 count 2?

5 A. No, after we went to final -- after we took that
6 vote, we didn't have to take a vote on count 2.

7 Q. That's my point.

8 A. Yeah.

9 Q. So, there was no -- there was no vote or
10 discussion on count 2 at that point?
14:22:47

11 A. Not after count 1 was taken unanimously, no.

12 MR. TERRIBLE: No other questions, Your
13 Honor.

14 THE COURT: Go ahead.

15 CROSS-EXAMINATION

16 BY MS. GRIMSMAN:

17 Q. Hi.

18 A. Hello.

19 Q. Was there ever a point in time when another juror
20 asked for evidence and people refused to give it to him?
14:23:09

21 A. No, not at all.

22 Q. Okay. Was there ever a point in time where one
23 of the jurors wanted to speak out and they told him that
24 they weren't allowed to?

25 A. Gosh, I don't remember that. No.

1 Q. Now, I understand that there was some frustration
2 between the foreperson and Jo, Juror No. 12?

3 A. Yes. Yeah. Um-hum.

4 Q. Following the frustration and the incident that
5 happened between the foreperson and Juror No. 12, was
6 Juror No. 12 allowed to participate in the
7 deliberations?

8 A. Yes. Absolutely. Yeah.

9 Q. Did people have discussions with Juror No. 12?

14:23:58 10 A. We all did, yes.

11 Q. What about Juror No. 9, Bill?

12 A. Bill? Yes. Oh, yes.

13 Q. Was there ever a point in time when he wasn't
14 allowed to speak or wasn't allowed to participate?

15 A. No, he always spoke.

16 Q. Now, I want to talk to you a little bit about the
17 voting itself and the way that the deliberations took
18 place.

19 Was there some discussions with regard to child
14:24:28 20 abuse type 1?

21 A. Yes, quite a bit.

22 Q. Okay. With regard to child abuse type 1 and the
23 discussions that took place with regard to that, were
24 they separated out as this is child abuse for count 1 or
25 this is child abuse for count 2, or were there just

1 discussions about child abuse type 1?

2 A. Well, from my recollection was we started with 1
3 and we wanted to see how everything fit into it. We
4 keep reading this over and over and over, and make our
5 work intense, you know, and some took longer, some were
6 shorter, but we all had an understanding before we
7 proceeded on a vote for anything, you know, and that's
8 the way we worked at it.

9 Q. Okay. And did, at some point, did the jury go
10 through the elements for child abuse type 1?
14:25:20

11 A. Oh, yes. Oh, yeah. All of them.

12 Q. And was there ever a point in time where the jury
13 said, as a body, we can't decide on child abuse type 1,
14 we're going to have to move on?

15 MR. TERRIBILE: Objection to "as a body,"
16 Your Honor.

17 MS. GRIMSMAN: That's it, the way it has to
18 happen.

19 MR. TERRIBILE: No, only one person has to
14:25:45 20 say it.

21 THE COURT: Sustained.

22 BY MS. GRIMSMAN:

23 Q. Was there ever a point in time when any one
24 particular juror said I'm through deliberating on child
25 abuse type 1, I can't make a decision?

1 A. I don't really believe so. It was -- there was a
2 lot of discussion to clarify many in the jurors' heads.
3 There was a few that couldn't understand the procedure
4 like the judge has sat down, and that had to be
5 established first before they could move on and
6 understand and make a decision for it. That's the way I
7 took it from the whole.

8 Q. So, when you talked about the procedure and you
9 considered the child abuse type 1, was there a point in
14:26:25 10 time when everybody could agree that child abuse type 1
11 was a guilty verdict?

12 A. I felt they all came to that conclusion, yeah.

13 Q. And as part of the voting for the felony murder
14 count 1 with child abuse type 1, and the discussions
15 that involved that, did you go through the elements of
16 child abuse type 1?

17 A. Oh, yeah, absolutely. Yes.

18 Q. So, in your impression of the deliberations, did
19 -- was the jury able to come to a conclusion about child
14:27:09 20 abuse type 1?

21 A. Every one of them came to a conclusion on it,
22 yes.

23 Q. Was that an integral part of being able to move
24 on to whether that child abuse led to the murder?

25 A. Yes, from what we understood, we had to

1 understand that fully and make a decision on it before
2 we can actually move on, and that took us the longest
3 time.

4 Q. Okay. Was there ever a point in time where a
5 juror wanting to discuss lesser included offenses for
6 the child abuse that you recall?

7 A. I believe we had to stick with one at a time, and
8 if child abuse 1 didn't fit, we had to go to child abuse
9 2, but everybody had to understand all the parameters of
10 child abuse 1 first before they could move down or away
11 from that. And there was no -- nobody standing saying I
12 can't decide. There was nobody doing that, that I
13 recollect, you know.

14 Q. Okay. Did you ever have any concern, personally,
15 that Juror 9 or Juror 12 were not allowed to participate
16 in deliberations?

17 A. They were always allowed to participate in
18 deliberations, always. They were asked even.

19 Q. You say they were asked. Explain what you mean.

14:28:51 20 A. Well, the foreperson would actually -- when
21 somebody wasn't talking, they would just be listening,
22 she would go after them and say, hey, what do you think
23 about this? And we -- there was no talking until that
24 person actually said something, you know, and they were
25 given time to speak about it and think about it and

1 speak about it.

2 Q. Now, there was -- we've heard that there was an
3 incident where juror -- the foreperson yelled at Juror
4 12, said that she had been sleeping during the trial.

5 Do you recall that incident?

6 A. Oh, I remember that, yes.

7 Q. Following that incident, did Jo, Juror 12, still
8 participate?

9 A. Oh, yes. She did. Even more, I believe so,
10 because actually all of us caught her sleeping a lot of
11 time, to be honest with you.

12 Q. When the issue came up between Juror -- the
13 foreperson and Juror 12, did the foreperson eventually
14 apologize to Juror 12?

15 A. Oh, yes, on more than one occasion. I remember
16 twice, as a matter of fact.

17 Q. And did things appear to calm down between them?

18 A. Oh, very much so, I think. I don't think there
19 was that much of a belligerent attitude between either
20 of them, to be honest with you. She was just trying to
21 get her to participate, you know.

22 Q. And with regard to Bill, Juror No. 9, was there
23 ever an incident that happened between the foreperson
24 and him?

25 A. As far as I'm concerned, there wasn't, because he

1 asked more questions than just about anybody, to be
2 honest with you.

3 Q. Do you recall if Exhibit number 347 that I'm
4 showing you was in the jury room or not?

5 A. On more than one occasion, yes.

6 Q. So, you believe this was in the jury room at some
7 point?

8 A. Oh, yeah. Oh, yes, it was.

9 Q. There was a question submitted -- may I approach,
10 Your Honor?

11 THE COURT: You may.

12 BY MS. GRIMSMAN:

13 Q. Do you recognize that at all? It's exhibit
14 number 1 for the hearing. (Handed.)

15 A. What's the question on this?

16 Q. Do you recall that question and answer being
17 discussed at any point?

18 A. You know, I don't even remember reading this, to
19 be honest with you.

14:31:50 20 Q. Okay. So, you don't recall one way or the other
21 whether it was discussed or not?

22 A. Not really. Not that.

23 Q. Okay. And with regard to the premeditated
24 murder, did you understand that this case did not need
25 to be a premeditated or intentional murder?

1 MR. TERRIBLE: Objection, Your Honor. Need
2 to be?

3 THE COURT: I'm sorry. What was that?

4 MR. TERRIBLE: Objection to the form of the
5 question.

6 MS. GRIMSMAN: I'm sorry. I'll rephrase it.

7 THE COURT: Sustained.

8 BY MS. GRIMSMAN:

9 Q. Did you understand that this defendant was not
10 charged with premeditated or intentional murder?
14:32:15

11 A. I don't really understand the question, to be
12 honest with you.

13 Q. Um, was it your understanding that this was a
14 felony murder case, that there was a charge of child
15 abuse that eventually led to the victim's death?

16 A. Yes, um-hum.

17 Q. And was there ever a, in your mind, was there
18 ever a point where you thought that the defendant has
19 been charged with premeditated or intentional murder
20 where he may have thought about this and planned it?
14:32:41

21 MR. TERRIBLE: Objection. Compound
22 question.

23 THE COURT: Sustained.

24 BY MS. GRIMSMAN:

25 Q. Was there ever a point in time where you

1 understood the charges to be that he had planned the
2 murder ahead of time, that it was premeditated?

3 A. That I, myself?

4 Q. Not whether you came to that conclusion, but
5 whether you thought he was charged with that?

6 A. I don't think he was charged with that, no. No.

7 Q. And, um, when you talked about that you -- the
8 defense attorney asked you if you, in your opinion, he
9 had intended the death and you said yes?

14:33:29 10 A. I don't remember saying that, no.

11 Q. Do you recall that? Okay. So, let me back up a
12 little bit.

13 When you returned your verdict of guilty, did you
14 determine that the defendant in this case had committed
15 child abuse?

16 A. I did. Yes, I did.

17 Q. And did you determine that that child abuse led
18 to the death of his son?

19 A. Yes, I did.

14:33:46 20 Q. Did you find it, as part of your duties as a
21 juror, to determine what his state of mind was, whether
22 he meant to kill his son or not?

23 THE COURT: I missed that last question.
24 I'm sorry.

25 (Whereupon, the court reporter read the last

1 question.)

2 THE WITNESS: Well, I think he killed his
3 son.

4 BY MS. GRIMSMAN:

5 Q. So, you did come to the conclusion that he did
6 kill his son?

7 A. Basically, yes.

8 Q. But did you ever find it your duty as a juror to
9 determine whether that was his intent or not?

14:34:38 10 A. Was my duty?

11 Q. That's what I'm asking, or did you just look at
12 whether he committed child abuse and that led to the
13 death?

14 A. Was -- I believe he did, so I must have make the
15 conclusions.

16 Q. And they are two separate things, and I may be
17 confusing you, and I think that's part of the problem.

18 This defendant is charged with felony murder that
19 he committed -- he intentionally committed a child abuse
14:35:04 20 and that child abuse led to the death.

21 MR. TERRIBLE: Objection, Your Honor.
22 That's not the charge. Objection to the order read.

23 THE COURT: Sustained.

24 BY MS. GRIMSMAN:

25 Q. That this defendant committed child abuse,

1 intentionally or knowingly, and that as a result of that
2 child abuse his son died?

3 MR. TERRIBLE: Objection. Same objection.

4 THE COURT: Overruled.

5 THE WITNESS: I believe what he did did lead
6 to his child's death, yes.

7 BY MS. GRIMSMAN:

8 Q. Okay. And can you see that there's a difference
9 between intending to commit child abuse that results in
10 his son's death or setting out that day with a plan to
11 kill his son?

12 A. Well, along the lines, somehow or another, a plan
13 had to be made, I believe, happened. Yes. Yes, I do.

14 Q. Okay. And so along the way, at some point, a
15 plan had to be made, and I don't disagree with you, I
16 guess we're kind of -- we're being kind of nitpicky with
17 you, and I apologize for that. But there was nothing
18 that required you, as a juror, to say that that plan
19 included necessarily his son's death. There was also
20 nothing in the instructions that said that he had to
21 plan his son's death.

22 Did you recognize that?

23 A. He had to have planned something for it to take
24 place.

25 Q. I agree.

1 A. That's what I concluded.

2 Q. And the State's position was that he gave his son
3 medication.

4 A. I believe, yes.

5 Q. And that that medication caused him physical
6 injury and eventually resulted in his death?

7 A. Right.

8 Q. As part of that, he also didn't contact 9-1-1,
9 didn't get any assistance, those -- those kind of
10 things.

11 A. Exactly.

12 Q. Okay. So, what we -- the State never asked you
13 as jurors to determine was that he set out with a goal
14 to kill his son.

15 A. Well, I don't believe he set out with a goal, to
16 be honest with you, not until it happened. It wasn't
17 something he planned for days ahead of time or anything
18 like that.

19 Q. And at some point when he didn't get any
14:38:29 20 assistance, he knew his son was dead -- at some point,
21 he knew his son was dead, correct?

22 A. Yes, I believe he did, yes.

23 Q. Do you have any way of knowing what he was
24 thinking at the time this all was going on?

25 A. No, I have no way of knowing, no.

1 Q. So, do you have any way to have a conclusion with
2 any reasonable -- beyond a reasonable doubt of what his
3 thought process was while this was going on?

4 A. I don't exactly know what he was thinking. I can
5 only tell you what I believe he did.

6 Q. And as a juror, you're entitled to your beliefs,
7 but when you went back there and you deliberated to
8 beyond a reasonable doubt, did you follow the
9 instructions that were given you?

14:39:32 10 A. I believe we did. I believe I did, yes.

11 Q. And did you look at whether or not you believed
12 this defendant had intentionally or knowingly committed
13 child abuse?

14 A. Yes, I believe he did.

15 Q. And did you look at whether that child abuse was
16 child abuse type 1?

17 A. Yes.

18 Q. And did you look at whether that child abuse type
19 1 resulted in the death of his son?

14:39:59 20 A. Yes.

21 THE COURT: Redirect.

22 MS. GRIMSMAN: Nothing further, Your Honor.

23 MR. TERRIBLE: I'll be right there, Your
24 Honor.

25 REDIRECT EXAMINATION

C E R T I F I C A T I O N

I, ROBIN G. BOBBIE, Registered Professional Reporter, Registered Merit Reporter, Certified Realtime Reporter, Certified Court Reporter, Certificate No. 50851, in and for the State of Arizona, do hereby certify that the foregoing pages constitute a full, true, and accurate transcript of all proceedings had in the foregoing matter, all done to the best of my skill and ability.

I FURTHER CERTIFY that I am not related to nor employed by any of the parties hereto, and have no interest in the outcome.

WITNESS my hand this 17th day of January, 2012.

/s/ Robin G. Bobbie

Robin G. Bobbie, RMR, CRR, CR
Arizona CCR No. 50851

1 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

2 IN AND FOR THE COUNTY OF MARICOPA

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4 - - -

5 IN RE:

6 THE STATE OF ARIZONA : CR2004-124662 001

7 - vs -

8 JEFFREY RICHARD MARTINSON : 1-CA-CR-13-0895

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12 January 19, 2012
13 Courtroom 703, Central Court Building
14 Phoenix, Arizona

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23 BEFORE: HONORABLE SALLY SCHNEIDER DUNCAN, J.

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25 - - -

POST-TRIAL EVIDENTIARY HEARING - DAY 2

APPEARANCES

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- - -

I N D E X

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
LAURA FERNANDEZ (Juror No. 6)	14	89	113	
KATHLEEN CURL (Juror No. 14)				
By The Court:	124			
	127			
		- - -		

1 especially questions about the law or legal issues, that
2 would be important to share with the jury?

3 A. Yes.

4 Q. Answers?

5 A. Yes.

6 Q. Do you recall, ma'am, that shortly after
7 deliberations began, you wrote a note to the Court dated
8 November 9th of 2011 submitted about 1:50 in the
9 afternoon, and you asked whether it was appropriate for
10 the jury to consider premeditation in connection with
11 the charge of felony murder?

12 A. I remember we asked a question, yes, about that.

13 MS. VAN DREUMEL: May I approach the
14 witness, Judge, with Exhibit number 1?

15 THE COURT: You may.

16 BY MS. VAN DREUMEL:

17 Q. I'm showing you, ma'am, what's been marked and
18 entered as Exhibit number 1. Would you take a minute
19 and look at that question and then flip the page and
20 look at the answer received from the Court?

21 A. I wrote that question.

22 Q. How about the answer? Do you remember receiving
23 that?

24 A. Yes.

25 Q. And the paragraph of the Court's typewritten

1 answer said that the defendant was not charged with
2 premeditated or intentional murder but was charged with
3 felony murder as directed in your instructions, right?

4 A. Correct.

5 Q. Do you know the difference between premeditated
6 and intentional murder?

7 A. I think I do.

8 Q. Okay. And did you read that answer to the jury
9 as a whole?

16:08:53 10 A. Yes.

11 Q. During deliberations in the guilty/not guilty
12 phase, before you came back with a verdict, did you tell
13 the jury that in your view Jeff set out to kill Josh
14 that day in order to hurt Miss Eberle?

15 A. I don't recall using those words, no.

16 Q. Was that your view?

17 A. I don't -- no. I don't know.

18 Q. Well, try for me. You said you don't recall
19 using the words?

16:09:32 20 A. Yeah. I'm trying to figure out when I said that,
21 or something like that, and what context I would have
22 said that in.

23 Q. Take your time.

24 A. Can you ask the question again?

25 Q. Sure. During the deliberations in the guilty/not

1 guilty phase, you stated that in your view Jeff set out
2 to kill Josh that day in order to hurt Miss Eberle or
3 maybe you said Kristin, referring to Miss Eberle?

4 A. Well, I believe I stated that when we were
5 looking at motive, that could have been a motive for why
6 he did it.

7 Q. Got ya. So, that would still have been during
8 the guilty/not guilty deliberations?

9 A. Correct.

16:10:16 10 Q. Okay. And so were you in the process of trying
11 to consider why Jeff would intentionally kill his son?

12 A. Yes.

13 Q. And is that what you ultimately found that for
14 whatever reason Jeff intentionally killed his son?

15 A. Yes.

16 Q. Now, on -- let me get the questionnaire again.

17 On questionnaire that you completed prior to the
18 voir dire process, I'm about to show you page 9.

19 Question number 30.

16:11:05 20 May I approach the witness, Your Honor?

21 THE COURT: You may. (Handed.)

22 BY MS. VAN DREUMEL:

23 Q. Will you take a look at that, please, and refresh
24 your recollection as to the question or the -- actually
25 it's kind of a statement followed by a question.

C E R T I F I C A T I O N

I, ROBIN G. BOBBIE, Registered Professional Reporter, Registered Merit Reporter, Certified Realtime Reporter, Certified Court Reporter, Certificate No. 50851, in and for the State of Arizona, do hereby certify that the foregoing pages constitute a full, true, and accurate transcript of all proceedings had in the foregoing matter, all done to the best of my skill and ability.

I FURTHER CERTIFY that I am not related to nor employed by any of the parties hereto, and have no interest in the outcome.

WITNESS my hand this 24th day of January, 2012.

/s/ Robin G. Bobbie

Robin G. Bobbie, RMR, CRR, CR
Arizona CCR No. 50851

1 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

2 IN AND FOR THE COUNTY OF MARICOPA

3
4 - - -

5 IN RE:

6 THE STATE OF ARIZONA : CR2004-124662 001

7 - vs -

8 JEFFREY RICHARD MARTINSON : 1-CA-CR-13-0895

9
10
11 - - -

12 January 23, 2012
13 Courtroom 703, Central Court Building
14 Phoenix, Arizona

15
16
17 - - -

18 BEFORE: HONORABLE SALLY SCHNEIDER DUNCAN, J.

19 - - -

20
21
22
23 POST-TRIAL EVIDENTIARY HEARING - DAY 3

APPEARANCES

MARICOPA COUNTY ATTORNEY'S OFFICE
BY: FRANKIE LYNN GRIMSMAN, ESQUIRE
STEPHANIE LOW, ESQUIRE
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Attorneys for the Defendant

- - -

I N D E X

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
CARLOS AMARO (Juror No. 10)				
By The Court:	9			
	16	27		
GENEVIEVE SMILEY (Juror No. 7)				
By The Court:	37, 51			
	41	48	51	
BRENDAN AVANT (Juror No. 8)				
By The Court:	55, 94			
	59	70		
JO MILLER (Juror No. 12)				
By The Court:	100, 156			
	120	136	149	156
		- - -		

1 Q. But on the chart you can, can't you?

2 A. Yes, would be the first column.

3 Q. Um-hum. Thank you.

4 A. The only thing missing on this sheet is actually
5 the medication name.

6 Q. Discriminate between the different bottles?

7 A. Correct.

8 Q. And the highlights?

9 A. And the highlights.

11:54:11 10 Q. I want to talk to you about the alternative
11 theories on the cause of death, the drowning, the
12 channelopathies, the anaphylactic shock, the
13 insecticide, or some combination of all of them.

14 Did you eliminate each and every one of them as a
15 possible cause of death?

16 A. Did I eliminate them? Is that not your job? Did
17 I eliminate them as possible cause of death, every one
18 of them. Channelopathy, you said, the drowning.

19 Q. Anaphylactic shock?

11:54:48 20 A. I was not qualified to eliminate channelopathy,
21 because I'm not a medical person. The evidence and
22 information that both my note-taking and that was
23 presented assisted in my eliminating other causes of
24 death.

25 Q. That's my only point.

1 A. Yes.

2 Q. Yes. In your mind, you were able to go through a
3 checklist and you could -- you found that drowning
4 wasn't the cause of death?

5 A. In my view.

6 Q. That's my point.

7 A. Yes.

8 Q. Channelopathies wasn't the cause of death?

9 A. Not qualified to determine that.

11:55:20 10 Q. Well, as a juror, you had to make that, you had
11 to go through some analysis?

12 A. I did the analysis based on the testimony from
13 the medical.

14 Q. That's my only point.

15 A. Yes, I eliminated that as a possible cause of
16 death.

17 Q. And so, too, with the insecticide or the
18 combination?

19 A. Yes.

11:55:33 20 Q. The venom?

21 A. From the ant, yes.

22 Q. And if I understood our conversation, you
23 eliminated them because you found them to all just to be
24 speculation. Did I get that right?

25 A. Not total speculation. There may have been some

1 merit, but in my process of elimination and determining
2 what's pertinent for me to make a decision, I was able
3 to eliminate them.

4 Q. Okay. In our discussion, it was my understanding
5 that you eliminated them because we didn't prove they
6 were the cause of death.

7 Did I understand that correctly?

8 A. That is true.

9 Q. And it was also my understanding in our
11:56:16 10 conversation that you reached your conclusion -- well,
11 you got to your verdict by concluding that Jeff intended
12 to kill his son?

13 A. Yes.

14 Q. And although you didn't find that Jeff planned
15 for weeks or even days ahead of time, sometime on that
16 Saturday he made the decision to kill Josh?

17 A. Yes.

18 Q. And that he eliminated the -- I'm sorry -- that
19 he administered the drug to Josh with that intention in
11:56:44 20 mind?

21 A. To harm Josh, yes.

22 Q. And did you find beyond a reasonable doubt that
23 Josh suffered any injury other than the death?

24 A. The death and ant bites. That would be
25 considered an injury, but it had no direct correlation

1 to his death.

2 Q. Let me rephrase it. Did you find beyond a
3 reasonable doubt that Jeff caused an injury to Josh
4 other than the death itself?

5 A. No, I think that was the death was significant
6 enough.

7 MR. TERRIBLE: Okay. No other questions,
8 Your Honor.

9 THE COURT: All right. How long do you
10 think your cross will be?
11:57:32

11 MS. GRIMSMAN: A little bit too long to do
12 it in one minute.

13 THE COURT: Okay. All right. Well, give me
14 an estimate and I'll make a judgment.

15 MS. GRIMSMAN: I probably need about 10 or
16 15 minutes, at least.

17 THE COURT: Enough said. You're going to
18 have to come back at 1:30. You remain under the
19 admonition. I'm going to have you wait just outside the
11:57:52 20 courtroom door at 1:30, and then we'll invite you in,
21 okay? All right.

22 MS. GRIMSMAN: Sorry.

23 THE WITNESS: I should go this way?

24 THE COURT: Go out the back door, yeah.

25 (Whereupon, a luncheon recess was taken at

C E R T I F I C A T I O N

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I FURTHER CERTIFY that I am not related to nor employed by any of the parties hereto, and have no interest in the outcome.

WITNESS my hand this 29th day of January, 2012.

/s/ Robin G. Bobbie

Robin G. Bobbie, RMR, CRR, CR
Arizona CCR No. 50851

1 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

2 IN AND FOR THE COUNTY OF MARICOPA

3
4 - - -

5 IN RE:

6 THE STATE OF ARIZONA : CR2004-124662 001

7 :

7 - vs -

:

:

8 JEFFREY RICHARD MARTINSON : 1-CA-CR-13-0895

9
10
11 - - -

12 February 7, 2012
13 Courtroom 703, Central Court Building
14 Phoenix, Arizona

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16
17 - - -

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19
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21
22
23 BEFORE: HONORABLE SALLY SCHNEIDER DUNCAN, J.

24
25 - - -

26 POST-TRIAL EVIDENTIARY HEARING - DAY 5

APPEARANCES

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Attorneys for the Defendant

- - -

I N D E X

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
WILLIAM RICHARDS (Juror No. 9)				
By The Court:	4			
	19	48	67	
DAWN ROBERTS BEECH (Juror No. 11)				
By The Court:	72			
	76	82	91	97
JASON HILL (Juror No. 13)				
By The Court:	100, 150, 170			
	104	136, 165 180	148, 176	
KRYSTEN NYLEN (Juror No. 15)				
By The Court:	185			
	189	226		
		- - -		

1 THE COURT: Phase 2?

2 THE WITNESS: No.

3 THE COURT: Phase 3?

4 THE WITNESS: No.

5 THE COURT: I think that's all my questions
6 for you.

7 Okay. I'm turning you over to the lawyers.

8 DIRECT EXAMINATION

9 BY MR. TERRIBILE:

11:13:22 10 Q. Good morning.

11 A. Good morning.

12 Q. Did you find beyond a reasonable doubt that the
13 carisoprodol was the cause of death in this case?

14 A. Yes.

15 Q. And did you find beyond a reasonable doubt that
16 the defendant gave or administered that pill to his son?

17 A. Yes.

18 Q. And did you find that the defendant gave his son
19 the pill with the intention of killing him?

11:13:39 20 A. Yes.

21 Q. Did you vote on both counts 1 and count 2?

22 A. Did I vote?

23 Q. On both count 1 and count 2?

24 A. Um, child abuse, right, count 2. Is that what
25 you're talking about? I voted, yes, I did.

1 Q. Let me just -- you tell me what you voted. I'm
2 not trying to tell you what you voted on. I wasn't
3 there.

4 A. We all voted on counts 1 and count 2.

5 Q. So, there were two votes?

6 A. Um, yes. I believe so.

7 Q. Please take us through the process. How was
8 count 1 voted on?

9 A. Um, you know, you don't, by any chance, have a
11:14:40 10 copy of the jury instructions, do you, with the -- just
11 to refresh my memory?

12 THE COURT: Let me see if I have.

13 Do you, Julie, have them?

14 Debbie, can you print off a set? I actually
15 have been looking for a set, which I thought I did have
16 on the bench, but I don't think I have handy.

17 MS. VAN DREUMEL: I have a set handy, but
18 mine has some highlights on it.

19 MS. GRIMSMAN: I know mine does also.

11:15:11 20 THE COURT: Give us a moment and we can get
21 one to you quickly.

22 THE BAILIFF: Which phase, Judge?

23 THE COURT: Phase 1. Final. You know what?
24 I think I have open, which means you're going to see it
25 in read only. So let me print it out. Sorry.

1 THE WITNESS: Thank you. It just seems like
2 a long time ago that we were deliberating.

3 THE COURT: That's fine.

4 THE BAILIFF: You have it open.

5 THE COURT: I do. I know I do. I'm looking
6 at it. I admit it. It's printing. Thank you. Could
7 you also bring me the copy I printed myself, and I'll
8 get out of the document. I printed two copies.

9 MS. VAN DREUMEL: Can we have one more?

11:16:02 10 THE COURT: Do you each want a copy too?

11 MS. VAN DREUMEL: We would like one marked
12 and admitted.

13 MS. GRIMSMAN: We can get that later. We
14 don't have to do it now.

15 THE COURT: I'm busy printing, so we'll do
16 it now, so there should be copies.

17 Let's -- going to kill a tree. Let's kill
18 trees right now.

19 MS. GRIMSMAN: It won't be our first tree.

11:16:27 20 THE COURT: Many copies. Many. I would say
21 maybe six, I don't know. Enough that the witness and I
22 can share my copy.

23 THE WITNESS: I just need the first page.

24 THE COURT: You'll get the whole thing.

25 THE WITNESS: Okay.

1 THE COURT: We aim to please, okay.

2 MS. GRIMSMAN: May we approach, Judge?

3 THE COURT: Sure.

4 MS. GRIMSMAN: It doesn't even need to be on
5 the record.

6 THE COURT: Okay.

7 (Whereupon, a discussion was held at the
8 bench off the record.)

9 THE COURT: All right.

11:20:17 10 THE WITNESS: Okay.

11 THE COURT: So, I just want to establish for
12 the record you've received a copy of the final jury
13 instructions.

14 THE WITNESS: Yes, I have.

15 THE COURT: Excellent, counsel. You also
16 should have received them. Have you not?

17 MS. LOW: Yes, we have.

18 THE COURT: Okay. Happily we are all now
19 literally on the same page.

11:20:33 20 THE WITNESS: I'm sorry for the confusion,
21 because we vote a lot of times.

22 BY MR. TERRIBILE:

23 Q. That's fine.

24 A. We discussed both, and I believe that it came
25 down to one vote for both, but I'm not a hundred percent

1 positive it was, because I think we took them together.

2 Q. Let me see what you're pointing at, please, if I
3 can approach. First degree felony murder.

4 A. Discussed them both, but I think we voted --
5 final -- our final vote was on, you know, what I mean,
6 the same thing.

7 Q. One vote?

8 A. Yes. Maybe.

9 Q. Okay. That's fair.

11:21:13 10 A. All right. Almost positive.

11 Q. Okay. Um, showing you what's been marked as
12 Exhibit number 1.

13 Would you please look at this to yourself, just
14 read it to yourself. There's two pages and then I'll
15 have some questions for you.

16 A. Okay. (Within complies.)

17 MS. GRIMSMAN: May I ask what you handed
18 her?

19 MR. TERRIBILE: Exhibit number 1.

11:21:44 20 Judge, while she's reading that, could I
21 move the jury instructions in as an exhibit so it's part
22 of the record?

23 THE CLERK: I'll need a copy of them.

24 THE COURT: Here. You can have mine.

25 BY MR. TERRIBILE:

1 Q. Did you read the second page?

2 A. Okay.

3 Q. Was that instruction -- I'm referring to the
4 second page. The first page is just to give you a
5 context, was that second page read to you or was that
6 made aware to you during your deliberations in Phase 1?

7 A. Yes.

8 Q. It was?

9 A. Um, we talked about everything for many days.

11:22:41 10 Yes, I remember this.

11 Q. Do you remember how it came to your attention?
12 Was it read to you? Was it handed to you?

13 A. Um, I remember talking about this question as it
14 was being written.

15 Q. Okay.

16 A. And, um, yes, this was read to me.

17 Q. Before you voted?

18 A. Yes.

19 Q. And having read that instructions, you still
11:23:15 20 found the defendant intentionally killed his son?

21 A. Yes.

22 MR. TERRIBILE: No other questions, Your
23 Honor.

24 THE COURT: All right.

25 CROSS-EXAMINATION

1 you, but I'm not allowed to do it that way.

2 MS. GRIMSMAN: Objection, Your Honor.

3 THE COURT: Sustained.

4 We're taking our lunch recess. You have
5 time to reflect. Come back at 1:30.

6 Sir, you'll just be outside the courtroom
7 door at 1:30 when it's time to come in.

8 (Whereupon, a luncheon recess was taken at
9 this time.)

13:31:49 10 THE COURT: We're back on the record.
11 Counsel is present. Mr. Martinson is present. The
12 witness is on the witness stand.

13 You may continue.

14 MR. TERRIBILE: Thank you, Your Honor.

15 BY MR. TERRIBILE:

16 Q. Before the lunch break, I had asked you the
17 following question: Did you conclude beyond a
18 reasonable doubt that Soma was the sole cause of death?
19 Your answer was, I really don't know because that's not
13:32:12 20 what I went in to decide.

21 Am I right so far?

22 A. Sounds correct, yes.

23 Q. What did you go in to decide?

24 A. There was two counts. I would have to look at
25 the -- the verdict forms we submitted to be exactly

1 correct but, basically, the murder -- the felony murder
2 was count 1 and count 2 was the child abuse.

3 Q. Okay. In order to reach a verdict on -- on any
4 count, you would have to have find that the State proved
5 beyond a reasonable doubt certain things, are you with
6 me so far?

7 A. Yes.

8 Q. I'm trying to understand what those things were
9 that you found beyond a reasonable doubt that led you to
10 conclude to vote guilty on count 1.

13:32:58

11 A. I guess the reason why I was having hesitation or
12 kind of a difficult time answering your question was
13 that I didn't really necessarily come to a conclusion
14 whether Soma was the sole cause or part of the cause.

15 Q. Okay. That's fair.

16 A. That's, basically, why.

17 Q. Okay. That's the answer then.

18 A. Right.

19 Q. Okay. What other contributing cause of death did
20 you find the State proved beyond a reasonable doubt?

13:33:27

21 A. Other causes of death?

22 Q. Well, you said Soma was not the sole cause of
23 death, so I'm trying to understand what else
24 contributed, in your mind.

25 A. I came to the conclusion that the defendant's

1 actions, whether it was giving Josh the drugs alone or
2 giving the drugs with another element, to me, it didn't
3 matter what -- to me it didn't matter. His actions were
4 the cause of the death.

5 Q. Okay. Okay.

6 A. So that's --

7 Q. That's fair. I didn't mean to cut you off.

8 A. No, that's fine.

9 Q. What -- what actions did you find the State
10 proved the defendant committed beyond a reasonable
11 doubt?

12 A. Child abuse by the definition that we were given.

13 Q. Okay.

14 A. And that that child abuse --

15 Q. Okay.

16 A. -- was the cause of the death.

17 Q. I'm trying to understand what acts -- what acts
18 were committed that were child abuse?

19 A. Administering the drug, Soma to Josh.

13:34:48 20 Q. Okay.

21 A. That's --

22 Q. That's fine. Did you find that he administered
23 the drug to Josh with the intention of killing him?

24 A. Personally, yes, I did.

25 Q. Right. Did you find that Josh suffered any

1 physical injury other than the death itself?

2 A. Yes.

3 Q. A physical injury that led to the death?

4 A. Well, I guess what I'm saying is if he weren't to
5 have died, say he was saved, he still had that
6 progression until the point that he died, so he still
7 had the toxicity effects of the drug through his body.

8 Q. All right.

9 A. So, that was, to me, would be one.

13:35:41 10 Q. That would be the physical injury that you found?

11 A. Right.

12 Q. Am I right?

13 A. Yes.

14 Q. Okay. Now, were you able to eliminate beyond a
15 reasonable doubt drowning as a cause of death?

16 A. Accidental drowning, yes.

17 Q. Drowning as a cause of death?

18 A. Yes.

19 Q. Please tell me how you were able to eliminate
13:36:12 20 beyond a reasonable doubt and let me --

21 MS. GRIMSMAN: Objection.

22 BY MR. TERRIBILE:

23 Q. Let me put the question in context. The
24 testimony from Dr. Hu was that he couldn't eliminate
25 drowning.

C E R T I F I C A T I O N

I, ROBIN G. BOBBIE, Registered Professional Reporter, Registered Merit Reporter, Certified Realtime Reporter, Certified Court Reporter, Certificate No. 50851, in and for the State of Arizona, do hereby certify that the foregoing pages constitute a full, true, and accurate transcript of all proceedings had in the foregoing matter, all done to the best of my skill and ability.

I FURTHER CERTIFY that I am not related to nor employed by any of the parties hereto, and have no interest in the outcome.

WITNESS my hand this 10th day of February, 2012.

/s/ Robin G. Bobbie

Robin G. Bobbie, RMR, CRR, CR
Arizona CCR No. 50851

1 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

2 IN AND FOR THE COUNTY OF MARICOPA

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5
6 THE STATE OF ARIZONA : CR2004-124662 001

7 - vs -

8 JEFFREY RICHARD MARTINSON : 1-CA-CR-13-0895

9
10
11 - - -

12 June 7, 2012
13 Courtroom 702, Central Court Building
14 Phoenix, Arizona

15
16 - - -

17 BEFORE: HONORABLE SALLY SCHNEIDER DUNCAN, J.

18
19 - - -

20
21
22
23 STATUS CONFERENCE

APPEARANCES

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Phoenix, AZ 85003
Attorneys for the Defendant

ALSO PRESENT:

DAN MIRANDA, ESQUIRE
Attorney for the victims

- - -

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(Whereupon, the following proceedings were held in open court.)

THE COURT: This is the time set for a status conference in CR2004-124662-001.

Can you announce?

MS. GRIMSMAN: Frankie Grimsman and Stephanie Low on behalf of the State.

Good morning, Your Honor.

10:30:42 MR. TERRIBILE: Michael Terribile on behalf of the defendant, whose presence is waived, and Treasure Van Dreumel will not be here this morning and we'll waive her --

MR. MIRANDA: Dan Miranda on behalf of Jeff Johnson for the victims.

10:31:07 THE COURT: Good morning. Counsel, there are a couple of pending motions. One that just came in this week, but one has been pending for some period of time. One was a Motion to Order Production, and I don't believe I ever received a response from the State.

MS. GRIMSMAN: Your Honor, I believe defense counsel is probably aware, but Court must not be, that Mr. Martinson was reindicted under another CR number.

THE COURT: Okay. I don't know that.

MR. TERRIBILE: That's all I know. I don't

1 know what. I don't know if it's a misdemeanor. I don't
2 know if it's related to this case. No one has given me
3 the professional courtesy of showing me what's going on.

4 MS. GRIMSMAN: Well, I'm prohibited from
5 telling anyone what's going on.

6 MR. TERRIBILE: Not if he was IA'd last
7 night.

8 THE COURT: Okay. Was he?

9 MS. GRIMSMAN: This morning. I did not
10:31:39 10 inform Mr. Terribile.

11 MR. TERRIBILE: And I still have no
12 indictment.

13 THE COURT: Okay. Well, was he IA'd?

14 MS. GRIMSMAN: That's correct, Your Honor.

15 THE COURT: Okay. So then it's public
16 record now. So what was he indicted on and what's the
17 CR number?

18 MS. GRIMSMAN: It is -- he's indicted on
19 first degree murder.

10:31:58 20 THE COURT: Okay.

21 MS. GRIMSMAN: Child abuse class 2 and child
22 abuse class 4, number 2012-00735-001.

23 THE COURT: Okay. All right. And so what
24 is the plan then?

25 MS. GRIMSMAN: Well, as it stands right now,

1 Your Honor, the IA Court has appointed the Legal
2 Defender's Office. She was aware there was a pending
3 case, but under the circumstances did not know if that
4 would go to the assigned attorneys. A million dollar
5 cash bond was set.

6 THE COURT: Okay. All right. Well, the
7 Legal Defender's previously conflicted off of
8 representing Mr. Martinson.

9 MS. GRIMSMAN: It was due to the attorney
10:32:38 10 that was on the case. I don't know that it was the
11 office itself and I don't know if that attorney is still
12 there. So I guess that information needs to all be
13 ferreted out. I assume what we would do next is go
14 before the presiding criminal so that he could make all
15 those decisions.

16 THE COURT: Well, I don't know that it
17 requires that it go before the presiding criminal. I
18 think I'd be making those decisions in terms of
19 determination of counsel. At the present, it's still my
10:33:03 20 case and that comes from the Court presiding, not the
21 presiding criminal.

22 MS. GRIMSMAN: Until that ruling is made,
23 Your Honor, because that case is not filed as a capital
24 case, we have not asked no bond, we've asked for a
25 million dollar cash bond.

1 THE COURT: Okay.

2 MS. GRIMSMAN: I would respectfully request
3 that the Court make the --

4 THE COURT: Okay.

5 MS. GRIMSMAN: -- presiding make those
6 decisions because I don't want to overstep.

7 THE COURT: I understand. I can take care
8 of those issues, but is the 2004 case dismissed?

9 MS. GRIMSMAN: It is, Your Honor.

10:33:30 10 THE COURT: Okay. So this matter is
11 dismissed, okay.

12 Well, and the other case is a noncapital
13 case, first degree murder.

14 MS. GRIMSMAN: That's correct.

15 THE COURT: Okay. All right.

16 MR. TERRIBLE: Is that the only difference?
17 I'm still confused.

18 MS. GRIMSMAN: No, the indictment has been
19 changed.

10:33:45 20 MR. TERRIBLE: Could I ask what the
21 difference is? If I'm not going to have the courtesy of
22 an indictment, could I, at least, know what the
23 difference is?

24 THE COURT: Well, I think it was articulated
25 by Miss Grimsman, but go ahead.

1 MS. GRIMSMAN: Your Honor, it was indicted
2 as premeditated and/or felony murder.

3 MR. TERRIBILE: Okay. That's the
4 difference. That's the alternative, okay.

5 MS. GRIMSMAN: It was indicted under a class
6 2 child abuse, circumstances endangering life, not
7 physical injury.

8 THE COURT: Okay. All right.

9 MS. GRIMSMAN: And it was also indicted with
10:34:14 10 a class 4 with the injury to the shoulder.

11 THE COURT: There you have it.

12 MR. TERRIBILE: Can I have the CR number?

13 MS. GRIMSMAN: 2012-00735.

14 MR. TERRIBILE: 00735?

15 THE COURT: Correct.

16 MR. TERRIBILE: Okay. That's not enough
17 numbers. Maybe I wrote it down wrong.

18 MS. LOW: I think it's 7335.

19 THE COURT: 7335. Okay. Fine. Well, that
10:34:39 20 renders, at least for the moment, moot the motion to
21 order production and the second motion for production in
22 the 2004 matter. And I know the criminal presiding
23 judge is not available right now, and so this matter
24 will just continue to pend until that gets sorted out,
25 okay?

1 Okay. We're at recess.

2 MR. TERRIBILE: Judge, yesterday, because of
3 the deadlines set by the Court, we filed tons of
4 motions. I will now withdraw all of those motions.

5 THE COURT: Okay. Withdrawn. Okay. Thank
6 you.

7 MR. TERRIBILE: Could I ask when I'm going
8 to get a copy of the indictment?

9 THE COURT: The 2004 trial matter is
10:35:25 10 vacated.

11 MS. GRIMSMAN: I don't know that I have the
12 duty or the right to give Mr. Terribile a copy of the
13 indictment because he is not the attorney of record. So
14 he keeps saying the professional courtesy, but as of
15 last night, even though we informed the commissioner
16 that there was an existing attorney, she did not want to
17 make that call since he was an attorney on a capital
18 case. It's assigned to the Legal Defender's.

19 THE COURT: Okay. Well, re-indictment
10:35:49 20 doesn't change who counsel of record is. So Mr.
21 Terribile, actually, is Mr. Martinson's counsel of
22 record. Indictments get dismissed. There are
23 superseding indictments all the time. It doesn't change
24 who the defense lawyer is.

25 So as far as this Court is concerned, the

1 defense lawyer is still the defense lawyer. It doesn't
2 matter what the name of the document is. It does mean
3 the trial is vacated in the 2004 matter, but the
4 happening of the Legal Defender's Office appearing at
5 the initial appearance or being appointed doesn't change
6 the fact that Mr. Martinson does have counsel intact.
7 So, I mean, that's this Court's position regarding
8 counsel, but I understand. I understand that the
9 presiding criminal judge and court presiding judge may
10 want to be involved, or that I may still remain involved
11 in that decision or otherwise, okay?

12 We're at recess on this matter.

13 (Whereupon, the proceedings concluded.)

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C E R T I F I C A T I O N

I, ROBIN G. BOBBIE, Registered Professional Reporter, Registered Merit Reporter, Certified Realtime Reporter, Certified Court Reporter, Certificate No. 50851, in and for the State of Arizona, do hereby certify that the foregoing pages constitute a full, true, and accurate transcript of all proceedings had in the foregoing matter, all done to the best of my skill and ability.

I FURTHER CERTIFY that I am not related to nor employed by any of the parties hereto, and have no interest in the outcome.

WITNESS my hand this 12th day of June, 2012.

/s/

Robin G. Bobbie, RMR, CRR, CR
Arizona CCR No. 50851

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. CR 2004-124662-001
	)	2012-007335-001
JEFFREY RICHARD MARTINSON,	)	
	)	
Defendant.	)	

BEFORE THE HONORABLE SALLY SCHNEIDER DUNCAN

APPEARANCES:

FOR THE PLAINTIFF: Stephanie Low

FOR THE DEFENDANT: Michael Terribile
Treasure VanDreumel

Phoenix, Arizona
June 26, 2012
9:07 a.m.

REPORTER'S TRANSCRIPT OF PROCEEDINGS
(Status Conference)

Marmie Guimont
Certified Reporter
Cert #50831
(COPY)

APPEARANCES

For the Plaintiff: Stephanie Low

For the Defendant: Michael Terribile

Treasure VanDreumel

1 THE COURT: This is the time set for status
2 conference in CR2004-124662-001, CR2012-007335-001.
3 Counsel, can you announce.

4 MS. LOW: Stephanie Low, State.

5 MR. TERRIBILE: Michael Terribile and
6 Treasure VanDreumel. We'll waive Jeff's appearance this
7 morning.

8 MS. CLASE: Colleen Clase on behalf of Jeff
9 Johnson for the victim who is not present.

10 THE COURT: How do you spell your last name?

11 MS. CLASE: It's C-l-a-s-e. Thank you.

12 THE COURT: Thank you. I'm in receipt of
13 defendant's objection to dismissal and request for a
14 hearing. There was an objection to -- or a request for
15 more time for briefing, basically, from the State.

16 I just want to put on the record the
17 following: Actually, for purposes of this discussion,
18 reinstating 2004-124662.

19 That doesn't mean it won't be dismissed but I
20 want to put on the record at the last status conference,
21 at least my recollection, I didn't pull the transcript but
22 my understanding was that case had been dismissed.

23 I thought maybe by another judicial officer
24 based on representations made by the State at the hearing
25 based on the new indictment.

1 In fact, after the hearing, when my clerk was
2 trying to prepare the minute entry, she said, Judge it
3 hasn't been dismissed. I thought it had been as a
4 procedural matter.

5 So I authorized it to be dismissed because I
6 thought it was just an administrative task and that a
7 judge had actually somehow dismissed it without me knowing
8 about it.

9 Based on the new indictment, that appears not
10 to have happened. I don't know what the exact
11 representations were.

12 I'm just telling you what the Court believed
13 after -- I can't remember, Ms. Low, whether it was you or
14 Ms. Grimsman who told me about the Indictment.

15 I'm reinstating it. It does not mean it
16 won't be dismissed but I was under a misapprehension at
17 the time procedurally. So no judge, apparently, had, in
18 fact, dismissed it.

19 The filing of the new indictment may end up
20 working a dismissal; it may not; I don't know. I don't
21 want to opine things.

22 I don't have an answer to your question
23 procedurally but I'm telling you exactly what happened.
24 So it had not been dismissed. No judge had dismissed it.
25 I'm just putting that on the record.

1 I'm not opining one way or another about any
2 outcome procedurally or for justification procedurally.
3 I'm just telling you what my impression was. So for
4 purposes of this case, there had not been any motion to
5 dismiss.

6 Not put before the court so I am reinstating
7 it technically, taking up the objections, but I'm viewing
8 these objections as to whether it should or shouldn't be
9 dismissed and what the procedural posture should be.
10 That's it.

11 With respect to a briefing schedule, I agree
12 with the State this is an extensive motion. And I don't
13 have any heartburn giving the State the time it needs to
14 be able to file a meaningful response. Ms. Low.

15 MS. LOW: Your Honor, respectfully, given the
16 Court's statements today and the statements that were in
17 the defense's objection to our Motion for Extension of
18 Time, the State actually has a concern now that the issue
19 that really is raised is going to hinge on what the
20 Court's understanding was of a conversation that was in
21 court that day.

22 THE COURT: Well, the beauty is we can get
23 the transcript made.

24 MS. LOW: And that's --

25 MS. VANDREUMEL: That's attached to our

1 appendix.

2 MS. LOW: Yeah, and I know that that's
3 included.

4 THE COURT: Let me look at it. I looked at
5 the motion because it hadn't been fully briefed. I
6 haven't studied everything. I'm just telling you what my
7 impression was that day when I got off the bench.

8 My clerk came to me and said, Judge, it
9 hasn't been dismissed and what should I do? Because,
10 technically, there needed to be an administrative -- I
11 thought it was just an administrative matter that needed
12 to be taken care of.

13 Let me take a look at the transcript. I have
14 a minute so hold on a minute.

15 (The Court reviews the transcript)

16 THE COURT: Okay. Well, I'm looking at page
17 6. It's Exhibit D of the June 7th, 2012, transcript of
18 the status conference before me.

19 And starting at line 7, the Court, "I
20 understand. I can take care of those issues but is the
21 2004 case dismissed?" And Ms. Grimsman, "It is, Your
22 Honor."

23 And it was on that basis that after the fact,
24 when my clerk asked me, when she was trying to do the
25 minute entry, she said, Judge, there isn't a dismissal on

1 the docket.

2 I said, Well, I guess we then should
3 administratively show that it's dismissed.

4 That's what happened so it was based on that
5 representation that I authorized the actual dismissal to
6 be entered for docketing purpose but not for any other
7 reason.

8 So the transcript represents what I remember
9 of the status conference and I've now been refreshed.
10 That's exactly what I thought had happened. I am
11 reinstating the 2004 case for purposes of this briefing.

12 I know that you had indicated that you felt
13 that the State needed more time. So I'm just asking what
14 is that schedule going to be? The 2004 case is hereby
15 reinstated.

16 I had based an administrative decision based
17 on those representations.

18 MS. LOW: And, Your Honor, really, I really
19 have a concern now that the minute entry does not at all
20 reflect what the Court has indicated that the Court's
21 understanding is today.

22 THE COURT: I'm sorry. What was that?

23 MS. LOW: The minute entry that relates to
24 the dismissal of the case doesn't reflect that at all.

25 THE COURT: I'm going to vacate that minute

1 entry because it was based on that conversation that it
2 happened after the representation made in court so I'm
3 telling you exactly what happened.

4 MS. LOW: And, Your Honor, respectfully, I
5 think that based on what's been represented in the
6 motions, based on what the Court has said today, and based
7 on that minute entry, I am, respectfully, asking the Court
8 to recuse itself because I think that this does relate to
9 what your recollections are and the representations that
10 you're making about what your understanding of the
11 conversations was.

12 THE COURT: Raise it in a motion then. I'm
13 not going to take it up like that. I'm just telling you
14 the actual record speaks for itself. That was the
15 representation as I remembered it.

16 Exactly as Ms. Grimsman represented it in
17 court and I don't feel that I have any bias one way or
18 another in this case. I have a motion that was brought to
19 me and it needed to be briefed.

20 I'm just asking the State what the briefing
21 schedule is. If you have other issues to raise, you can
22 raise them. Okay. So take care of that.

23 Do it in written form and whoever is
24 appropriate to hear those matters will hear those
25 matters. When does the State expect to be able to file a

1 response to the objection?

2 MS. LOW: Well, and, Your Honor, without
3 waiving our right to object to you hearing it, we're
4 asking for at least until July 20th, I believe is what I
5 put in my Motion.

6 Because I think as everybody knows,
7 Ms. Grimsman is gone for the next 3 weeks so I don't have
8 a way to get ahold of her, really, with any certainty.

9 THE COURT: Okay. I don't have a problem
10 with that. The response will be July 20th. When will the
11 reply be?

12 MS. VANDREUMEL: July 27th, Friday.

13 THE COURT: Okay. Then I will set oral
14 argument the following week. If other issues get raised
15 by the State, they do.

16 If other judges need to get involved, they
17 will. We'll take care of that in due course depending on
18 what pleadings are filed.

19 MS. LOW: And, Judge, I'm out of the office
20 the 1st, 2d, and 3d of August. The next week.

21 THE BAILIFF: Friday, August the 10th, at
22 2:30 p.m.

23 THE COURT: August 10th at 2:30, yes?

24 MS. CLASE: Your Honor, the victim is out of
25 town August 9th through 13 and if she wants to exercise

1 her right to be present, we hope that it can be scheduled
2 when she is in town.

3 THE COURT: Hold on one second. Let me go
4 into ICIS.

5 MS. VANDREUMEL: Judge, I think we need to be
6 careful because he has a last day of August 16th, if I am
7 recalling correctly.

8 And we need to make sure that it's done prior
9 to. Since he is not here to even discuss waiving time.

10 THE COURT: How about setting it -- and I
11 will talk to you about the conflict -- August 6th at
12 9 a.m. So August 6th at 9 a.m. and it looks like that
13 doesn't conflict with anybody's calendars.

14 Okay. Thank you. Is there anything else to
15 talk about, Mr. Terribile?

16 MR. TERRIBILE: No, Your Honor.

17 MS. VANDREUMEL: Judge, our objections are
18 already lodged in the record.

19 MR. TERRIBILE: Judge, I don't want to give
20 you any heartburn but I have heartburn thinking about my
21 client being in custody for 8 years while we play around
22 with everyone else's calendar.

23 If there was just an acknowledgment that
24 there's a problem with the guy sitting in custody for 8
25 years, I would feel better. I'm sorry. I had to say

1 that.

2 THE COURT: Okay. Noted for the record.

3 (The Court adjourned at 9:19 a.m.)

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I, Marmie Guimont, do hereby certify that the
forgoing pages constitute a full, true and accurate
transcript of the proceedings had in the foregoing matter,
all done to the best of my skill and ability.

WITNESS my hand this 5th day of July, 2012.

/s/Marmie Guimont

Marmie Guimont, CSR, RPR
Certification #50831