

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2017-001324-001 DT

07/12/2021

HONORABLE KATHERINE COOPER

CLERK OF THE COURT
N. Pallas
Deputy

STATE OF ARIZONA

JOHN NELSON SCHNEIDER
ALLISTER R ADEL

v.

PATRICK JAY SANFORD (001)

JEREMY HUSS

JUDGE COOPER

ERIC AIKEN

RULING RE: MOTION TO DISMISS

The Court has reviewed Defendant's Motion to Dismiss filed 3/19/2021, the State's Response filed 4/16/2021, the Reply filed 5/7/2021, the State's Motion to Strike Defendant's Reply filed 5/17/2021, pertinent portions of the record, and additional pleadings referenced. The Court also considers counsels' oral argument on 5/28/2021.

Defendant moves to dismiss the indictment pursuant to the Double Jeopardy Clause of the Fifth Amendment and the Arizona Constitution based on prosecutorial misconduct on the following grounds: 1) the State obtained the indictment with perjured testimony; 2) the State failed to disclose *Brady* impeachment evidence regarding its lead witness, Det. Cristie Eisentraut; and 3) the State presented false expert testimony at trial.

Evidence Presented at Trial

This case arises from the 2011 death of Denise Smith. On April 16, 2011, Smith's ex-husband Brian Smith found her dead in her second floor bedroom with a gunshot to her chest, the gun beside her. Denise had a several-year history of medical and mental health issues. At the time of her death, she suffered from depression, anxiety, chronic pain, and suicidal ideation. She and Brian had divorced after a long marriage. They had two adult sons.

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On April 6, 2011, ten days before her ex-husband found her dead, Smith attempted suicide. She went to a pawnshop to buy a gun. A mandatory wait period prevented her from buying it that day. She returned to her home and took a large quantity (50 pills) of her pain medication. She left a suicide note for her sons with information about her bank accounts. Her son Aaron found her, and she was admitted to St. Luke's Hospital from April 6 to April 12, 2011.

On April 12, 2011, St. Luke's released her to ex-husband Brian's care. In the car leaving the hospital with Brian she said that she was angry that she was still alive. Two days later, on April 14, 2011, she returned to the pawnshop and bought the gun. She told Brian that she had the gun but would not use it on herself because she had test-fired it and it was loud. Between April 12 and April 14, 2011, she talked about committing suicide by electricity with her ex-husband and expressed suicidal thoughts to her counselor.

Smith and Sanford met online in the year before her death. They dated and lived together at her two-story town home from approximately November 2010 to March 2011 when the relationship ended. On April 15, 2011, she contacted Defendant. She told a friend she was excited to see him. Sanford told police that he picked her up, they went to his residence where they spent the night, and he dropped her off at her town home around 10:30 a.m. the next morning on April 16, 2011.¹ Later that day Smith did not return her sons' calls or texts. They and Brian became concerned that Smith had harmed herself, so Brian went to her home where he found Smith deceased. He called 911 and reported that his ex-wife had committed suicide. City of Phoenix police treated the death as a suicide.

Det. Eisentraut responded to the call at Smith's home that night and undertook an investigation. She ordered forensic testing, talked to Smith's friends and family, interviewed Sanford, and enlisted experts. In 2012, forensic testing revealed Smith's DNA and the Y-STR DNA of four males, including Defendant, on the gun. Following those lab results, Eisentraut sent evolving summaries of her investigation to the Phoenix Crime Lab and MCAO. Two months before trial, Eisentraut took a leave of absence. The Police Department removed her as the case agent and sent a letter to defense counsel stating that her leave was not "related to any misconduct investigation or integrity issue." (Exh. J to Motion to Dismiss.)

In 2017, six years after Smith's death, the State charged Defendant with Second Degree Murder on the theory that Defendant killed Denise because he was upset about their break-up.

¹ Defendant's presence in Smith's home on April 16, 2011 was a material issue. The State asserted that Smith and Sanford spent the night at her residence on April 15 and therefore he was in Smith's home on April 16.

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Eisentraut testified as the State's sole witness at the grand jury proceeding. Trial began November 2019 and with a mistrial after the jury deadlocked. Re-trial is set for August 2021.

Double Jeopardy and Prosecutorial Misconduct

Defendant contends that the State's misconduct in this case bars re-prosecution under the Double Jeopardy Clause of the Fifth Amendment and Arizona Constitution, Art. 2, Section 10. Whether double jeopardy bars a retrial is a question of law for the court. *State v. Moody*, 208 Ariz. 424, 94 P.3d 1119 (2004).

The Double Jeopardy Clause protects a defendant from multiple prosecutions for the same offense. Article 2, Section 10 of the Arizona Constitution states that no person shall be "twice put in jeopardy for the same offense." The Clause also "protects a defendant 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'..." *State v. Minnitt*, 203 Ariz. 431, 437, 55 P.3d 774, 780 (2002) (quoting *Green v. United States*, 355 U.S. 184, 187 (1957)).

The Clause bars re-prosecution when there is "[i]ntentional and pervasive misconduct on the part of the prosecution to the extent that the trial is structurally impaired." *Minnitt*, 203 Ariz. at 438. The misconduct need not result in a mistrial, but must be "so egregious that it raises concerns over the integrity and fundamental fairness of the trial itself." *Id.* Instances of prosecutorial misconduct may be viewed cumulatively in determining the overall fairness of the trial and whether reversal is required. *State v. Roque*, 213 Ariz. 193, 230, 141 P.3d 368, 405 (2006); *State v. Vargas*, 249 Ariz. 186, 468 P.3d 739 (2020).

Prosecutorial misconduct is not, as the State alleges,² limited to acts or omissions by the prosecutor. It includes misconduct by law enforcement personnel who are part of the prosecution team.³ In *Milke v. Mroz*, 236 Ariz. 276, 339 P.3d 659, the Court of Appeals rejected the State's argument that prosecutorial misconduct had not occurred because the prosecutor did not know about the police misconduct, stating:

² State's Response to Motion to Dismiss, 4/16/21, p. 2.

³ The State also argues a witness' inconsistent statements do not constitute perjury citing *State v. Patterson*, 4 Ariz. App. 265, 266 (1966). Response at p. 3. *Patterson* is inopposite because Defendant does not claim Eisentraut gave inconsistent statement. He contends that Eisentraut presented false information regarding Defendant's statement, a witness statement, and other evidence discussed herein.

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The extent of any individual prosecutor's knowledge of the misconduct is immaterial. Though in some cases an individual may be the focus of the inquiry, it is the duty of the State as a whole to conduct prosecutions honorably and in compliance with the law.

Id. at 283.

The prosecution is one team. Information known to the law enforcement agency on which the case relies is imputed to the prosecutor. *Milke*, 236 Ariz. at 282 (internal citation omitted). The prosecutor's office cannot "keep[ing] itself in ignorance by compartmentalizing information about different aspects of a case." *State v. Lukezic*, 143 Ariz. 60, 67, 691 P.2d 1088, 1096 (1984). As the *Minnitt* court stated, the focus of the inquiry is the "[i]ntentional and pervasive misconduct on the part of **the prosecution**." *Minnitt*, 203 at 438 (emphasis added).

The Misconduct at the Grand Jury

Defendant contends that the State obtained an indictment with false information in four respects: 1) Eisentraut falsely stated that Defendant said he went inside Smith's home for half an hour on April 16, 2011 (the day she died), 2) Eisentraut falsely told the grand jury that Defendant had pushed Smith down the stairs, 3) Eisentraut and the prosecutor presented false testimony about DNA transfer, a forensic issue, and 4) Eisentraut falsely stated that the toilet seat was up in the master bathroom on April 16, 2011 to show that Defendant had been upstairs in the home where Smith was found.

The trial court may dismiss an indictment based in part on evidence that the State knew or should have known was not true. In *State v. Moody*, 208 Ariz. 424, 440 (2004), the Arizona Supreme Court stated:

In *Basurto*, the Ninth Circuit held that due process is violated if the government bases an indictment "partially on perjured testimony, when the perjured testimony is material, and when jeopardy has not attached."

Moody at 440, citing *United States v. Basurto*, 497 F.2d 781 (9th Cir. 1974). Perjury is a "false sworn statement [a witness makes regarding] a material issue, believing [the statement] to be false." *Id.* citing A.R.S. §14-2702(A)(1). A statement is material if it could have affected the course or outcome of a proceeding. *Id.*

The defendant in *Moody*, like Defendant Sanford here, faced a re-trial. He filed a motion to dismiss based in part on a claim that the State knowingly obtained the indictment with false evidence. The trial court denied the motion, and *Moody* appealed directly to the Arizona Supreme Court. It held the court may review an indictment post-trial as to perjured, material testimony "when a defendant has had to stand trial on an indictment which the government knew

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was based partially on perjured, material testimony “ *Id.* (citations omitted). In addressing Moody’s motion, the *Moody* court then evaluated each alleged perjured statement to determine whether to dismiss the indictment.

The State contends that Defendant waived arguments related to the grand jury proceeding because Defendant did not file a motion to remand the indictment or special action before trial. The *Moody* court addressed this issue. Pursuant to *Moody*, Sanford’s claim is timely. Jeopardy has not attached. Therefore, this court may review the indictment for perjured, material testimony at grand jury.

1. Defendant’s Recorded Statement – Never entered the home.

Defendant’s first claim is that Eisentraut told the grand jury that Defendant told her that he entered Smith’s home for “a half an hour or so” on April 16, 2011. That testimony was false. In fact, Sanford told Eisentraut unequivocally, and multiple times, that he did **not** enter the home that day.

On March 2, 2017, a member of the grand jury asked Eisentraut:

GJ: Did [Mr. Sanford] say that he went into Denise’s residence that morning when he dropped her off?

A: Yes.

GJ: And how long did he stay?

A: Whenever I asked him, **he couldn’t give me anything more than approximately a half an hour or so.** Enough to drop her off, give her a kiss goodbye, tell her he was going to see her that night.

(GJ Transcript, Exh. A to Motion to Dismiss, p. 59, ll 1-6, emphasis added.)

However, Sanford repeatedly told Eisentraut that he did **not** go in Smith’s home that morning. In a recorded interview on April 14, 2014, Defendant told Eisentraut:

Eisentraut: Okay and then you said you didn’t even go inside?

Sanford: Her house, no, huh-uh. Huh-uh.

Eisentraut: Ok. So didn’t even go inside...

Sanford: **No.**

Eisentraut: ...her house that morning?

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Sanford: Got in my car and she came over and kissed me in the door and I backed out...It was just a matter of dropping her off, getting in my car, and coming home and **no, I did not go inside the house.**

(Transcript of 4/14/2014 Interview, Exh. B to Motion, p. 22, ll. 959-971 emphasis added.)

Later in the same interview, Kyle Eisentraut, Det. Eisentraut's husband, also a City of Phoenix police officer, questioned Defendant who stated:

K. Eisentraut: Why did you tie her up?⁴

Sanford: I didn't. **I wasn't in the house**, don't even know what you're talking about.

K. Eisentraut: Yes you were.

Sanford: No.

K. Eisentraut: Your DNA tells me you were in the house.

Sanford: That's impossible.

(*Id.* at 2014 Int. Tr., Exh. B, p. 63, ll. 2801-2812.)

K. Eisentraut: Why do you keep with this story of I didn't go in the house when we can prove you did? You bet...need to come up with a better lie.

Sanford: It was the night before I did, on Friday night. **Saturday morning, no sir.**

(*Id.* at 2014 Int.Tr., Exh. B, p. 63, ll. 2839-2842, emphasis added.)

Eisentraut knew that her statement was false. First, Defendant told her and her officer husband four times that he did not enter the home that morning. Second, her language was intentional. She did not say "he went inside" by mistake. She specifically attributed a statement to Sanford, stating, "**he couldn't give me anything more than approximately a half an hour or so.**"

Eisentraut's statement was material. The grand juror's question itself establishes that whether or not Defendant entered the home on April 16 was a determinative issue for the grand jury. The physical evidence showed that the gun fired and Denise died in the upstairs bedroom on April 16, 2011. Therefore, whether Defendant entered the home that day was an important and disputed fact in the case. As case agent, Eisentraut knew that police had no direct evidence that Sanford entered the home that day. By placing him in the home that day, Eisentraut filled

⁴ Smith was not tied up when found nor was there any evidence presented at trial that she was ever tied up.

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that gap in the State's case and made it more likely that the grand jury would find probable cause that Defendant murdered her by shooting her. By stating the false fact as Defendant's words ("he couldn't give me..."), Eisentraut made her false testimony more persuasive.

The State does not dispute that Eisentraut's testimony was the exact opposite of what Sanford actually stated to her. Instead, the State blames Defendant, arguing Defendant contradicted himself in a prior interview.⁵ The State's explanation is flatly contradicted by the record. According to the State, Eisentraut drew a "reasonable inference" that he was in Smith's home on April 16 from his statement, "we hung out there for about an hour." (Appendix D to State's Response.) Defendant said:

... she called me up oh, Friday the – I believe it's the 15th – just said she wanted to see me and I took a shower and took about two hours and went over and picked her up. She, uh, we hung out there for about an hour and we came back here and talked to my mom for about hours and – excuse me, I'm getting a cigarette, and we went to bed about 10:30

Sanford's statement relates to April 15, not April 16 (the day of Smith's death), and spending the night at *his* residence where he lives with his mother. Defendant says nothing about "half an hour." And, as stated, when asked directly in a later interview, he specifically denied going in the home. The record does not support the State's argument about a "reasonable inference" nor does it justify Eisentraut's misrepresentation to the grand jury.

The State also attacks defense counsel stating he failed to cite accurately Eisentraut's testimony. The Court has considered the text as cited in the State's Response, page 11, and finds no merit to the State's claim.

The Court finds that Eisentraut statement that Defendant said that he entered Smith's home on April 16 was false and material and that Eisentraut knew that it was false.

2. An Act of Violence

Defendant's second issue is Eisentraut's testimony that one of Smith's co-workers stated Defendant pushed her down the stairs. This was material untrue testimony that alleged a specific act of physical violence between Defendant and Smith for the purpose of leading the grand jury to believe that Defendant had been violent toward Smith.

On March 2, 2017, Eisentraut told the grand jury:

A: [Denise] even relayed to one of her co-workers that [Mr. Sanford] had been physical with her and had **pushed her down the stairs.**

⁵ Eisentraut interviewed Sanford three times.
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(GJ Transcript, Exh. A, p. 13, ll. 15-17, emphasis added.)

She repeated this allegation in discussing an item on Defendant's Facebook page:

A: And I thought that was odd, since I have been given information that Denise had told one of her friends or at least one of her co-workers that **he had pushed her down the stairs of her two-story town home.**

(*Id.*, Exh. A, p. 25, ll. 14-17, emphasis added.)

The record supports Defendant's position that the statement was knowingly false. There was no evidence presented at trial that Smith made this statement to anyone. The State called several of Smith's co-workers at trial. Guadalupe Alvarez- Shaw testified that she overheard a loud argument between Smith and Defendant. Yolanda Martinez testified that Smith was "stressed out" and mentioned problems in her relationship with Defendant. Christine Bartley Zimiga stated Smith said she was afraid at one time but Zimiga also testified that Smith was excited to see Defendant on April 15. None of these witnesses testified that Defendant pushed her let alone pushed her "down stairs."

The State contends that Eisentraut did not commit perjury at the grand jury because Eisentraut testified as to what she was told. In *Moody*, the Court found that the detective's testimony as to what police informant Logan told him may have been false but relaying Logan's statement did not constitute perjury. *Moody*, 208 Ariz. at 440. The State sources Eisentraut's testimony to her 12/29/2012 lab request where she wrote that "one of Denises [sic] told me Denise had confided to her that Patrick often grabbed her and **pushed her down.**" (Exh. E to Motion to Dismiss, emphasis added.)

However, what she told the grand jury is not what she wrote. She testified that a co-worker said that Defendant pushed Smith "down the stairs" and "down the stairs of her two-story home." Pushing someone down a flight of stairs is distinctly different conduct than a push. A push down stairs conveys an intent to hurt or even kill someone. Before the grand jury she first said "down the stairs." Then she changed it to "down the stairs of her two-story town home," conveying an even greater danger and risk of harm. Eisentraut did not relay at all what a witness purportedly told her. And there is no support in Exhibit E, her other reports, or the record for her testimony.

Eisentraut's false statement was material. She intentionally falsified her testimony to bias the grand jury against Sanford. The State charged Defendant with murder, the most serious crime. Eisentraut's statement told the grand jury that Defendant had a propensity for violence by describing a past instance of violent behavior without any factual support.

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The Court finds that Eisentraut falsely testified that a coworker said that Sanford pushed Smith down the stairs, knowing that her statement was false and that her testimony likely influenced the outcome of the grand jury proceeding.

3. The Toilet Seat

Next, Defendant asserts that Eisentraut falsely told the grand jury that the toilet seat was up in the master bathroom on April 16, 2011 to lead the jury to believe that Defendant was upstairs in the master bedroom area where Smith was found. She testified:

Q. [D]id you notice if the toilet seat was up or down in the house?

A. Yes, and it's one of those things you go back through and you go back through and sometimes you will notice something that you might not have noticed the first time around. One of the things I notice while reviewing these photographs and conducting...looking for more of an analysis of everything in the scene, I noticed the toilet seat in the master bedroom was up. And, Denise didn't seem to be the type of woman that would move it up.

(Exh. A, p. 35, ll. 1-10.)

The statement was false. It is undisputed that, on April 16, 2011, the toilet seat in the **master** bath was not up when police arrived and took photographs. The issue is whether Eisentraut knew or should have known that the statement was false. The State contends that Eisentraut did not intend to misstate the evidence. Scene photographs depict the toilet seat up in the **guest** bath. The State claims that Eisentraut inadvertently confused the master bath with the guest bath and that her error had no impact on the grand jury.

The record does not support the State's position. Eisentraut reported the same false information at least twice in two reports dated February 7, 2013 and January 9, 2014. (Exhs. F and G to Motion.) She used that "mistake" to support her request to MCAO to charge Defendant with murder. Exh. G. Her testimony was not an innocent error.

Nor was it harmless. It furthered the State's theory that Defendant was in the home on April 16, 2011. It placed Defendant upstairs in the home near Smith and the firearm and corroborated Eisentraut's false statement that Defendant said he went inside the home on April 16, 2011.⁶

The State asserts that the statement was immaterial because any raised toilet seat (master or guest bath) in Smith's home is evidence that Defendant was there. The grand jury did not

⁶ In Exhs. F and G, Eisentraut also referenced the toilet seat in the master bath in connection with a shell casing found in the master bath trash can. However, she did not testify about the casing at grand jury.

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know about the guest bath. The State did not present any evidence regarding the guest bath. They heard only Eisentraut's false testimony about the master bath area next to the bedroom where Denise and gun lay.

The Court finds that Eisentraut's statement regarding the toilet seat in the master bathroom was false and material.

Transfer DNA

Finally, Defendant contends that Eisentraut and the prosecutor presented false information to the grand jury regarding transfer DNA, the process whereby DNA is deposited on an item indirectly through a third person or object. In this case, transfer DNA presented a difficulty for the State's theory because it provided a scientific explanation for Defendant's DNA found on the gun. Because of transfer DNA, Smith could have easily transferred Defendant's DNA from her hand to the gun.

At the grand jury, Eisentraut testified:

Q (Grand Juror): Is it possible for that DNA that is under the fingernails to transfer to the gun if she used it?

Q (Prosecutor): Is it fair so say when it comes to DNA and things like this, anything is possible?

A (Eisentraut): Uh-huh.

Q (Prosecutor): And another question you can look at is this probable, and in a case like this, is it probable to have DNA transfer of that type of nature in this case?

A (Eisentraut): No. And as previously stated, her fingernails were extremely short during the scene investigation...And so that cellular material was found very deeply up underneath, not in a way where it would be easily transferable.

Q (Prosecutor): So, is it fair to say possible, but most likely not probable.

A (Eisentraut): Yes, fair to say.

(GJ Transcript, Exh. A, pp. 56-57, ll 25; 1-19.)

Eisentraut's testimony raises several issues. First, it was incorrect. Transfer DNA is as common as DNA deposited by direct touch and just as likely to occur. At trial, the State's DNA expert, Dana Chapman, called transfer DNA the "first principle of forensic DNA:"

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The first principle of forensic DNA is that DNA is transferring from both items. So if I'm coming in contact with a cup, I'm leaving my DNA behind. If there was DNA on the cup, I'm also potentially picking up some of that DNA.

(Chapman Transcript, Exh. C to Motion, p. 81, ll. 5-10.) She went on to testify in detail about the concept of transfer. She stated that there is no way to distinguish between DNA from direct or primary contact and DNA found due to secondary transfer.

Q. Is there any way for you to tell if any of those individual people had actually touched that item?

A. There isn't a way currently to determine whether someone physically came in contact with the item themselves.

(*Id.*, p. 69, l. 25 – p. 70, l. 4.) (*See also* p. 71, ll. 1-10; p. 74, ll. 8-15, 16-25; pp. 75, ll. 1-25; p. 77, ll. 4-5.) Eisentraut's testimony that it was "not probable" that Smith could not have transferred Defendant's DNA to the gun was deceptive.

Second, the prosecutor manipulated the juror's question to elicit a favorable answer for his case. A juror asked a clear question: "Is it possible for that DNA that is under the fingernails to transfer to the gun if she used it?" Before Eisentraut could answer, the prosecutor interjected and re-phrased the question, adding the phrase "anything is possible." Then he re-phrased again to suggest that DNA transfer was not "probable" "in a case like this." Finally, he re-stated the question as a conclusion, "So, is it fair to say possible, but most likely not probable." In short, he did not allow an answer to the juror's question. He re-phrased the juror's question to elicit an answer favorable to the State.

In considering Defendant's Motion to Dismiss, the Court is limited to a review of perjured testimony. Despite the misleading questioning by Rademacher, the Court finds that Eisentraut's DNA testimony falls more within realm of opinion than fact. The questions and answers related to the possibility and probability of DNA transfer, and the testimony on this issue at grand jury was not sufficiently detailed for the Court to conclude that Eisentraut committed perjury on this issue.

Conclusion

The State prosecuted Defendant on an indictment marred by multiple instances of perjury, violating his right to due process. Eisentraut knew from her investigation that Defendant denied entering the home on April 16, 2011, that no one reported that Smith had been pushed down the stairs at her home, and that Defendant did not leave the toilet seat up in the master bath. This testimony tainted the case with false information for the sole purpose of obtaining an

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indictment. Her gratuitous personal opinions and commentary further manipulated the proceeding so that her false statements would have greater influence over the grand jury. When a juror asked if police canvassed the neighborhood, she stated yes but no one reported “anything suspicious” and “that’s a very common scenario in those types of neighbors,” suggesting that something suspicious had occurred. (Exh. A, p. 58, ll. 4-9.) Her statements undoubtedly affected the grand jury’s decision. They were the voice of a police detective who essentially told them that Defendant is a violent person capable of murder.

Failure to Disclose Impeachment Evidence

The second area of alleged misconduct is the State’s failure to disclose impeachment material regarding Eisentraut. The State had a duty to disclose the information under Criminal Rule 15.1 and *Brady v. Maryland*, 373 U.S. 83 (1963). The information pertained to a formal inquiry within MCAO regarding Eisentraut’s grand jury testimony in another matter. The information could have been used to impeach Eisentraut in this trial. The State’s failure to produce it constitutes egregious misconduct because Eisentraut’s credibility was central to the State’s case and the information may have had “an important effect on the jury’s determination.” *Milke*, 236 Ariz. 276 at 280 (2014) (internal citation omitted). In addition, the information was known to the prosecution months before trial. Post-trial, even after the prosecutor knew about it, he failed to disclose it.

The Impeachment Evidence

In February, 2019 (9 months before this case went to trial in November 2019), an MCAO prosecutor, Jason Kalish, initiated an inquiry regarding Eisentraut’s grand jury testimony in an unrelated matter, *State v. Schroeder*, CR2017-132477-001. Kalish expressed concern that Eisentraut misrepresented the victim’s statement to the grand jury. Eisentraut testified that the witness said that Schroeder pointed a knife at him. In the interview, the witness said that Schroeder was holding a knife and giving him directions but he did not say that Schroeder pointed it at him. MCAO relied on the Eisentraut version in charging Schroeder with kidnapping that witness and child abuse in addition to murder.

Kalish referred the matter to MCAO’s Rule 15 Discovery Database Committee, an internal committee that investigates integrity violations by law enforcement officers. MCAO requested Eisentraut explain the basis for her testimony.⁷ She responded by email. Then, from February 2019 to February 2020, Eisentraut remained “pending review” by the Rule 15

⁷ The Court relies on documents produced in camera by the State and that the Court then ordered disclosed on April 19, 2021. The documents include an email from Kalish to other MCAO prosecutors dated February 21, 2019 referencing subject “Issue with homicide detective” and Eisentraut’s written response, a photograph of the victim in a police interview room, and a CD of the victim’s statement.

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Committee. According to the State's pleadings, in February 2020, MCAO elected not to include Eisentraut on the MCAO Rule 15 Database ("Database" aka "Brady list).

State's Response to Defendant's Requests for Information

In approximately March 2021, Defendant's investigator obtained a copy of a document generated by MCAO titled "Brady Report" dated December 23, 2019. Eisentraut's name appears on the document. (Exh. K to Motion to Dismiss.) Defense counsel contacted the prosecutor requesting information about Eisentraut and the report. (Exhs. L, M, N to Motion.) The State provided no substantive information until Defendant filed his Motion to Dismiss asserting this claim for prosecutorial misconduct and dismissal based on the State's failure to disclose the information.

The State responded that it had no obligation to produce the information. Notwithstanding the objection, the State did produce some materials to the Court for an in camera review.⁸ The Court found the materials relevant to Eisentraut's credibility and ordered the State to produce these and any other "materials and information related to a *Brady* inquiry and/or investigation regarding Det. Eisentraut." Ruling 4/19/2021. More litigation ensued. Defendant requested additional materials referenced in the disclosed documents. The State refused. Defendant filed a Motion to Compel. Ultimately, the State produced and the Court reviewed more documents in camera and ordered them disclosed with redactions.⁹

Duty to Disclose

The State claims that it was not obligated to produce information regarding the Kalish referral because MCAO did not place Eisentraut's name in the Database. It maintains that under *Brady* it is required to disclose related to an officer's truthfulness if only if the officer is in the Database.

That is not correct. The State had a duty to disclose the information. Period.

To comply with *Brady/Giglio*, the prosecution is required unilaterally to disclose **any impeachment or exculpatory evidence** that is favorable to the defendant

⁸ Kalish's 2/21/2019 email, Eisentraut's response, an excerpt of Eisentraut's grand jury testimony, and a photograph and a CD of the victim's interview.

⁹ MCAO's Civil Department got involved and submitted the additional materials related to Eisentraut's Rule 15 inquiry with proposed redactions and a privilege log. The Court approved the proposed redactions except for one sentence that referred to another case and contained no work product or other protected information. Ruling 6/25/2021.

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and which may create a reasonable doubt in jurors' minds regarding the defendant's guilt.

Milke, 236 at 280. “Favorable evidence includes both exculpatory and impeachment material that is relevant either to guilt or punishment.” *Milke v. Ryan*, 711 F.3d 998, 1012 (9th Cir. 2013) (Milke’s habeas corpus case). Furthermore,

Regardless of good or bad faith, a state's failure to adhere to *Brady/Giglio* by willfully or inadvertently suppressing favorable evidence violates a defendant's due process rights.

Milke at 280.

The State’s disclosure obligation is not limited to information from a database. Nor is it confined to officers that have been through some internal MCAO process. Not only are the dangers of this interpretation obvious (think foxes and henhouses), but nowhere does the case law support that position. Moreover, the State’s duty includes any information known to the prosecutor **or** law enforcement. It is the prosecutor’s “duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case including the police.” *Id.* at 283 (citation omitted). “[T]he prosecution is deemed to have knowledge of and access to anything in the possession, custody or control of any [federal] agency participating in the same investigation of the defendant.” *United States v. Bryan*, 868 F.2d 1032 (9th Cir. 1989).

Therefore, while MCAO’s internal process may provide one mechanism for identifying information about officers, the scope of the State’s obligation to disclose impeachment evidence does not stop there.

The State also argues that it had no duty to disclose because the information was not relevant or admissible. Again, that is not the law. The duty extends to any evidence that might affect credibility or be used for impeachment. “When, as here, “the ‘reliability of a given witness may well be determinative of guilt or innocence,’ nondisclosure of evidence affecting credibility falls within this general rule [of mandatory disclosure].” *Milke*, 236 Ariz. 276 citing *Giglio v. United States*, 405 U.S. at 154 (1972) (internal citation omitted). Admissibility is a separate issue.¹⁰

Furthermore, the information about Eisentraut *was* relevant and material. “Due process imposes an “inescapable” duty on the prosecutor “to disclose known, favorable evidence rising

¹⁰ The State’s argument contradicts MCAO’s own policy which instructs DCAs: “Material that must be disclosed is not always admissible evidence in trial.” MCAO Prosecution Policies and Procedures, 6.4(B)(3). Disclosure and admissibility of impeachment material are separate issues.

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to a material level of importance.” *Milke*, 711 F.3d 998, 1012 (9th Cir. 2013)(internal citation omitted). The prosecutor in *Schroeder* (Kalish) initiated MCAO’s integrity review process of an officer. His concern involved the same officer (Eisentraut) engaging in the same type of misconduct alleged here – presenting false sworn testimony to the grand jury. Eisentraut was and is the primary law enforcement witness for the State in the Sanford matter. She put the case together and literally touched every aspect of it. Her credibility was a significant issue for the State at trial as Defendant’s cross-examination demonstrated. Defendant was entitled to impeach her with the information. Given the myriad of issues with Eisentraut’s truthfulness, there is no question that the information would have affected her credibility before the jury.

MCAO’s “pending review” of Eisentraut was ongoing months before and during the Sanford trial. It was never disclosed. Post-trial the State continued to withhold the information even as it prepared to re-try Sanford. The prosecutor knew about the Kalish referral by at least December 2020 – before defense counsel requested it. (State’s Notice to the Court, 5/28/2021.) Yet, when Mr. Huss asked for information in March 2021, the prosecutor stalled with non-responses, such as “Once I have a response I will let you know.” It took a Motion to Dismiss, a Motion to Compel, and two Court orders for Defendant to obtain the information. Frankly, had it not been for Defendant’s investigator, the State never would have disclosed it.

Incredibly, the State claims Defendant is not prejudiced because Defendant can use the information in the re-trial. (Response, p. 20.) That argument underscores the intentional disregard for the misconduct that took place. Had the information been disclosed in 2019, *there might be no re-trial* because the information “may well [have been] determinative of guilt or innocence.” *Id.* at 282.

Conclusion

For these reasons, the Court finds that the prosecution engaged in egregious prosecutorial misconduct in failing to disclose impeachment evidence before and during the trial and for more than a year thereafter.

Garrett Testimony

Lee Garrett was the State’s firearms examiner who testified as an expert witness as to the distance between the gun and Smith when the gun fired. In pre-trial disclosures and defense interview, Garrett stated that he based his opinion in part on the gun powder pattern on Smith’s blouse. At trial, he stated that he did not rely on the blouse. On cross-examination Garrett refused to admit that he had said something entirely different in his pre-trial interview and report. Defendant asserts that Garrett’s “blatant dishonesty” constitutes prosecutorial misconduct.

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The Court does not find that Garrett's trial testimony rises to the level of prosecutorial misconduct. The Court does not find that it affects the structural integrity of the case unlike Eisentraut's grand jury testimony and the State's failure to disclose impeachment evidence. The Court does find that the State failed to disclose what Garret said at trial about the blouse and that the lack of disclosure unfairly impacted the defense at the time. However, since the Court has precluded Garrett's testimony on other grounds, the Court need not consider an appropriate sanction for non-disclosure. See Ruling 7/2/2021.

More

The Court is troubled by the State's failure to acknowledge and take responsibility for Eisentraut's misconduct as well as their own. Prosecutors have a responsibility to serve truth and justice first. *United States v. Kojayan*, 8 F.3d 1315, 1323 (9th Cir. 1993). In the State's briefing, the Court cannot find an iota of appreciation for the seriousness of its misconduct in the briefs.

Instead, the prosecutor tries to shift blame by stating that, if defense counsel had interviewed Eisentraut a second time, he could have discovered information about her. (Response to Motion to Dismiss, pp.20-21.) He blames the State's lack of disclosure on Defendant's discovery requests. (State's Response to Motion to Compel.) He portrays the Kalish referral as a police matter until defense counsel refutes that portrayal. (State's Motion to Correct Minute Entry with Van Dorn Affidavit 4/23/2021; State's Supplemental Notice to the Court with Van Dorn Affidavit 6/8/2021.) He misstates the record. Dana Chapman did not testify that transfer DNA is a "phenomenon" or words to that effect.¹¹ He makes legal arguments directly contradicted by the case law, including *Brady* and *Milke*.¹² These tactics do not further justice and, with respect to record and legal citation, they ignore the ethical obligations of candor and honesty to the Court.

Conclusion

The State obtained this indictment using perjured testimony. Even after trial, the State persists in making arguments directly contrary to the most cherished principles of law and due process, including the protections that *Brady* and *Milke* emphasize are afforded to all defendants. Given the pre- and post-trial misconduct, the Court finds the appropriate remedy is dismissal with prejudice, as nothing short of that remedy will end this miscarriage of justice and deter the State from similar conduct going forward.

¹¹ Counsel's use of the single quote (as if he is not citing a direct item of testimony) does not make his representation less misleading. (State's Response, p. 12; See Chapman testimony above.)

¹² See also counsel argument that Defendant's claim for dismissal based on Eisentraut's perjured grand jury testimony refuted in *Moody*, *supra*.

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Therefore, based on the prosecution's egregious misconduct in presenting material, false testimony to the grand jury and failing to disclose impeachment evidence before and during trial and for months thereafter,

IT IS ORDERED dismissing with prejudice the indictment and pending charges against Sanford.

IT IS FURTHER ORDERED denying the State's Motion to Strike Defendant's Reply to Motion to Dismiss.