

**STATE OF ARIZONA
IN THE COURT OF APPEALS
DIVISION TWO**

STATE OF ARIZONA
Ex rel. M. LANDO VOYLES
PINAL COUNTY ATTORNEY,
Petitioner,

No. 2 CA-SA 2014-0050

v.

Pinal County CR 201201764

THE HONORABLE PETER J. CAHILL,
VISITING JUDGE OF THE PINAL
COUNTY SUPERIOR COURT,
Respondent,

And

RICHARD T. WILSON,
Real Party in Interest,
Respondent.

**APPENDIX IN SUPPORT OF
PETITION FOR SPECIAL ACTION**

**M. LANDO VOYLES
PINAL COUNTY ATTORNEY**

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APPENDIX A

July 8, 2014 Minute Entry Opinion and Order

**The original Opinion and Order had no page numbers.
Page numbers have been added to assist
the Court and counsel

**ARIZONA SUPERIOR COURT
PINAL COUNTY**

Date: 7/08/2014
PETER J. CAHILL, JUDGE
(Visiting Judge)

C. DURNAN
Judicial Assistant

STATE OF ARIZONA, <p style="text-align:right">Plaintiff,</p> v. RICHARD T. WILSON, <p style="text-align:right">Defendant.</p>	CR201201764
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ORDER GRANTING MOTION

Disqualifying the Pinal County Attorney's Office

This matter is before the court on Defendant's claim that the Pinal County Attorney's Office repeatedly and improperly accessed sealed court records and thus a sanction should be imposed including the disqualification of the County Attorney's office from representing the State in this matter. The court reviewed the pleadings, the evidence presented, and the relevant case law.

A. BACKGROUND.

Defendant is charged with First Degree Murder. The State has filed a Notice of Intention to Seek the Death Penalty.

Defendant seeks by this motion to have sanctions imposed upon the State because its counsel, the Pinal County Attorney's office improperly accessed certain court pleadings that had been, by order of the court, filed "under seal." The motion asks for imposition of the sanction of dismissal of the charges against Defendant. In the alternative, Defendant seeks the disqualification of the Pinal County Attorney as counsel for Plaintiff.

Because the harm done here does not warrant a dismissal of the charges, this request will not be granted. However, alternative relief is appropriate under the present circumstances. Disqualification of counsel is ordered because County Attorney staff violated court orders when they read and distributed documents that had been sealed by order of the

court. The County Attorney's office, including high level supervisory staff, apparently believes that when a judge has made a "wrong ruling," the County Attorney's office may decide whether to comply with court orders. County Attorney's staff believes that it may review sealed records to determine if the judge made a "bad call," whether a motion in a capital case was properly filed *ex parte*.

In any case but especially a capital case, the public, the parties and the court must be confident that the law and the court's orders will be followed. Where, as here, it is shown that counsel will not follow the rules, where counsel have "set themselves above the law," the court must act.

After considering alternative forms of relief, such as financial penalties and contempt findings, disqualification is found to be the appropriate remedy in these circumstances.

B. THE FACTS.

Two motions filed by Defendant utilized Rule 15.9 of the Arizona Rules of Criminal Procedure. This rule authorizes the filing of *ex parte* pleadings in capital case litigation. Here in Pinal County, in an effort to insulate the assigned trial judge from any matters raised in these sensitive filings, a judge, and not the assigned trial judge, is designated as the "*ex parte judge*."

Defense counsel's *ex parte* pleadings were filed April 4 and June 12, 2013. Only defense counsel and the "*ex parte judge*" are fully aware of the entire contents of both of the pleadings. The County Attorney's office and this court now have copies of the June filing, the motion and order compelling the release of Mr. Nolan Pierce's medical records. (Defendant is charged with killing Mr. Pierce.) Regarding the April pleadings, at least to the court's knowledge, only Defense counsel and the "*ex parte judge*" are aware of the entire motion. It is known that this motion sought court assistance in the collection of various records for the mitigation investigation. The "*ex parte judge*" has since vacated the order that the April motion remain sealed, and only a heavily redacted version of the April Order has been given to this court.

After defense counsel learned that his sealed, *ex parte* June motion had been viewed by counsel for the State, he filed this request for sanctions and sought an evidentiary hearing.

This case was assigned and then re-assigned to a series of judges until the Pinal County Presiding Judge assigned the matter to this court in February 2014. Then, notice of assignment of a new prosecuting attorney was given in March 2014. After an April 2014 status hearing, an evidentiary hearing on this request for sanctions was conducted in May 2014. Several witnesses testified at this hearing: the Clerk of the Superior Court, Mr. Chad

Roche; Ms. Odette Apodaca of the Clerk's office; Ms. Tari Parish, paralegal with the County Attorney's Office; and former Pinal County deputy county attorney, Mr. Gregory Hazard.

Mr. Roche testified about the results of the investigation his office made into improper access of sealed documents in this matter. A report of the investigation, admitted into evidence as Ex. #1, showed that the County Attorney's office improperly accessed the sealed *ex parte* pleadings filed by the defense in April and June 2013. The access was obtained by use of a computer terminal provided by the Clerk's office to the County Attorney's office. The terminal was provided for a limited purpose: use by Victim Assistance personnel providing victim services—not general file research on Clerk's office filings. There was no way to limit the access to only certain documents and not others. As a result, sealed were accessible by County Attorney personnel at this terminal but the sealed documents were identified as “sealed documents.”

When Mr. Roche learned that non-Victim Assistance personnel had accessed the sealed records, further access by County Attorney personnel to sealed documents was terminated.

During Mr. Roche's testimony, he was asked exactly when County Attorney staff had accessed these documents. This required further investigation. Mr. Roche's testimony was interrupted to allow him to get this information. His testimony on this information is discussed below.

Ms. Tari Parish, a County Attorney's office's paralegal, works with Mr. Richard Wintory and she has worked with him at his previous places of employment. On July 18, 2013, she logged into the Clerk's AJACS system. While looking at the list of documents in this case, she says she first noticed a June 12, 2013 filing. She was not using the Clerk's computer terminal for its intended purpose, victim assistance.

According to Ms. Parish, nothing in the title of the filing suggested that this June 12, 2013 motion had been filed by Defendant. According to Ms. Parish's testimony, she initially assumed that the pleading had been filed by her office. However, based on later testimony presented by Mr. Roche when he was recalled to the stand, the court finds that Ms. Parish opened the June 12 filing only after she opened an earlier filing, an *ex parte* motion filed by Defendant in April.

Ms. Parish testified that when she “clicked” on the June filing that it opened. This confirmed, she claims, that the pleading must have been filed by her office.

The first displayed page of the June motion was a handwritten “cover page.” It stated: “*Ex-parte Motion for Victim's Medical and Mental Records.*” Ms. Parish admitted that “*Sealed*” was plainly written on the bottom of the “cover page.” She admits that she saw this. Ms. Parish next saw Mr. Huggins' letterhead on the next page, the motion. As a result, even Ms. Parish

admits that she at this point knew full well that she was reading a pleading filed by defense counsel, and filed under seal. Nevertheless, she continued to review the document.

The reason Ms. Parish gives now why she opened the record in the first place is not the point. Once she opened the sealed pleading, once she read on the “cover page” that the filing was “*Sealed*,” once she saw that the pleading had been filed by the defense, she knew exactly what she was doing. She knew she was violating a court order.

Ms. Parish brought the motion to the attention of an attorney in the office, Mr. Gregory Hazard, accessing the motion again for him along with a judge’s order under the same title. This order reinforced what the “cover page” told her: the document had been ordered sealed by order of the court. Ms. Parish printed both sealed documents for Mr. Hazard. He admits that he read the June motion July 18, 2013 and that the next day he read the court’s order directing that the documents, the motion and order, be filed under seal.

Once Mr. Hazard saw the court order that the documents were filed under seal he knew what he was doing and knew, or certainly should have known, that he was violating a court order.

Mr. Hazard contacted his supervisor, Mr. Long. He told him that he had reviewed sealed documents. Mr. Hazard met with Mr. Wintory to discuss the sealed documents. Mr. Wintory was told that office personnel had reviewed sealed documents. According to Mr. Hazard, Mr. Wintory reviewed the sealed documents himself as he had the “very document” in his hand. Mr. Wintory is the Chief Deputy County Attorney.

Once Mr. Wintory saw that the documents were filed under seal, he knew, or certainly should have known, that office personnel were violating a court order.

County Attorney Voyles and Chief Deputy Wintory had in July 2013, and continue to have, supervisory responsibility for this case. This includes responsibility to supervise the currently assigned prosecutor, Ms. Susan Eazer.¹

Mr. Hazard testified that the matter of accessing sealed records was also discussed with other members of the County Attorney’s Office, including Mr. Jason Easterday, chair of the office’s “ethics committee.” The court presumes that Mr. Easterday continues to chair the office “ethics committee.” No testimony was offered to the contrary.

The justification that Mr. Hazard gives for reviewing sealed documents was as follows:

¹ There was no evidence presented that Ms. Eazer had any involvement in the events that gave rise to the sanction imposed here.

“... the information was obtained by a simple click on a computer information system, not because of doing anything improper, [therefore] whatever the judge had ordered, clearly it was not under seal.”

Mr. Hazard says that, at least to him, this makes “perfect sense.”

Mr. Hazard saw no problem in his office’s disregarding the court order sealing this motion and order. On the contrary, his focus was on the “ethical violation(s)” and shortcomings of others, including defense counsel. He also testified that, in his view at least, Judge Georgini’s order sealing the records was a “bad call,” a “wrong ruling.”

Finally, Mr. Hazard testified that under these same circumstances today—where a paralegal brought him accessed, sealed records, he would do again just what he did here.²

Mr. Roche testified that the County Attorney’s Victim Assistance Terminal was also used to access documents filed by the defense April 4, 2013. These documents were also ordered sealed by the court.

Ms. Apodaca, of the Clerk’s office, testified that the April 2013 Motion and order were “improperly accessed.”

Regarding the April 2013 documents, Ms. Parish testified that she could not recall whether she had viewed these pleadings. But when she learned that computer records showed that the same terminal she was using showed that someone had accessed and printed the April document at 3:07 p.m. and then again at 3:13 p.m. on July 18, 2013, just exactly when she admitted viewing the June documents, Ms. Parish acknowledged that it could have been her that viewed the April documents on that date, July 18, 2013.

Mr. Roche was recalled to testify about his further investigation into just when the County Attorney’s improper access occurred. The Clerk’s computer records show that the April motion was viewed twice on July 18, 2013, both times by a terminal in the county attorney’s office, with its victim advocate “CAVA login,” first at 3:07 PM and then again at 3:54 PM. Exhibit #12, admitted into evidence. The records show that at 3:56 PM and again at 3:59 PM that a command was given to print the documents. (“Unity Retrieved Document.”)

Mr. Roche testified his computer records show that the June motion was viewed on July 18, 2013, at the terminal in the county attorney’s office, at 3:13 PM and that at 3:15 PM a command was given to print the documents. Ex. #12.

² Mr. Hazard is no longer with the Pinal County Attorney’s office.

Despite her testimony that she reviewed the June filings first, the court finds that based on Mr. Roche's testimony that Ms. Parish actually reviewed the April filings first, and not the June filings first, as she testified. Then, having learned what defense counsel filed in April, she continued, going on to review next the *ex parte* filings made in June. Later, likely after Mr. Hazard became involved, she went back and opened and printed the April filings.

The court finds that if the lawyers involved in these events were presented with a similar choice, whether or not to comply with lawful orders of the court, Mr. Voyles, Mr. Wintory, and Mr. Easterday (*each still in the office*) would act consistent with their actions here: They, not the courts, would decide whether Clerk's records can be reviewed; they would decide whether or not to comply with court orders if in their opinion the judge had made a "bad call"; that where they believed that defense counsel was wrong, they were then free to do whatever they wanted.

C. THE LAW.

The Defendant has the burden of proving that the requested disqualification is proper. *State ex rel. Romley v. Super. Ct., Maricopa County*, 184 Ariz. 223, 228, 908 P.2d 37, 42 (App. 1995) (citing *State v. Pennington*, 115 N.M. 372, 851 P.2d 494 (App. 1993)).

Because Defendant ought not to be permitted to interfere with the State's attorney-client relationship except "in extreme circumstances," the Arizona Supreme Court has cautioned that he must show sufficient reasons why the County Attorney's office should be disqualified. *Villalpando v. Reagan*, 211 Ariz. 305 121 P. 3d 172 (2005), (citing *Alexander v. Super. Ct.*, 141 Ariz. 157, 161, 685 P.2d 1309, 1313 (1984)).

Once this showing is made by Defendant however, the burden then shifts to the County Attorney's office to demonstrate that disqualification is not required. *Id.* One reason why a prosecutor's office may be disqualified is the appearance of impropriety. *State v. Latigue*, 108 Ariz. 521, 502 P.2d 1340 (1972). However, this court is to "view with suspicion" a motion based upon a claimed appearance of impropriety. *Gomez v. Super. Ct. In and For Pinal County*, 149 Ariz. 223, 226, 717 P.2d 902, 905 (1986).

When considering whether a prosecuting office should be disqualified, the trial court should consider the following factors identified in *Alexander*: (1) whether the motion was made for purposes of harassment; (2) whether the party seeking disqualification will be damaged if the motion is not granted; (3) whether alternative solutions exist, or is the proposed solution the least damaging possible under the circumstances; and (4) whether the possibility of public suspicion outweighs any benefits that might accrue due to continued representation. *Id.* at 165, 685 P.2d at 1317.

The "appearance of impropriety" includes a consideration of the need to maintain public confidence in the integrity of our judicial system. *State ex rel. Romley*, 184 Ariz. at 229,

908 P.2d at 43. Furthermore, “[a]ctual prejudice, or the lack of it, is but one facet of whether a fair prosecution is endangered by the appearance of impropriety. While it is impossible to formulate a bright line rule in this area, this court will consider not only the requirements set forth in *Alexander*, but also any showing of prejudice or the lack of it.” *Turbin v. Super. Ct. In and For County of Navajo*, 165 Ariz. 195, 199, 797 P.2d 734, 738 (App. 1990).

In *Turbin*, the court noted that public confidence in the criminal justice system is maintained by assuring that the prosecutor operates in a fair and impartial manner. *Id.* at 198, 797 P.2d at 737. Circumstances that would cause this confidence to erode are properly considered when a court considers a motion to disqualify the prosecutor. *Id.* (citing, *Latigue*, 108 Ariz. at 523, 502 P.2d at 1342).

In considering a motion such as this, the court may consider the severity of the charges as well as the relative complexity and simplicity of the case. *Id.* at 199, 797 P.2d at 738.

Finally, in deciding this motion, the court has balanced the effects of the County Attorney’s conduct and the possibility of further similar such conduct against any delay involved in finding and bringing another prosecutor into the case. *Villalpando*, 211 Ariz. 305, 121 P. 3d 172 (citing *State v. Rupp*, 120 Ariz. 490, 586 P.2d 1302 (App. 1978)).

D. ANALYSIS.

What happened here was no mistake. Instead, it was a deliberate disregard of court orders. To Mr. Voyles, Mr. Hazard, Mr. Wintory, Mr. Long, and Mr. Easterday, “the ends justified the means.” The use by the defense of Rule 15.9 to obtain Mr. Pierce’s medical records *ex parte* justified, at least to these lawyers, the violation of court orders.

Implicit in the testimony and arguments here is this message: According to the Pinal County Attorney, it is prosecutors who make the final decision on what records are “sealed”—not the Superior Court; the final say on what records may be reviewed lies with the Pinal County Attorney.

Actions by the County Attorney and his staff led the parties, counsel, the court and the public to believe that certain lawyers felt they were somehow above the law, that it was the County Attorney, his Chief Deputy and the chair of the office “ethics committee” who had the ultimate authority to decide what records were really “sealed.”

After the May 2014 evidentiary hearing, counsel were given the opportunity to submit further briefing. Counsel for the State submitted a statement reporting on discussions she reportedly had with members of the Clerk’s office. Defendant objects to the court considering this unsworn hearsay when Defendant had no opportunity for cross-

examination of Ms. Eazer. See Reply, filed June 6, 2014. Defendant's objection is **SUSTAINED**. Counsel's memorandum to Mr. Roche attached to her Supplemental Memorandum dated May 30, 2014 is ordered **STRICKEN**.

Even if it was somehow proper for the court to consider and rely upon this unsworn report of conversations, the memorandum from Plaintiff's counsel to Mr. Roche dated May 29, 2014, would not change what happened here.

Counsel reports in her memorandum on other cases where documents that had been labeled "sealed," but in fact were not sealed. But, this does not change the fact that the documents in question here, the motions and orders filed in April and June 2013, had in fact, rightly or wrongly, already been ordered by a judge to be filed under seal.

Thus, it would make no difference that documents in other cases were marked "sealed" when in fact they were not. The documents in question here were, when they were improperly accessed, "sealed" as the result of court orders to this effect.

It is not for the County Attorney to decide that Judge Georgini somehow made a "bad call" or that he made a "wrong ruling."

The State's argument that there are "serious questions about the accuracy" of the Clerk's records is but a smokescreen, an attempt to blame others. Rather than acknowledge that the office deliberately disregarded orders of the court, counsel refers to "faults of the AJACS system and the documentation produced from it."

County Attorney staff, including the top supervisor, accessed, reviewed or distributed records in violation of the court's orders in a way that greatly diminishes "public confidence in the criminal justice system."

Nothing in the record would support a finding that Defendant's request for sanctions, his effort to seek a disqualification of Plaintiff's counsel, was made with an intent to harass.

Second, the severity of the charges and the careful scrutiny that is required in capital litigation suggests that Defendant would be prejudiced if the Pinal County Attorney's Office continues to disregard court orders that are intended to keep some matters *ex parte*. While a showing of prejudice is not required *per se*, it is a consideration. But prejudice has been shown. That prejudice is to the authority of the court. There is no reason to believe that this County Attorney and his employees will respect its orders in the event a judge makes a "bad call," in a deputy County Attorney's opinion. With particular reference to *ex parte* proceedings filed under Rule 15.9, ARCrP, the court concludes that this County Attorney and his staff will, as they have shown, put themselves above the law, that they believe they decide what may be properly filed under seal. The message to the court has been received: When a member of the Pinal County Attorney's staff decides that a judge has made a "bad

call,” they will act just as they did here, they will ignore the court’s order because, in their opinion, it is a “wrong ruling.”

Third, disqualification of the Pinal County Attorney’s Office is an appropriate remedy considering the gravity of the violation. Defendant requests a dismissal of all charges. However, this relief is not appropriate.

Lastly, and most importantly, the appearance of impropriety and possibility of public suspicion significantly outweighs any benefits of continued representation by the Pinal County Attorney’s Office. While this case itself is not complex, it is a case in which the State is pursuing the death penalty, thus opening the case to particular scrutiny.

Accordingly,

E. CONCLUSION.

IT IS HEREBY ORDERED that Defendant’s request for a dismissal of all charges is **DENIED**.

IT IS FURTHER ORDERED that the Pinal County Attorney’s Office is **DISQUALIFIED** from further representation of Plaintiff, the State of Arizona, in this matter.

IT IS FURTHER ORDERED that the current trial date, **November 12, 2014**, a firm trial under the Rules of Criminal Procedure, is **AFFIRMED**.

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APPENDIX B

**State's Motion to Stay the Trial Court's Ruling
Regarding Disclosure of Victim's Medical Records**

and alternatively

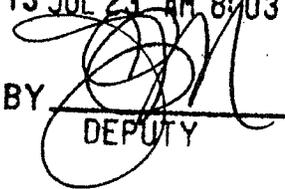
Motion for Reconsideration of the Court's Ruling

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FILED
CHAD A ROCHE
CLERK OF SUPERIOR COURT

13 JUL 23 AM 8:03

BY 
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PINAL

THE STATE OF ARIZONA,

Plaintiff,

vs.

RICHARD TRAY WILSON,

Defendant.

) CR201201764
)
) STATE'S MOTION TO STAY THE
) COURT'S RULING REGARDING
) DISCLOSURE OF VICTIM'S MEDICAL
) RECORDS
)
) and alternatively
)
) MOTION FOR RECONSIDERATION OF
) THE COURT'S RULING
)
) (oral argument requested)
)
)
) Honorable Joseph R. Georgini
)
)
)

The State of Arizona, by and through undersigned counsel, requests the Court to issue a stay of its order requiring the Arizona Department of Corrections to disclose all medical and mental health records of the victim. Furthermore, the State of Arizona requests the Court to reconsider its previous ruling ordering the disclosure of the victim's records. First, Defendant's request *ex parte* was improper under Arizona law. Second, Defendant has



not met his burden of showing the need for obtaining these records. Finally, disclosure of the victim's records violates Victim's Rights. Defendant's motion should be denied.

Respectfully submitted July 22, 2013.

M. LANDO VOYLES
PINAL COUNTY ATTORNEY

BY


Gregory Hazard
Deputy County Attorney

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTS

About two days before March 16, 2012, Defendant strangled his cellmate Nolan Pierce to death while the two were in their prison cell at Arizona Department of Corrections Security Management Unit 1 (SMU 1) in Florence, Arizona. Nolan Pierce's body was discovered by a detention officer during his routine check of inmates. As the detention officer approached Defendant's cell, Defendant told the detention officer to "get this trash out" while pointing at the direction of the deceased. Defendant then stated that Nolan Pierce's body was beginning to stink. Defendant later told investigators that during a fight he strangled Nolan Pierce with a cord about two days before his body was discovered by authorities. Defendant also mentioned that he had previously beaten Nolan Pierce and caused him injuries, but nobody at the prison did anything about it. A Pinal County grand

jury subsequently indicted Defendant on one count of First Degree Murder. The State has filed its notice to seek the death penalty.

On June 12, 2013, Bret Huggins, Counsel for Defendant, filed a motion *ex parte* to order the Arizona Department of Corrections to disclose the medical and mental health records of the victim Nolan Pierce. On June 18, 2013, this Court signed an order compelling the Arizona Department of Corrections to disclose all of Nolan Pierce's medical and mental records that are within the possession of DOC or Wexel Health, including any "outside medical or mental health records provided to DOC from private sources." The Court ordered the matter sealed until further notice.

In the late afternoon of July 18, 2013, Counsel for the State was provided a copy of Defendant's motion. This motion was discovered by Counsel's paralegal while she was researching court filings for this case. The motion was not sealed, but part of the record of materials available on AJACS. The following day, Counsel for the State received a copy of the Court's order, which was also obtained on AJACS and evidently not sealed.

The State now requests this Court stay its order compelling DOC to disclose Nolan Pierce's medical and mental health records until a hearing has been held and all interested parties have had an opportunity to be heard. Disclosure of Nolan Pierce's medical and mental health records at this time violates Mr. Pierce's Victim's Rights, and representatives for Mr. Pierce should be permitted to be heard on the disclosure of his records. The State further requests that this Court reconsider and reverse its ruling compelling the disclosure of these records to Defendant.

II. LAW AND ARGUMENT

A. Proceeding *ex parte* is improper under Rule 15.9

Defendant's reliance on Rule 15.9 to proceed *ex parte* in seeking Nolan Pierce's records is improper and misplaced. Rule 15.9 deals solely with the appointment of investigators and expert witnesses for indigent defendants, including "mitigation specialists" in Capital Cases. Rule 15.9(b) states explicitly, "No *ex parte* proceeding, communication, or request may be considered pursuant to this rule unless a proper showing is made concerning the need for confidentiality." The plain language of the Rule does not permit the type of *ex parte* communication Defendant had with this Court. Obtaining a court order for the disclosure of a victim's medical records is not countenanced by this Rule. Defendant was not requesting the appointment of an investigator or an expert witness. In his motion Defendant did not discuss any mitigation discovery. More importantly, Defendant cites no legal authority in his motion to grant him the right to proceed *ex parte* and obtain the victim's medical records. In reality, Defendant's motion is a request for discovery, covered by Rule 15.1(g), a fact which Defendant concedes in his own motion. He then continues, "However, in this case, while the state *might* be required to disclose some of the records, it probably would be unable to obtain the large amount of documentation required by the defense and/or sift through it to determine if it was required to disclose any of it. Therefore this is a request for an *ex parte* order" Hence, Defendant offers not proof, but mere speculation of what the prosecution "might" do if he were to request discovery pursuant to the proper Rule. This speculation somehow requires Defendant to keep his request for discovery a secret from the State, although he fails to articulate why. Nonetheless, he concludes that an *ex parte*

order is necessary, providing no bridge to cross this chasm of logic. In any event, Rule 15.9(b) expressly forbids Defendant from proceeding *ex parte* in this manner. Thus, the Court should never have considered Defendant's motion *ex parte*, much less granted his request. Rule 2.9 of the Arizona Code of Judicial Conduct forbids this type of *ex parte* communication because the law does not expressly authorize the communication. See also *State v. Apelt*, 176 Ariz. 349, 365-366 (Ariz. 1993). See also ARIZ. RULES OF PROF'L CONDUCT ER 3.5.

Even assuming *arguendo* that Rule 15.9 covers requests for discovery and somehow circumvents Rule 15.1 – a proposition not supported by law – Defendant has not made a proper showing concerning the need for confidentiality. He articulates no specific facts to support the need for confidentiality. He does not state in his motion why he has a substantial need for obtaining the victim's medical and mental health records. He gives no reason whatsoever aside from generalized statements of preparing a defense and mitigation. His blanket statement, "There is an obvious need for confidentiality in these requests," is conclusory and bereft of any facts to support his conclusion.

B. Defendant has not met his burden for obtaining the discovery of the victim's medical records

Rather than proceeding *ex parte* under the guise of Rule 15.9, Defendant should have made a discovery request pursuant to Rule 15.1(g). Rule 15.1(g) requires that the defendant show he has a substantial need in the preparation of his case for material or information not otherwise covered by Rule 15.1, "and that the defendant is unable without undue hardship to obtain the substantial equivalent by other means." Upon this

showing by the defendant, the “court in its discretion may order any person to make it available to the defendant. *The court may, upon the request of any person affected by the order, vacate or modify the order if compliance would be unreasonable or oppressive* (emphasis added).”

Defendant has filed no notice of defenses for this case. In his motion Defendant provided this Court with no facts to meet his burden of a substantial need for disclosure of Nolan Pierce’s records. He did not articulate that he would incur “undue hardship” to obtain whatever it is he seeks to find in Nolan Pierce’s health records. Defendant never states why he needs to obtain Nolan Pierce’s medical and mental health records. Although he mentions mitigation in his motion, he does not connect how the victim’s medical records would provide mitigation for the Defendant. Arizona defines mitigation as something which does not “constitute a justification or excuse of the offense in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability.” *State v. Risco*, 147 Ariz. 607, 611 (Ariz.App. 1985). I am confounded as to how Nolan Pierce’s complete mental health and medical history would constitute mitigating circumstances for the Defendant. In any event, Defendant makes his request without a reason. “Discovery rules are not meant to be used for “fishing expeditions.” *State v. Hatton*, 116 Ariz. 142, 150 (Ariz. 1977)(holding that Defendant had no substantial need for disclosure: “[The] suggestion that police reports of criminal activity in the area might disclose that a person other than appellant committed the homicides is the purest speculation.”) The Court should deny Defendant’s request.

**C. Nolan Pierce's medical and mental health records are protected by
Victims' Rights**

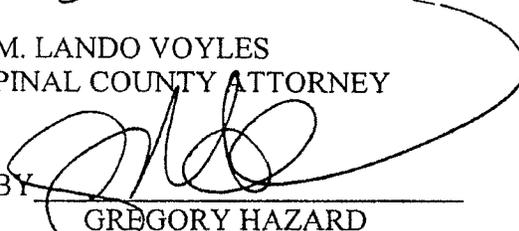
Nolan Pierce, through his lawful representatives, has a right under the Arizona Constitution to deny the disclosure of his medical records. ARIZ. CONST. art. II, § 2.1; *State ex rel. Romley v. Superior Court (Roper)*, 172 Ariz. 232 (Ariz.App. 1992). By proceeding *ex parte*, the Defendant, and this Court by its order, bypassed the right of Nolan Pierce's representatives to be heard, and if they had an objection to disclosure, to voice their objection. In this way, the Court's order silenced a crime victim. The Court should have taken into consideration this important right guaranteed by the Arizona Constitution. In contrast, Defendant has no constitutional right to an *ex parte* hearing in a capital case. *See State v. Apelt*, 176 Ariz. 349, 365-67 (Ariz. 1993). *Cf. Morehart v. Barton*, 226 Ariz. 510 (Ariz.2011)(holding that crime victims had no constitutional right to attend an *ex parte* hearing that involved investigation of Defendant's mitigation evidence but in no way implicated Victims' Rights). When balanced against Nolan Pierce's rights as a crime victim, Defendant's request must be denied.

III. CONCLUSION

Defendant's request *ex parte* for the disclosure of Nolan Pierce's medical and mental health records is prohibited by law. Defendant has proffered no legitimate reason to proceed *ex parte*. Defendant has proffered no legitimate reason to obtain Nolan Pierce's records. Nolan Pierce's legal representatives have a right to be heard as Defendant's motion triggers a substantial right guaranteed by the Arizona Constitution. We therefore ask this Court to stay its order and reverse its ruling.

RESPECTFULLY SUBMITTED this 22 day of July, 2013.

M. LANDO VOYLES
PINAL COUNTY ATTORNEY

BY 
GREGORY HAZARD
Deputy County Attorney

ORIGINAL of the foregoing filed
this 23 day of July, 2013 with:

The Clerk of Superior Court
Pinal County Courthouse
Florence, Arizona 85232

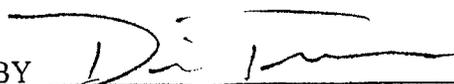
Copies mailed/delivered this
same date to:

Honorable Joseph R. Georgini
Judge of the Superior Court

Bret Huggins
Attorney For Defendant

James Soslowsky
Attorney for Defendant

Victim Services

BY 

APPENDIX C

**Response to State's Violation Accessing Confidential
Records and Interfering with the Defendant's Right to
Conduct an Independent Investigation**

1 **LAW OFFICE OF BRET HUGGINS**

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3 550 South Main Street
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6 Telephone (520) 868-0659
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9 Arizona Bar Number 007535

10 Attorney for Defendant Richard Wilson

D. Powell RECEIVED
AUG 02 2013
PINAL COUNTY ATTORNEY

11 ARIZONA SUPERIOR COURT

12 PINAL COUNTY

13 STATE OF ARIZONA,

14 Plaintiff,

15 vs.

16 RICHARD TROY WILSON,

17 Defendant.

) Case No. CR201201764

) RESPONSE TO STATE'S VIOLATION
) ACCESSING CONFIDENTIAL
) RECORDS AND INTERFERING WITH
) THE DEFENDANT'S RIGHT TO
) CONDUCT AN INDEPENDENT
) INVESTIGATION

) Assigned to the Hon. Joseph R. Georgini

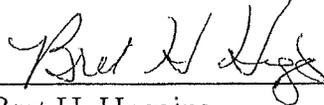
18 The Defendant Richard Wilson, by and through Counsel Bret H. Huggins,
19 respectfully responds to the State accessing confidential records relating to the defense
20 investigation of a case where the State is seeking the death penalty and then violating clear
21 and established professional ethical standards and seeking affirmative interference from the
22 Court on the grounds of the Victim's Rights provisions of Constitution and Statute when
23 there is no such "victim" pursuant to the express terms of Constitution and Statutes invoked
24 by the prosecutor.
25

1 The Defendant respectfully requests the Court to sanction the prosecution for
2 accessing confidential information and interfering with the Defendant's right to conduct an
3 independent investigation relating to both innocence/guilt and mitigation including but not
4 limited to dismissing the case, ordering the removal of the Pinal County Attorney's Office
5 from further representation and reporting the matter to the appropriate disciplinary authority
6 of the State Bar and such other and further relief as is appropriate.

7 This response is based upon the Sixth, Eighth and Fourteenth Amendments to the
8 United States Constitution as well as Art. 2 §§ 2.1, 3, 4, 8, 15, 23, 24, 32 and 33 of the
9 Arizona Constitution and the attached Memorandum of Points and Authorities.
10

11 RESPECTFULLY SUBMITTED this 1st day of August, 2013.

12 **LAW OFFICE OF BRET HUGGINS**

13 
14 _____
15 Bret H. Huggins

16 **MEMORANDUM OF POINTS AND AUTHORITIES**

17 The Defendant Richard Wilson respectfully responds to the State's outrageous
18 invasion of protected confidential court information and request for Court interference with
19 the Defendant's right to conduct an independent investigation upon specious grounds by
20 misstating legal authority.
21

22 **FACTS:**

23 The Prosecutor's paralegal obtained a confidential *ex parte* motion of Defendant and
24 the Court's *ex parte* order by using its unlimited access to the automated Court information
25 system known as AJACS. The Prosecutor being informed that his subordinate paralegal had

1 done so, then followed up with his own personal access and review of the confidential
2 documents and prepared a pleading requesting the Court to interfere with the independent
3 investigation.

4 It appears none of the Judges, not the Court, nor any counsel outside the Pinal
5 County Attorney's Office was aware that pursuant to the Court Information system known
6 by the acronym AJACS that the Pinal County Attorney's Office had complete unrestricted
7 access to all sealed *ex parte* orders issued by the Pinal County Superior Court. The Pinal
8 County Attorney's and their investigators, paralegals and other staff, could access at will and
9 without limitation sealed *ex parte* orders including such sealed *ex parte* orders as those issued
10 in cases where the State is pursuing the death penalty against accused.
11

12 From the beginning of training in professional responsibility, one of the most basic
13 tenets is that if a lawyer comes into possession of confidential materials, whether by
14 misdelivery, accident or other cause, that the lawyer is to immediately stop reading, take
15 reasonable steps to preserve the confidentiality of the information and notify opposing
16 counsel and where necessary the Court for addressing the breach of confidentiality.
17

18 When an attorney sees a pleading entitled *ex parte* motion of opposing counsel, the
19 attorney certainly knows that it is a confidential pleading that he/she should not have access
20 to. When an attorney sees an *ex parte* order, he/she knows that it is confidential.

21 The Arizona Rules of Professional Responsibility provide that when a lawyer receives
22 a document he knows is confidential he is to promptly notify the other side and preserve the
23 status quo. See 17 A.R.S. Sup.Ct.Rules, Rukle 42, Rules of Prof.Conduct, ER 4.4. The
24 comment to this rule is as follows:
25

1 Paragraph (b) recognizes that lawyers sometimes receive
2 documents that were mistakenly sent or produced by opposing
3 parties or their lawyers. If a lawyer knows or reasonably should
4 know that a document was sent inadvertently, then this Rule
5 requires the lawyer to stop reading the document, to make no
6 use of the document, and to promptly notify the sender in order
7 to permit that person to take protective measures.

8 See also, Inadvertent disclosure revisited. David D. Dodge, 43-Sep Ariz. Att'y 8 (2006).

9 In this case, the prosecutor has represented to the court the following:

10 On June 12, 2013, Bret Huggins, Counsel for Defendant, filed a
11 motion *ex parte* to order the Arizona Department of Corrections
12 to disclose the medical and mental health records of the victim
13 Nolan Pierce.

14 * * *

15 In the late afternoon of July 18, 2013, Counsel for the State was
16 provided a copy of Defendant's motion, This motion was
17 discovered by Counsel's paralegal while she was researching
18 court filings for this case. The motion was not sealed, but part
19 of the record of materials available on AJACS. The following
20 day, Counsel for the State received a copy of the Court's order,
21 which was also obtained on AJACS and evidently not sealed.

22 State's Motion at page 3. The prosecutor admits he knew the motion was an *ex parte* motion
23 brought by opposing counsel in a capital case. He indicates it was not sealed. This
24 statement is untrue. This statement is false.

25 However, even if the prosecutor believed the statement to be true, it did not relieve
him of his ethical responsibilities to "stop reading the document, to make no use of the
document, and to promptly notify" opposing counsel.

The AJACS system identifies the document as a sealed document, it is not available
on the AJACS system to the public or defense counsel. However, because the Pinal County
Superior Court Clerk's AJACS system did not limit access to confidential court documents

1 to the County Attorney's Office and staff, the prosecutor and his paralegal did have access
2 to a confidential document they had no legal authority to receive. Because of the unethical
3 conduct of the prosecutor and his paralegal, the Defendant's right to conduct an
4 independent investigation has been knowingly and intentionally violated.

5 Additionally, in regard to the prosecutor's attempt to shift blame for the violation of
6 confidentiality to his paralegal because it was the paralegal who first discovered the
7 document and then brought it to his attention, this too is addressed by the ethical rules. ER
8 5.3 provides in relevant part:
9

10 **Responsibilities Regarding Nonlawyer Assistants**

11 With respect to a nonlawyer employed or retained by or
12 associated with a lawyer:

13 * * *

14 (c) a lawyer shall be responsible for conduct of such a person
15 that would be a violation of the Rules of Professional Conduct
16 if engaged in by a lawyer if:

17 (1) the lawyer orders or, with the knowledge of the specific
18 conduct, ratifies the conduct involved;

19 * * *

20 17A A.R.S. Sup.Ct.Rules, Rule 42, Rules of Prof.Conduct, ER 5.3. If the paralegal obtains
21 the confidential information and brings it to the attention of the prosecutor and the
22 prosecutor then does not stop reading the material and goes on to use the information
23 without notifying opposing counsel, the prosecutor is responsible for the conduct of the
24 paralegal.
25

It should not be necessary for Defense counsel in a capital case to justify or brief an
issue which is properly the matter of an *ex parte* order. However, once the confidentiality has

1 been breached, how can one make confidential that which is now contained within public
2 documents in open records? How can one unring the bell?

3 The State has represented to this Court that it can contest the access to medical
4 records under the custody and control of the Department of Corrections, the investigating
5 agency in this case, because Nolan Pierce is the “victim.” The State misleads this Court.

6 The definition of “victim” contained within Article 2.1 of the Arizona Constitution
7 states as follows:

8 “Victim” means a person against whom the criminal offense
9 has been committed or, if the person is killed or incapacitated,
10 the person's spouse, parent, child or other lawful representative,
11 **except if the person is in custody for an offense or is the**
12 **accused.**

13 (Emphasis added) A.R.S. Const. Art. 2 § 2.1. See also A.R.S. §13-4401 (19). The prosecutor
14 knows perfectly well that Nolan Pierce is not a victim because he was in custody of the
15 Arizona Department of Corrections at the time this offense is alleged to have occurred. The
16 first sentence of the prosecutor’s statement of facts acknowledges that Nolan Pierce was in
17 his “prison cell at the Arizona Department of Corrections Security Management Unit 1.”
18 State’s motion at page 2.

19 Next, the prosecutor should know that the material requested in the Defendant’s *ex*
20 *parte* motion, is Brady material that the State has an independent duty to disclose under
21 *Carriger v. Stewart*, 132 F.3d 463, 479-482 (9th Cir. 1997). However, although the State has an
22 obligation to disclose such information even in the absence of a request by defense counsel,
23 that does not preclude the defense from obtaining such essential information in regard to
24
25

1 investigation of the offense as well as mitigation on its own without interference by the
2 prosecutor. See *Carriger*, supra.

3 The defendant is entitled to conduct a meaningful independent investigation in any
4 capital murder prosecution and the failure to do so can constitute ineffective assistance of
5 counsel. *Strickland v. Washington* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984);
6 *Wiggins v. Smith*, 539 U.S. 510, 521-522, 123 S.Ct. 2527, 2535, 156 L.Ed.2d 471 (2003)
7 (question is not whether counsel should have presented a mitigation case. Rather, we focus
8 on whether the investigation supporting counsel's decision not to introduce mitigating
9 evidence of Wiggins' background *was itself reasonable*.)

11 It would not be a reasonable investigation if defense counsel failed to get the
12 information requested in the *ex parte* order.

13 Long before the adoption of Rule 15.9 of Criminal Procedure, Courts recognized the
14 need for Defense counsel in capital cases to have access to *ex parte* proceedings to conduct
15 adequate defense investigations. In :

17 Due to the inherent constitutional dimensions of an indigent
18 defendant receiving or not receiving investigative support when
19 represented by private appointed counsel, this Court feels that
20 to avoid approaching a continuing equal protection, due process
21 and right to counsel question, some procedure should be
22 developed whereby counsel for the defendant could make a
23 positive *ex parte* showing of an investigative need to the State
24 court without an adversary hearing*58so the record is clear on
25 this question.

26 *Mason v. State of Ariz.* 360 F.Supp. 56, 57 -58 (D.C.Ariz., 1973).

27 It was just such concerns that led to the adoption of Rule 15.9 of Criminal Procedure.

1 In *Morehart v. Barton*, 226 Ariz. 510, 250 P.3d 1139 (2011), a case in which there was a
2 “victim” pursuant to the Arizona Constitution, the Arizona Supreme Court made clear that
3 the victim rights provisions do not authorize a victim to be present for ex parte proceedings
4 under Rule 15.9 and by necessary implication, no right to object.

5 Many years ago, our Court made clear that a prosecutor has no standing to challenge
6 what attorney a Defendant selects to represent them. *Knapp v. Hardy*, 111 Ariz. 107, 523
7 P.2d 1308 (1974). Just as a prosecutor has no standing to select the investigators, mitigation
8 specialists or mental health experts required on a capital defense team, neither can the
9 prosecutor object to the manner in which a thorough defense investigation is conducted or
10 the information that is sought and obtained.

12 Any reasonably competent attorney would realize that pursuing the leads suggested
13 by the information presented in a capital case is necessary to making informed choices
14 among all possible defenses. *Wiggins*, supra 539 U.S. at 525, 123 S.Ct. 2527; see also *Penry v.*
15 *Lynaugh*, 492 U.S. 302, 319, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

17 Death penalty cases present unique ethical, pragmatic and constitutional
18 problems. *Beck v. Alabama*, 447 U.S. 625, 637, 100 S.Ct. 2382, 2389, 65 L.Ed.2d 392
19 (1980); *Lockett v. Ohio*, 438 U.S. 586, 603–05, 98 S.Ct. 2954, 2964–65, 57 L.Ed.2d 973 (1978).
20 They also demand careful judicial scrutiny to ensure constitutional compliance. *Smith v.*
21 *Lewis* 157 Ariz. 510, 514, 759 P.2d 1314, 1318 (1988). The Eighth Amendment to the
22 United States Constitution requires heightened standards of due process in cases where the
23 State seeks death. *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); *Eddings*
24 *v. Oklahoma* 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).
25

1 Included within the Due Process guarantees of the 14th Amendment is the procedural
2 guarantee that if the State has rules and statutes the State must follow those rules or it
3 violates the federal due process guarantees. In this case, the Rules of Professional Conduct
4 prohibit a lawyer from using confidential information improperly obtained in any manner.
5 The Rules of Criminal Procedure, Rule 15.9 of Criminal Procedure specifically authorize a
6 Capital Defendant to obtain procedural orders regarding investigative information without
7 engaging in an adversarial proceeding. To allow the Prosecutor to invade this process by
8 gaining access to confidential information violates the due process guarantees.
9

10 The prosecutor cavalierly attacks the Court and suggests that the Court's granting of
11 the *ex parte* request is a violation of the judicial canons. State's motion at page 5. This
12 suggestion is reprehensible and an attack on the Court conducting an ex parte proceeding
13 specifically authorized under Rule 15.9 of Criminal Procedure. It is a veiled attempt to make
14 the Judge cower from his responsibility to provide meaningful opportunity for a full and
15 complete defense investigation. And it ignores the express statements of the Supreme Court
16 in *Morehart*, supra:
17

18 Our conclusion that the Victims are not entitled to attend the
19 contemplated ex parte hearing is not affected by this Court's
20 decision in *Apelt*, 176 Ariz. at 365, 861 P.2d at 650. There we
21 rejected a defendant's argument that the trial court erred in
22 refusing to hold an ex parte hearing on a request for expert
23 assistance in a capital case. *Id.* The Court noted that there was
24 no Arizona legal authority for such a hearing, that neither due
25 process nor equal protection generally requires ex parte
proceedings for such requests, and that the defendant had failed
to show any prejudice from the denial of an ex parte
procedure. *Id. But cf. Ex Parte Moody*, 684 So.2d 114, 120
(Ala.1996) (holding that Fifth, Sixth, and Fourteenth
Amendments entitle criminal defendant to ex parte hearing on
request for expert assistance); *Stevens v. Indiana*, 770 N.E.2d 739,

1 759 (Ind.2002)(describing split among state courts whether ex
2 parte hearings may be constitutionally required).

3 ¶ 21 *Apelt* did not address a defendant's entitlement to be
4 present at a hearing, much less whether victims could attend.
5 **Moreover, that opinion's comments about the legal**
6 **authority for ex parte proceedings have been superseded**
7 **by Rule 15.9(b), which authorizes ex parte**
8 **communications related to court-appointed investigators**
9 **and experts for indigent capital defendants when there is a**
10 **need for confidentiality. Although *Apelt* recognized that**
11 **Arizona's Rules of Criminal Procedure provide for the**
12 **disclosure of witnesses and other evidence the defense**
13 **intends to use at trial, including evidence regarding**
14 **mitigating circumstances, see Ariz. R.Crim. P. 15.2(h), that**
15 **fact does not obviate the need to preserve the**
16 **confidentiality of defense work product or attorney-client**
17 **material during the investigation of mitigation**
18 **evidence.** *Apelt* does not preclude trial courts from determining
19 that, in particular cases, disclosure would interfere with the
20 defendant's rights to receive effective assistance of counsel and
21 to obtain the "basic tools" for an adequate defense. *Ake*, 470
22 U.S. at 77, 105 S.Ct. 1087.

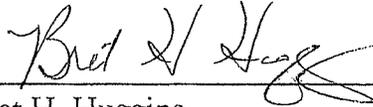
23 *Id.* 226 Ariz. at 515, 250 P.3d at 1144. First, the Prosecutor misstates the law claiming
24 Nolan Pierce has victim status under the Arizona Constitution and, second, follows with the
25 argument that *State v. Apelt*, 176 Ariz. 349, 365, 861 P.2d 634, 650 (1993) prohibits *ex parte*
proceedings when the Supreme Court has said *Apelt* has specifically been modified by Rule
15.9 of Criminal Procedure. This certainly appears to be an absence of candor to the
tribunal, like making a false statement of law or failing to disclose contrary legal authority
which is prohibited. See 17A A.R.S. Sup.Ct.Rules, Rule 42, Rules of Prof.Conduct, ER 3.3.

Wherefore, the Defendant respectfully requests that the Court strike the prosecutor's
motion and to dismiss the case for violation of the Defendant's sixth amendment right to
counsel. See *State v. Pecard*, 196 Ariz. 371, 998 P.2d 453 (1999). Alternatively, the Defendant

1 requests the Court to conduct an evidentiary hearing on the State's violation of
2 confidentiality and after hearing to order that the Pinal County Attorney's Office be
3 disqualified from further prosecution of this matter, that Court make a complete report be
4 made to the appropriate disciplinary authority of the State Bar of the ethical violations and
5 for such other and further relief as is just and appropriate in the premises.

6 RESPECTFULLY SUBMITTED this 1st day of August, 2013.

7 **LAW OFFICE OF BRET HUGGINS**

8 

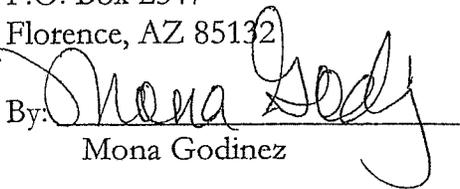
9

Bret H. Huggins

10 Copies of the foregoing
11 mailed/delivered this 1st
12 day of August 2013 to:

13 Pinal County Attorney's Office
14 P.O. Box 887
15 Florence, AZ 85132
16 Counsel for the State

17 Hon. Joseph R. Georgini
18 P.O. Box 2547
19 Florence, AZ 85132

20 By: 
21

Mona Godinez

APPENDIX D

July 26, 2013 Minute Entry granting a Stay of the Court's order previously ordered under seal dated June 18, 2013 and filed on June 19, 2013

FILED
CHAD A ROCHE
CLERK OF SUPERIOR COURT
2013 JUL 29 PM 3:49
BY msj
DEPUTY

IN THE SUPERIOR COURT
PINAL COUNTY, STATE OF ARIZONA

Date: 07/26/2013

Judge: THE HON JOSEPH R GEORGINI.

By Judicial Assistant: Shane Beck

THE STATE OF ARIZONA,

Plaintiff,

vs.

RICHARD TRAY WILSON

Defendant(s).

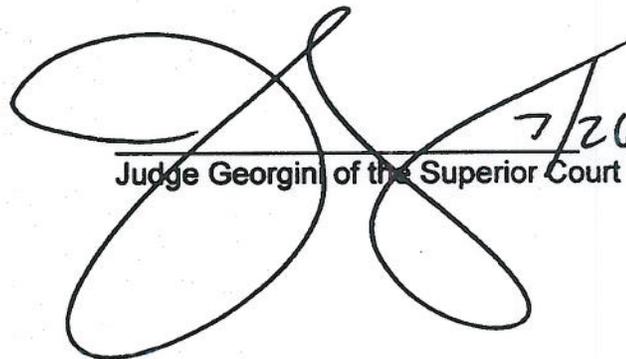
) S1100CR201201764

) NOTICE

This Court having considered the State's Motion to Stay and Motion for Expedited Ruling on its Motion to Stay this Court's Order of June 18, 2013.

IT IS HEREBY ORDERED granting a stay of this Court's order previously granted under seal dated June 18, 2013 and filed on June 19, 2013.

IT IS FURTHER ORDERED that this Court will Stay enforcement of its June 18, 2013 order filed under seal on June 19, 2013 until the Review Hearing/PTC set for September 10, 2013 at 9:00 a.m. before the Honorable Joseph R. Georgini.


7/26/13
Judge Georgini of the Superior Court

Mailed/distributed copy: 07/26/2013
BRETT HUGGINS

JAMES SOSLOWSKY (CO COUNSEL)

Office Distribution:
COUNTY ATTORNEY
VICTIMS ASSISTANCE
JUDGE/ «NAME»

APPENDIX E

March 12, 2014 Minute Entry Order of Judge White unsealing the April 4, 2013 Ex Parte Motion because there was no proper showing of need for confidentiality

IN THE SUPERIOR COURT

PINAL COUNTY, STATE OF ARIZONA

Date: 03/12/2014

Judge: **THE HON KEVIN D WHITE.**

By Judicial Administrative Assistant: JUDY HANCOCK

<p>THE STATE OF ARIZONA,</p> <p style="text-align: right;">Plaintiff,</p> <p>vs.</p> <p>RICHARD TRAY WILSON</p> <p style="text-align: right;">Defendant(s).</p>	<p>)</p>	<p><u>S1100CR201201764</u></p> <p><u>ORDER</u></p>
--	---	--

The Court has reviewed Defendant’s Supplement to Ex Parte Motion For Court Order To Assist Mitigation Investigation and Proposed Order filed on February 25, 2014. Neither the original Motion nor the Supplement to it establish a proper showing of the need for the Motion to be considered *ex parte*. Accordingly,

IT IS ORDERED that Defendant’s Ex Parte Motion for Court Order to Assist Mitigation Investigation and Proposed Order filed on February 25, 2014, and the Supplement to the Motion dated February 25, 2014, shall be unsealed and disclosed to the State as shall the Court’s sealed minute entry of February 13, 2014.

The Defendant also submitted a Proposed Order with the Motion. The Order identifies specific agencies and entities from which the Defense may seek mitigation evidence. To avoid the possibility of compromising specific defense/mitigation theories or tactics, the identities of the specific agencies that may be targeted by the Defense for mitigation evidence shall be redacted from the proposed order to be disclosed to the state. Accordingly,

IT IS ORDERED that a redacted copy of the Proposed Order submitted with the Ex Parte Motion for Court Order to Assist Mitigation Investigation shall be disclosed to the State.

IT IS FURTHER ORDERED that the State shall have 10 business days from the filing of this minute entry to submit a Response to the Motion.

Mailed/distributed copy: 03/12/2014

BRET HUGGINS

JAMES SOSLOWSKY

Office Distribution:

**COUNTY ATTORNEY/LONG/JOHNSON
VICTIMS ASSISTANCE
JUDGE/WHITE
JUDGE/CAHILL**

APPENDIX F

April 10, 2013 trial court opinion in
State v DeMocker, P1300-CR2010-01325
(Yavapai County Case)

FILED
 4:50 O'Clock P.M.
 APR 10 2013
 SANDRA K MARKHAM, Clerk
 By: *[Signature]*

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

STATE OF ARIZONA,)	
)	
Plaintiff,)	Case No. P1300CR2010-01325
)	
vs.)	RULING ON DEFENDANT'S MOTION
)	TO DISMISS FOR PROSECUTORIAL
STEVEN CARROLL DEMOCKER,)	MISCONDUCT OR MOTION TO
)	DISQUALIFY THE YAVAPAI COUNTY
Defendant.)	ATTORNEY'S OFFICE
)	

Preface

Pending before the Court is Defendant's "Motion to Dismiss for Prosecutorial Misconduct or Motion to Disqualify the Yavapai County Attorney's Office." In accordance with the procedure stipulated to by counsel, on March 22, 2013, the Court issued to counsel a preliminary ruling. The Court heard closing arguments on April 4, 2013.

After considering the exhibits and the testimony of the witnesses, along with the closing arguments of counsel, it is clear that the actions of a number of persons contributed to creation of the situation now under review by the Court. Not being without flaws, this Court is hesitant to criticize others, but in this case, a certain amount of criticism is unavoidable, and the criticism is given with respectful recognition of the oftentimes crushing workloads, workplace pressures and stress under which the persons involved operated.

In this Court's opinion, the Clerk of the Court, Yavapai County's Management Information Systems (MIS) administrator, defense counsel, members of the Yavapai County Attorney's Office (hereinafter referred to as "the YCAO")¹ and court personnel contributed to create this situation. Each of these players contributed in their own ways to cause what the Court of Appeals has found to be an interference with Defendant's relationship with his counsel.

There was incompetence by the Clerk of the Court and the administrator of OnBase. "Sealed" documents were electronically distributed to the YCAO through OnBase. Numerous people within the YCAO were given access by the Clerk of the Court to sealed and/or *ex parte* documents through OnBase. There was no explanation given why the Clerk of the Court failed to maintain control over the court file, but instead allowed the hard file to remain with a judicial

¹ Unless otherwise stated, "the YCAO" includes Victim Services, a division of the YCAO

division for an extended period of time where a YCAO attorney was allowed to view the file folder containing the envelopes of the sealed documents.

Contributing to the situation was the fact that there was no clear understanding of what “under seal” or “sealed” meant. Most of the witnesses believed that “sealed” meant only “restricted from the public” thus reinforcing their belief that if they were able to access a document on OnBase or received a hard copy of the document, they were entitled to see it. Only a few witnesses believed “sealed” meant “restricted from everyone.” The same differing interpretations of “*ex parte*” caused people to believe that if the document could be accessed on OnBase, the document was not restricted from viewing by them.

There was a lack of vigilance and diligence on the part of numerous persons working in the YCAO as well as defense counsel. An experienced prosecutor never wondered why he was receiving orders marked “under seal” revealing the names of appointed consulting experts prior to the disclosure of those experts as testifying experts. As for defense counsel, while all of the Rule 15.9 Orders at issue have clearly visible routing stamps from the Clerk of the Court showing that the “under seal” orders were routed to the YCAO and Victim Services, no attorney or defense administrator seemed to notice until Judge Darrow launched his inquiry.

However, even with the abundance of errors that have been revealed by the evidence, this Court is firmly convinced that the State did not directly or indirectly benefit from the viewing, printing and emailing of the documents at issue and that Defendant was not directly or indirectly prejudiced in any way by the viewing, printing and emailing of the documents at issue by members of the YCAO. The State proved beyond a reasonable doubt that the questioned conduct of the YCAO has had no effect on how the case has been prosecuted. The facts and reasons for those conclusions are set forth below.

Findings of Fact and Conclusions of Law

These findings of fact and conclusions of law are based in large part on the Court’s determinations of the credibility of the witnesses. The many exhibits contain much useful information. However, to resolve the critical points and conflicting evidence, the Court made determinations of the credibility of witnesses. It is on those credibility determinations that this ruling is primarily based. The Court’s findings of fact are the most credible set of facts based on all the evidence, including the exhibits, presented to the Court.

1. Steven DeMocker was indicted for first-degree murder and related charges in October 2008, in connection with the July 2, 2008 murder of his former wife, Carol Kennedy. The case (CR2008-1339) was assigned to the Hon. Thomas Lindberg. On November 20, 2008, the State filed an “Amended Notice of Intent to Seek Death Penalty” in CR 2008-1339. *See* Exhibit 655. A second death penalty notice was filed on May 13, 2009. The State withdrew the death penalty on May 26, 2010. *See* Exhibit 571. It was reported that “DeMocker had faced the death penalty until Lindberg dismissed two of three death penalty aggravators in response to untimely disclosure of evidence by the prosecution. Later, prosecutors dropped the remaining aggravator.” *See* Exhibit 3, p. 2 to Exhibit 525. It was also reported that Charlotte DeMocker,

Defendant's daughter, personally met with Sheila Polk, the Yavapai County Attorney, in April 2010 and requested "dismissal of the death-penalty petition." *See* Exhibit 2, p. 4 to Exhibit 525.

2. The case proceeded to trial in May 2010. After weeks of jury selection, opening statements began in June 2010. Mr. John Sears was one of the attorneys on Defendant's original defense team. During Mr. Sears' opening statement on June 3, 2010, prosecutors learned for the first time that Hartford Insurance Company, pursuant to a disclaimer by Defendant, paid the life insurance proceeds from policies insuring Carol Kennedy. *See* Exhibit 690, pp. 4 – 5. This surprised the assigned prosecutor, Joe Butner, because the insurance company had repeatedly told the YCAO that it would not pay the insurance proceeds until after the murder charge was resolved. Upon hearing Mr. Sears' opening statement, Mr. Butner immediately initiated an investigation regarding payment of the life insurance proceeds. *Id.*, p. 5. It was that investigation that resulted in Count III of the December 2010 indictment.

3. Upon filing of the State's "Motion for Determination of Counsel with Chronology of Events and Exhibits" on July 12, 2010, the trial became messy. *See* Exhibits 690 and 695. Sheila Polk, the Yavapai County Attorney, drafted the motion and appeared at a telephonic status conference regarding that motion. *See* Exhibit 693. In that motion, the State accused defense counsel of improper, if not criminal, conduct when they assisted Defendant in obtaining the life insurance proceeds that were used to pay Defendant's attorneys' fees.

4. By August 2010, the issues involving counsel and payment of the life insurance proceeds had surpassed the trial issues and had evolved into a possible criminal investigation of defense counsel, a State Bar complaint against defense counsel brought by the County Attorney, granting of immunity to a witness, a gag order against a non-party and possible withdrawal of defense counsel. *See* Exhibit 683. All of those issues were causing substantial trial delays.

5. Sheila Polk filed the State Bar complaint against defense counsel on August 4, 2010. Before filing the Bar complaint and the "Motion for Determination of Counsel," Ms. Polk consulted two times with State Bar counsel to seek guidance regarding her ethical obligations. She consulted with a local Prescott attorney and a probate expert, Phoenix attorney Marlene Appel, about issues regarding Carol Kennedy's probate estate. Ms. Polk also directed that a petition be filed with the probate judge handling Carol Kennedy's estate. Ms. Polk believed that she was ethically obligated to bring the issue of an apparent conflict between Defendant and his counsel to the attention of Judge Darrow in order to protect Defendant's due process right to competent counsel and to protect the State against reversal of a conviction on appeal. She believed she also had an ethical obligation to bring to the probate judge's attention evidence of what appeared to be inappropriate, if not criminal, activity regarding the insurance proceeds. By the time the Bar complaint, the petition in the probate court and the motion regarding counsel's conflict were filed, Ms. Polk believed the investigation conducted by the Yavapai County Sheriff's Office had found sufficient evidence to support the allegations being made in those pleadings.

6. In the "State's Motion for Determination of Counsel," Ms. Polk wrote that:

On information and belief, the State alleges that Defendant has continued to receive public funds in the form of payments by the Yavapai County Public Defender to pay for his defense. This information creates further reasonable

suspicion that a fraud on the county has occurred with respect to the acquisition of public funds for Defendant's defense. *See* Exhibit 695, p. 9.

Ms. Polk's belief was based on information she received from Julie Ayers. *See* ¶ 152.

7. The State wished to present evidence to the jury that the transfer of the insurance money to defense counsel was illegal. On August 13, 2010, in a sealed minute entry, Judge Darrow ruled that the State could present evidence "as to the ultimate disposition of the [life] insurance proceeds" and the reasons for any witness' "involvement in the transfer of the insurance funds," but precluded "any evidence or argument offered to suggest that the transfer of funds occurred in an unlawful manner." *See* Exhibit 628. Following that ruling, Judge Darrow made a series of rulings related to the State's efforts to introduce evidence at trial about the life insurance proceeds. *See* Exhibits 629, 630 and 631. Those rulings, in general, were not favorable to the State.

All of these minute entries were "sealed." Exhibit 628 contains a distribution stamp reflecting that the minute entry was distributed to defense counsel, the YCAO and the victims' attorney. Exhibits 629, 630 and 631 bear endorsements to defense counsel and the YCAO's prosecutors. Apparently, these minute entries were "sealed" only from the public and media.

8. Because of the issues involving defense counsel, a mistrial was eventually granted on November 12, 2010. *See* Exhibit 668.

9. By the time the mistrial was declared, over 175 motions had been filed and the State had done eighty disclosure statements.

10. On September 29, 2010, the grand jury returned an eight-count indictment against Defendant (case # CR 201080461). The charges related to the alleged fraudulent email (Counts III, IV, V, VI, VII and VIII) and to the voice-in-the-vent story (Counts I, II and VII). *See* Exhibit 622. This indictment was a result of the YCAO's determinations that Defendant's voice-in-the-vent story that he told during a voluntary interview with the YCAO and the anonymous e-mail were both false.

11. On December 10, 2010, the grand jury returned a ten-count indictment against Defendant (case # CR2010-01325). *See* Exhibit 623. Counts IV through X are essentially the same charges in the September 29, 2010 indictment. Count III charges a fraudulent scheme related to Carol Kennedy's testamentary trust and the life insurance proceeds. Counts I and II are the original murder charges.

12. Contrary to Ms. Polk's testimony, there is no count in the December 10, 2010 indictment charging Defendant with defrauding Yavapai County or filing a false financial affidavit in support of Defendant's indigency application.

13. OnBase is the document management system used by Yavapai County. OnBase was implemented by Yavapai County in 2005. The Clerk of the Court is one of the County departments that uses OnBase. Beginning in 2008, all documents filed with the Clerk of the Court were electronically scanned for viewing on computers by authorized users of OnBase. In addition, certain documents (minute entries, orders and judgments) that previously were

distributed to the YCAO via hard copy were distributed electronically through OnBase. Sheila Polk, objected to the document distribution plan because (1) she believed the Clerk of the Court simply was shifting work and costs from the Clerk of the Court's office to the YCAO, and (2) the YCAO would no longer receive hard copies of documents the rest of the bar would receive. Nevertheless, the Clerk of the Court implemented electronic distribution of minute entries, court orders and judgments. *See Exhibit 595.* As part of Ms. Polk's negotiations with the Clerk of the Court over implementation of electronic distribution of documents, the Clerk of the Court promised to purchase a print module for the YCAO, but did not fulfill that promise.

14. So that the Public Defender and the YCAO, including Victim Services, could more easily obtain the documents each would have previously received by hard copy from the Clerk of the Court, a query feature using folders was set up in OnBase by the MIS administrator. Thus in OnBase, a folder for each of Victim Services and the YCAO was established. The Clerk of the Court coded a document to be electronically distributed to particular OnBase users' folders. By using the query feature, each agency could request all documents scanned by the Clerk of the Court and placed in its folder the previous day. The query result would list all documents distributed by the Clerk of the Court to that agency's folder. The documents could then be viewed, printed or emailed to someone by the person who initiated the query.

15. After the Clerk of the Court began distribution of documents electronically through OnBase, private attorneys either could continue to receive documents from the Clerk of the Court by regular mail or electronically by providing the Clerk of the Court an email address.

16. All of the documents at issue were electronically stored in OnBase and either (1) electronically distributed to the YCAO through OnBase and then viewed, printed and distributed to members of the YCAO, (2) viewed using OnBase, or (3) viewed and emailed from OnBase.

17. OnBase was administered by the Yavapai County Management Information Services Department ("MIS").

18. Documents filed with the Clerk of the Court were electronically scanned, coded by the Clerk of the Court for electronic delivery, and assigned an event code as well as a restriction level. The assigned event code equated to a generic document title that was populated to and displayed on the index of documents on OnBase.

19. The event-code document titles on OnBase were not very descriptive. In order to find a particular document, the OnBase user might have to open several documents in order to locate the document being searched for.

20. Even though all case related documents were electronically imaged and stored on OnBase, the Clerk of the Court continued to maintain physical case files.

21. At the time each document was imaged for posting to OnBase, the Clerk of Court assigned a Restriction Level to each document. The Restriction Levels were:

- i. N -- not restricted; documents available to the public.
- ii. Y -- restricted; documents available to the parties, but not to the public.
- iii. S -- sealed; documents available only to those with access to sealed documents.

22. Jeanne Hicks took office as the Yavapai County Clerk of the Court on December 2, 2001. She retired in April 2011. It was during her tenure as Clerk of the Court that OnBase was implemented. It was during her tenure that the events in question occurred.

23. When a document was ordered "sealed" or designated "under seal" by a judge and filed with the Clerk of the Court, the Clerk of the Court placed the document in a separate envelope. If a judge's order was labeled "under seal" or "sealed," the Clerk of the Court treated the order as sealed even though there was no express provision in the order directing the order to be sealed. If a lawyer filed a pleading labeled "*ex parte*," the Clerk of the Court would seal that document and send the document to a judge to decide whether the document should be unsealed. A brief description of the document was placed on a label on the envelope. Neither the document nor the envelope was to be viewed by anyone except a judge without a court order.

24. After the Clerk of the Court received a document for filing, the document would go to the Distribution Counter. There, a Distribution Clerk determined who should receive the document. The Distribution Clerk placed a distribution stamp on the document and indicated to whom the document was to be distributed. The document then went to a Scanning Clerk. The Scanning Clerk entered in OnBase the document's restriction code (N, Y or S) and the code or codes for the persons or agencies into whose OnBase folder an electronic copy of the document was to be placed. It is from that electronic folder that the query feature would retrieve documents.

25. The Clerk of the Court determined access levels for OnBase users. MIS implemented those access levels.

26. In an email dated September 11, 2008 to the Clerk of the Court's chief deputy, Renee Baner, a representative of the YCAO, Carol Landis, requested that certain members of the YCAO be given unrestricted access to criminal case documents in OnBase. The Clerk of the Court responded on September 12, 2008, and advised Ms. Landis that if the YCAO needed access to restricted documents in criminal cases, "an Administrative Order needs to be done by Judge Brutinel to give specific access to individuals in your offices as he has done with the Public Defender and AG's office." There is no evidence that the YCAO ever requested an Administrative Order or that an Administrative Order granting such access was ever signed by the Presiding Judge.

27. Two mistakes resulted in members of the YCAO being able to use OnBase to view, print, distribute and email the documents at issue. First, on September 16, 2008, OnBase users in the YCAO were mistakenly granted access to sealed documents in criminal cases. With respect to the YCAO users, that mistake was discovered on December 16, 2010 and corrected by MIS on December 17, 2010. *See* Exhibit 654. As noted above, access to sealed documents should have been limited to judges absent a court order. Second, the Distribution Clerk mistakenly designated sealed orders and minute entries for distribution to the YCAO and Victim Services thus resulting in the Scanning Clerk placing an electronic copy of the document in folders of the YCAO and Victim Services users of OnBase. Ms. Hicks believes this mistake was due to the fact that the sealed documents that were electronically distributed to the YCAO and Victim Services were not labeled "*ex parte*." However, that opinion is contradicted by the fact that one of the Rule 15.9 Orders at issue was labeled "*ex parte*" and yet the Clerk of the Court electronically distributed the Order to the YCAO and Victim Services. *See* ¶ 51, Tab 4.

28. On July 6, 2009, defense counsel filed "Defendant's Motion to File Rule 15.9 Applications *Ex Parte*, *In Camera* and Under Seal, and for an Expedited *Ex Parte*, *In Camera* Under Seal Hearing." *See* Exhibit 613. The death penalty was still in play, so the Defendant's Motion was based on Rules 15.9(b) and (d), Arizona Rules of Criminal Procedure. The Defendant's Motion was delivered to the assigned prosecutor, Joe Butner, in the YCAO. Mr. Butner does not recall seeing the motion. The YCAO did not submit any opposition to the motion.

29. The same day, July 6, 2009, Judge Lindberg ordered the defense motion sealed. *See* Exhibit 615. The Minute Entry Order reflects that a copy of the minute entry was delivered via email to Mr. Butner. Mr. Butner does not recall seeing that document, but even if he did, he did not give the matter much thought. He just thought Defendant was seeking appointment of experts and he was interested in who Defendant would disclose as expert witnesses.

30. On July 10, 2009, Defendant's "Motion for Determination of Indigency and for Rule 15.9 Appointments" was filed. *See* attachment to Exhibit 544. This motion was submitted *ex parte* and, therefore, was not delivered to the YCAO. That same day, Judge Lindberg held an *ex parte* hearing on Defendant's motion.² Judge Lindberg issued two minute entries regarding that hearing. *See* Exhibit 697. The YCAO was endorsed on the shorter minute entry and it was copied to Victim Services. The OnBase history report confirms that this shorter minute entry was electronically distributed to the YCAO and Victim Services. That minute entry was a public document from the time it was posted on OnBase on July 13, 2009 until it was sealed on December 23, 2010. It was unsealed on January 4, 2011. The longer minute entry also is dated July 10, 2009. In that minute entry, Judge Lindberg found "that the Defendant is currently indigent based upon the financial statements and testimony that clarifies the financial statement." Judge Lindberg ordered that "[t]his minute entry shall be sealed in the file, shall not be scanned into the computer system and shall not be distributed." The minute entry was not placed on OnBase until September 2, 2011, but contrary to Judge Lindberg's order, the Clerk of the Court coded the minute entry as a public document. The OnBase history report shows that the minute entry was not electronically distributed. The transcript of the July 10, 2009 hearing was later filed and ordered sealed. *See* Exhibit 513, Tab 38.

31. Each day, a YCAO legal clerk (Seretha Hopper or Barb Genego in the Prescott office and Pamela Spear in the Verde Valley office) accessed OnBase and ran a search query to identify all orders and minute entries that the Clerk of the Court posted to OnBase the day before and designated for distribution to the YCAO. The OnBase search would result in an index identifying all the documents. The legal clerk would then highlight all documents in the index

² Rule 6.4 (b), Arizona Rules of Criminal Procedure provides, in part, that "[t]he defendant shall be examined under oath regarding defendant's financial resources by the judge, magistrate, or court commissioner responsible for determining indigency." Because that rule mandates by the use of "shall" that the defendant be present for an indigency hearing, any victim would be entitled to be present. *See* ARS § 13-4420. Could a trial judge conduct an *ex parte* indigency hearing if he or she concluded that it was necessary to protect a defendant's right to a fair trial? For example, *see State v. Bible*, 175 Ariz. 549, 602 – 603, 858 P.2d 1152, 1205 – 1206 (App. 1992). This Court need not decide this issue because the YCAO did not challenge Judge Lindberg's procedure or ruling.

and print hard copies of the documents for distribution within the YCAO. Once printed, the legal clerk in the Prescott office would deliver the documents to the “first-floor legal clerk” who would collate and staple the documents. (Pamela Spear would do all tasks in the Verde Valley office.) This clerk would briefly scan each document searching for hearing dates so that those dates could be calendared in the YCAO’s calendaring program called P2. This clerk would also verify which deputy county attorney was assigned to the case and then put the document in that attorney’s mail slot.

32. It was not unusual for the first-floor legal clerk (and Pamela Spear in the Verde Valley office) to process several hundred documents printed from OnBase each day.

33. In addition to processing the documents printed daily from OnBase, the first-floor clerk in Prescott acted as receptionist for the YCAO, answered phones and processed the mail. This clerk had no time to review the content of the documents printed from OnBase other than to scan for future hearing dates so that they could be calendared in P2.

34. Seretha Hopper, Barbara Genego or Pamela Spear printed from OnBase fourteen of the documents at issue. *See* Exhibit 513, Tabs 2, 4, 6, 7, 9, 19, 24, 25, 26, 28, 30, 32, 34, 36 and Exhibit 516. They each testified that the printing occurred as part of the daily batch printing of documents distributed by the Clerk of the Court through OnBase to the YCAO. That testimony is consistent with the OnBase history report that reflects that all of the documents, except the Tab 36 document, were electronically distributed to the YCAO and, therefore, would have appeared in the daily query result. The Tab 36 document was not electronically distributed to the YCAO; there has been no explanation of how that document would have been captured in a daily query.

35. Each of these YCAO legal clerks assumed that if a document appeared in the document list generated from the OnBase search query, she was authorized to print and see the document. Even if one of the legal clerks had seen “under seal” or “*ex parte* under seal” on any document, they would have assumed that because the document appeared on OnBase in the generated list of documents resulting from the query, she was entitled to print and distribute the document. None of the legal clerks recalled seeing any of the documents at issue. No member of the DeMocker prosecution team ever asked any of the legal clerks to search for or print confidential documents from OnBase. None of these legal clerks spoke to any member of the DeMocker prosecution team about the documents in issue.

36. YCAO paralegals (Deborah Cowell, Rhonda Grubb and Kathleen Durrer) often accessed documents through OnBase. These three paralegals viewed and/or printed seven of the documents at issue. *See* Exhibits 513, Tabs 9, 10, 14, 16, 17, 30 and 34.

37. YCAO paralegals accessed OnBase on a daily basis to review documents available to them in cases (including *DeMocker*) to which they were assigned.

38. Deborah Cowell began working for the YCAO in July 2004 as a legal secretary. She has been a paralegal with the YCAO since 2005. She became involved in the DeMocker case before it was charged. She knew that the State was seeking the death penalty. Her primary responsibilities were to organize and prepare disclosure statements and research and draft motions and responsive pleadings to motions filed by the defense.

39. Ms. Cowell viewed or viewed and printed four of the documents at issue. *See* Exhibit 513, Tabs 10, 14, 16 and 17. She has no specific recollection of seeing any of the documents except Defendant’s motion seeking appointment of a paralegal. *Id.*, Tab 17. She did

not find the motion of any interest and her reaction to this defense request was, "You know, so what?" *See* Exhibit 659, p. 16, ls. 15 – 16. She did not use any information from these documents nor did the attorneys. She told Joe Butner about the request for a paralegal, but she recalled no conversations with Mr. Butner about Rule 15.9 Orders.

40. In 2006, Ms. Cowell was diagnosed with a medical issue that she believes has affected her memory in that she forgets details. Because of Ms. Cowell's health issues, Rhonda Grubb began assisting with preparation of disclosure statements in January 2010. Ms. Cowell did not discuss Rule 15.9 *ex parte* motions with Ms. Grubb nor did she discuss sealed orders with Ms. Grubb.

41. Ms. Cowell believed there were two levels of "sealed" documents – those prohibited from viewing by the public and those prohibited from viewing by anyone except the court and the defense. She saw many documents on OnBase that were labeled "filed under seal" and she believed that the documents were sealed only from the public. She believed that if a document were labeled "*ex parte*, sealed," then she should not have been seeing it. However, she also believed that if the Clerk of the Court made an "*ex parte*" document available on OnBase, then it was okay for her to look at it. In other words, if the document was accessible on OnBase, Ms. Cowell did not necessarily recognize that she was not supposed to see the document.

42. Although Ms. Cowell told Detective Jarrell that "there were a couple of times when" she saw defense requests for experts on OnBase that she did not think "we should see," Ms. Cowell did not advise the Clerk of the Court that she was able to view "*ex parte*" documents on OnBase. *See* Exhibit 659, p. 14, ls. 7 – 10.

43. Given her heightened awareness about the issue because of this case, Ms. Cowell now would report to the Clerk of the Court if she saw an "*ex parte*, sealed" document on OnBase. However, she believes that at the time she saw the documents, even if she had noticed "*ex parte*, under seal," she is not sure she would have realized she was not supposed to see the documents or that she would have done anything differently.

44. Ms. Cowell's understanding of Rule 15.9 was that it was a mechanism whereby a defendant could approach the court for state funds to assist the defense. She was not sure if the process was confidential, but she believed she was not precluded from seeing Rule 15.9 documents.

45. Kathleen Durrer now works as a Legal Analyst for the YCAO. From 2002 until January 2012, she worked as a paralegal for the YCAO. Ms. Durrer has an MBA and a second master's degree and retired from the Air Force after a career as an accountant and auditor.

46. Ms. Durrer was not involved in the day-to-day work on the DeMocker case. During the trial, Jeff Paupore asked her to print out some documents and assist in preparing a response to a discovery motion involving a request for discovery of an interview that Sheila Polk had with an attorney.

47. Ms. Durrer used OnBase daily. Because of the generic document titles on OnBase, it was not unusual to open several documents before finding the one of interest. She also may have opened a document more than once while trying to find the one that she was looking for.

48. Ms. Durrer assumed that if the document appeared on her computer screen while using OnBase, she was authorized to see it. She knew that documents could be sealed from the public, but available to the lawyers. Therefore, if she saw a sealed document on OnBase, she

assumed it was sealed only from the public. She knew that sealed documents could not be viewed in the Clerk of the Court's hard file.

49. Ms. Durrer drafted the notice regarding viewing an *ex parte* pleading on OnBase in *State v. Wiesner*. See Exhibit 609. When she saw the document on OnBase and being aware of the issue in *DeMocker*, Ms. Durrer contacted the office manager and the Judicial Assistant for Division 1. Ms. Durrer asked if she should be able to see the document on OnBase. The YCAO reported this viewing to the Clerk of the Court's Chief Deputy and the Court Administrator.

50. Ms. Durrer viewed one of the documents at issue. See Exhibit 513, Tab 9; Exhibit 572. She does not recall seeing the document. She did not discuss its contents with anyone or use it in any way. She did not see any other Rule 15.9 documents and she was never asked to search for confidential or Rule 15.9 documents. Ms. Durrer did not report her viewing of this document because she thought that being "under seal" did not mean she was not allowed to see it.

51. There were thirty-eight documents at issue at the beginning of the evidentiary hearing. See Exhibits 513 and 689. The following is a summary of each document. The document restriction code is that reflected in the OnBase history report (Exhibits 516 and 576) at the time(s) of viewing by staff of the YCAO. The name(s) of each person who viewed, printed or emailed the document is included. These activities were done using OnBase unless otherwise noted.

Tab 1 (Document Handle # 1669477): The motion is titled "Defendant's Motion for Rule 15.9 Appointment of Transcription and Document Experts." The motion was filed on July 21, 2009 and is labeled as "Ex Parte, In Camera, Under Seal." According to the OnBase history report (Exhibit 576), the document was coded as "S" (sealed) with "no electronic delivery." Although the document was not electronically delivered to Victim Services, Anthony Camacho viewed the document on August 11, 2009 at 9:49 a.m. There was no testimony regarding how the document would have shown up in a daily query without having been coded for electronic delivery to Victim Services. Ms. Grubb viewed the document in 2012 when the document was coded as public.

Anthony Camacho August 11, 2009 at 9:49 a.m. Viewed
Rhonda Grubb January 19, 2012 at 3:03 p.m. Viewed
Rhonda Grubb March 27, 2012 4:02 p.m. Viewed

Tab 2 (Document Handle # 1681714): This document is titled "Order for Rule 15.9 Appointments" and was signed by Judge Kiger for Judge Lindberg on July 29, 2009. This Order granted the motion in Tab 1. The Order was filed on August 3, 2009. The Order is labeled "Under Seal." There is a Clerk of the Court distribution stamp on the Order clearly reflecting that the Clerk of the Court distributed the Order to defense counsel, the YCAO, Victim Services and Division 6.³ The OnBase history report reflects that the document had a restriction code of "N" (public, not restricted) and was electronically delivered to the folders of the YCAO in Prescott

³ The distribution stamp uses "Victim Witness." Because the division now is known as Victim Services, that is the name this Court has used in this ruling.

(PCA), the Public Defender in Prescott (PPD) and Victim Services in Prescott (PVS). The following people viewed, printed or emailed the document using OnBase unless otherwise noted:

Seretha Hopper August 5, 2009 at 7:02 a.m. Printed
Paula Glover August 5, 2009 at 4:22 p.m. and 4:23 p.m. Viewed and Mailed
Anthony Camacho August 5, 2009 at 10:25 a.m. Viewed
Anthony Camacho August 11, 2009 at 9:39 a.m. and 9:49 a.m. Viewed
Barb Paris October 9, 2009 at 4:28 p.m. Viewed
Joe Butner viewed a hard copy.
Rhonda Grubb January 19, 2012 at 3:04 p.m. Viewed; March 27, 2012 4:05 p.m. to 4:27 p.m. Viewed 3 times and exported four times.

Tab 3 (Document Handle # 1695294): This motion is titled “Defendant’s Motion for Reimbursement of Costs Incurred to Provide Appointed Experts with Necessary Disclosure.” The motion was filed on August 7, 2009 and is labeled as “Ex Parte, In Camera, Under Seal.” The names of four consulting experts are set forth on page two of the motion. The attachments are invoices for the document management company approved by Judge Lindberg in the Order marked as Tab 2. The OnBase history report reflects that the document was delivered only to Division 6 and never viewed through OnBase by any member of the YCAO.

Tab 4 (Document Handle # 1693972): This is the Order granting the motion under Tab 3. The Order is dated August 10, 2009 and was filed on August 11, 2009. The Order is labeled “Ex Parte, In Camera, Under Seal.” The Clerk of the Court’s distribution stamp clearly reflects that it was distributed to the YCAO, Victim Services as well as defense counsel. No expert is mentioned in the Order. The OnBase history report reflects that the document restriction was “S” (sealed) when viewed and printed by Seretha Hopper and Paula Glover, but electronically delivered to the YCAO and Victim Services. The document was a public document when viewed and emailed by Rhonda Grubb. The document was seen by the following people:

Seretha Hopper August 12, 2009 at 7:06 a.m. Printed
Paula Glover August 12, 2009 at 9:49 a.m. Viewed
Joe Butner viewed a hard copy.
Rhonda Grubb January 19, 2012 3:04 p.m. Viewed
Rhonda Grubb March 27, 2012 4:05 – 4:07 p.m. Viewed and exported two times.

Tab 5 (Document Handle # 1712278): This document is titled “Defendant’s Application for Rule 15.9 Appointment” of three consulting experts. The name and field of expertise of each proposed expert is set forth in the motion. The resume of each proposed expert is attached to the motion. The motion was filed on August 18, 2009 and is labeled “Ex Parte, In Camera, Under Seal.” The original of the motion was mailed to the Clerk of the Court and a copy to Judge Lindberg. The OnBase history report reflects that the document was coded as sealed and electronically delivered to Division 6 only. No viewing by any member of the YCAO using OnBase is reflected in the OnBase history report.

Tab 6 (Document Handle # 1711676): This is the Order granting the motion marked under Tab 5. The Order is titled “Order for Rule 15.9 Appointments.” It was signed by Judge Lindberg on August 19, 2009 and filed by the Clerk of the Court on the same day. The Order names the three consulting experts sought by Defendant for appointment by the Court along with each of their approved hourly rate. The Order is labeled “Under Seal.” The Clerk of the Court

distributed the Order to the YCAO, Victim Services as well as defense counsel as clearly reflected by the distribution stamp. The OnBase history report confirms that the document was electronically distributed to the YCAO, Victim Services and the Public Defender even though the document was coded as sealed. The following people accessed the document:

Seretha Hopper August 20, 2009 at 6:59 a.m. Printed
Paula Glover August 20, 2009 at 11:49 a.m. Viewed; 11:51 a.m. Mailed
Joe Butner saw a hard copy.

Tab 7 (Document Handle # 1713201): Judge Lindberg signed this Order on August 20, 2009. This Order amends his August 19, 2009 Order (Tab 6) by changing the hourly rate for one of the consulting experts. The Order is titled "Order for Rule 15.9 Appointment Re Peter Barnett." The Clerk of the Court filed the Order on August 21, 2009. The Order is labeled "Under Seal." The clearly visible distribution stamp reflects that the Clerk of the Court distributed the Order to the YCAO and Victim Services as well as defense. The OnBase history report reflects that the document was coded as sealed, but electronically delivered to the Public Defender, the YCAO and Victim Services, and accessed by the following:

Seretha Hopper August 24, 2009 at 11:39 a.m. Printed
Anthony Camacho August 24, 2009 at 8:09 a.m. Viewed
Paula Glover August 24, 2009 at 9:14 a.m. Viewed and Printed (twice)
Joe Butner viewed a hard copy.

Tab 8 (Document Handle # 1731392): This document is titled "Defendant's Motion for Rule 15.9 Appointment of Expert Jury and Trial Consultant." The motion was filed on August 31, 2009 and is labeled "Ex Parte, In Camera, Under Seal." A copy of the motion was mailed only to Judge Lindberg. The motion sets forth the name of the proposed expert and his resume is attached to the motion. According to the OnBase history report, the document was coded as sealed and electronically delivered only to Division 6. The only person in the YCAO who viewed the document was Barb Paris on September 14, 2009 at 3:36 p.m. There was no explanation given as to how the document would have appeared in a daily query without having been electronically delivered to the YCAO or Victim Services.

Barb Paris September 14, 2009 at 3:36 p.m. Viewed.

Tab 9 (Document Handle # 1729173): This Order grants the motion marked as Tab 8. It is titled "Order for Rule 15.9 Appointment" and was signed by Judge Lindberg on September 2, 2009. The Order sets forth the name of the appointed expert and his hourly billing rate. The Clerk of the Court filed the Order on September 2, 2009. The Order is labeled "Under Seal." In addition, Judge Lindberg wrote on the Order, "Clerk is to file this motion and order in a sealed part of the file." However, according to the distribution stamp, the Clerk of the Court distributed the Order not only to defense counsel, but also to the YCAO and Victim Services. The OnBase history report reflects that the document was code as sealed, but nonetheless electronically delivered to the YCAO, Victim Services and the Public Defender and accessed by the following people:

Seretha Hopper September 4, 2009 at 7:01 a.m. Printed

Anthony Camacho September 4, 2009 at 8:34 a.m. Viewed
Paula Glover September 4, 2009 at 8:48 a.m. Viewed; 8:57 a.m. Printed
Barb Paris September 14, 2009 at 3:39 p.m. Viewed
Kathleen Durrer September 16, 2009 at 9:28 Viewed
Jack Fields January 14, 2010 at 1:30 p.m. Viewed
Joe Butner viewed a hard copy.

Tab 10 (Document Handle # 1780317): This document is titled “Defendant’s Motion for Rule 15.9 Appointment of a Defense Based” specialist. It is labeled “Ex Parte, In Camera, Under Seal.” It was filed on October 2, 2009. (There is no signature or mailing certificate page included in the copy provided to this Court.) The name of the proposed “specialist” is identified on page two of the motion. The “specialist’s” resume is attached to the motion. The OnBase history report reflects that the document initially was coded as public and electronically delivered only to Division 6. As shown below, Marie Higgins viewed the document eighteen days after it was filed. There was no evidence regarding why she viewed it three weeks after it was filed. Because it was not electronically delivered to Victim Services, the document should not have appeared in a daily query. In addition, this document is a motion as opposed to an Order; this motion would not normally be electronically distributed by the Clerk of the Court to anyone. When viewed by Ms. Cowell and Ms. Higgins the document was “public.” The document then was coded as sealed shortly after they viewed the document. The document was coded sealed when Mr. Fields viewed the document using OnBase.

Deborah Cowell October 14, 2009 at 5:14 p.m.; October 20, 2009. Viewed
Marie Higgins October 20, 2009 at 8:28 a.m. Viewed
Jack Fields January 14, 2010 at 1:35 p.m. Viewed

Tab 11 (Document Handle # 1807981): This motion amends the motion marked under Tab 10. It is titled “Defendant’s First Amended Motion for Rule 15.9 Appointment of a Defense Initiated Victim Outreach Specialist.” The motion was filed on October 21, 2009. A copy was sent only to Judge Lindberg. Accordingly, the motion is labeled “Ex Parte, In Camera, Under Seal.” The proposed “specialist” is identified on page two of the document. Judge Lindberg ordered both documents marked as Tabs 10 and 11 be filed under seal. *See* Tab 16. According to the OnBase history report, the document was coded as sealed, electronically delivered only to Division 6 and not viewed using OnBase by any member of the YCAO.

Tab 12 (Document Handle # 1817045): This document is titled “Notice of Filing of Declaration of [name omitted].” It was filed on October 28, 2009. The pleading and attached “declaration” were mailed only to Judge Lindberg; accordingly, the document is labeled “Ex Parte, Under Seal, In Camera.” The document reflects that Division 6 received it on November 2, 2009. The OnBase history report reflects that the document was coded as sealed and electronically delivered only to Division 6.

Jack Fields January 14, 2010 at 1:28 p.m. and 2:33 p.m. Viewed.

Tab 13 (Document Handle # 1836061): This document is titled “Defendant’s Motion for Rule 15.9 Appointment of Field Researcher.” The name of the proposed field researcher is set forth on page one of the motion. The motion was filed on November 9, 2009 and is labeled

“Ex Parte, In Camera, Under Seal.” A copy of the motion was mailed only to Judge Lindberg. When filed, the document was first coded as public and the same day, changed to “Y” (restricted), and electronically delivered only to Division 6. The OnBase history report does not reflect any viewings using OnBase by any member of the YCAO.

Tab 14 (Document Handle # 1835120): This document is titled “Defendant’s Revised Application for Rule 15.9 Appointment of Peter Barnett.” The motion is label “Ex Parte, In Camera, Under Seal.” *See* Tab 15. It was filed on November 12, 2009 and a copy was delivered only to Judge Lindberg. The motion requests that Mr. Barnett’s role in the forensic investigation be expanded. The OnBase report reflects that the document was coded as public and electronically distributed only to Division 6. Therefore, the document should not have shown up in any OnBase user’s query result list.

Marie Higgins November 16, 2009 at 8:05 a.m.; November 17, 2009 at 8:28 a.m.
Viewed

Deborah Cowell November 16, 2009 at 11:35 a.m. Viewed

Jack Fields January 14, 2010 at 2:35 p.m. Viewed

Tab 15 (Document Handle # 1835490): This Order grants the motion marked under Tab 13. The Order is titled “Order for Rule 15.9 Appointment” and denotes that it is “Under Seal.” The appointed researcher’s name is set forth in the order along with her approved hourly rate. The Order was signed by Judge Lindberg on November 10, 2009 and was filed on November 16, 2009. The distribution stamp reflects that the Clerk of the Court distributed the Order to Victim Services along with defense counsel, but not to the YCAO. The OnBase history confirms that the document was coded as sealed and electronically delivered by the Clerk of the Court to Victim Services and the Public Defender, but not the YCAO.

Paula Glover November 17, 2009 at 9:59 a.m. Viewed; 10:10 a.m. Mailed

Tab 16 (Document Handle # 1867359): This is Judge Lindberg’s ruling on the motions marked as Tabs 10 and 11. It is titled “EX PARTE, UNDER SEAL RULING re: Defendant’s October 2, 2009 Motion for Appointment of Specialist.” This signed minute entry order is dated December 9, 2009 and was filed on that same date. There is no distribution stamp on this document. The Order includes the following:

IT IS FURTHER ORDERED that the Clerk of the Yavapai County Superior Court shall seal this Court’s ruling re: Defendant’s October 2, 2009 Motion for Appointment of Specialist, which shall remain under seal and not be opened except upon further order of the Court.

The OnBase history report confirms that the document was coded as sealed and electronically delivered only to the Public Defender.

Jack Fields January 14, 2010 at 1:20 p.m. Viewed

Tab 17 (Document Handle # 1874830): This document is titled “Defendant’s Motion for Rule 15.9 Appointment of Paralegal Assistant Karen McClain.” The motion was filed on December 11, 2009 with a copy delivered only to Judge Lindberg. The motion is labeled “Ex Parte, In Camera, Under Seal.” The name of the paralegal requested by Defendant to be

appointed is contained in the title of the document and on page one of the document. The OnBase history report reflects that the document was electronically distributed only to Division 6. When viewed by Deborah Cowell, the document was coded as public, but when viewed by Jack Fields, it was coded as sealed.

Deborah Cowell December 15, 2009 at 4:16 p.m. Viewed; 4:19 p.m. Printed
Jack Fields January 14, 2010 at 1:20 p.m. Viewed

Tab 18 (Document Handle # 1884181): This document is titled "Defendant's Motion for Reconsideration of Motion for Rule 15.9 Appointment of Defense Based Victim Outreach Specialist [name omitted]" and is labeled "Ex Parte, In Camera, Under Seal." The motion was filed on December 17, 2009 and a copy was delivered only to Judge Lindberg. This motion was ordered to be filed under seal. *See* Tab 20. This document was delivered electronically only to Division 6 and when viewed by Jack Fields, it was sealed according to the OnBase history report.

Jack Fields January 14, 2010 at 2:39 p.m. Viewed

Tab 19 (Document Handle # 1884117): This Order grants the motion marked under Tab 17. The Order is titled "Order for Rule 15.9 Appointment" and is labeled "Under Seal." The order identifies the appointed paralegal and her approved hourly billing rate. Judge Lindberg signed the Order on December 17, 2009. The Order was filed that same day. According to the distribution stamp, the Clerk of the Court distributed the Order to the YCAO, Victim Services and defense counsel. The OnBase history report confirms that the document was electronically delivered to the YCAO, Victim Services and the Public Defender even though coded as sealed.

Seretha Hopper December 18, 2009 at 7:01 a.m. Printed
Paula Glover December 18, 2009 at 9:39 a.m. Viewed; 9:55 a.m. Mailed; 10:08 a.m.
Viewed; 10:09 a.m. Mailed
A copy was found in the "core file."

Tab 20 (Document Handle # 1891795): This is Judge Lindberg's ruling on the motion marked as Tab 18. The minute entry order is titled "EX PARTE, UNDER SEAL COURT ORDER re: Defendant's Motion for Reconsideration." The Order is dated December 22, 2009 and was filed by the Clerk of the Court on December 23, 2009. There is no distribution stamp on this document. The Order contains the following:

IT IS FURTHER ORDERED the Clerk of the Yavapai County Superior Court shall seal Defendant's December 17, 2009 Motion for Reconsideration and this Court's Order regarding same, which shall remain under seal and not be opened except upon further order of the Court.

The OnBase history report reflects that the document was electronically delivered only to the Public Defender and coded as sealed and, therefore, should not have appeared in Victim Services' daily query.

Barb Paris January 12, 2010 at 9:14 a.m. Viewed

Tab 21 (Document Handle # 1918723): This motion was filed on January 11, 2010 and is titled "Defendant's Application for Rule 15.9 Appointment of Dr. Norah Rudin." The motion is labeled "Ex Parte, In Camera, Under Seal" and was delivered only to Judge Lindberg. This motion was ordered to be filed under seal. *See* Tab 26. The proposed consulting expert's name and field of expertise are prominently displayed on page one of the motion. The expert's resume is attached to the motion. The OnBase history report reflects that the document was coded as sealed and electronically delivered only to Division 6. The report does not reflect viewing using OnBase by any member of the YCAO.

Tab 22 (Document Handle # 1918724): This document is titled "Defendant's Motion for Rule 15.9 Appointment of Additional Paralegal Assistance" and is labeled "Ex Parte, In Camera, Under Seal." A copy of the motion was mailed only to Judge Lindberg. He ordered the motion to be filed under seal. *See* Tab 24. The OnBase history report reflects that the document was coded as sealed and electronically delivered only to Division 6.

Jack Fields January 14, 2010 at 1:21 p.m. Viewed; January 18, 2010 at 11:28 a.m. Viewed

Tab 23 (Document Handle # 1918725): This document is titled "Defendant's Motion for Rule 15.9 Appointment of Dr. Alison Galloway" and is labeled "Ex Parte, In Camera, Under Seal." The motion was filed on January 11, 2010 and a copy was delivered only to Judge Lindberg. Judge Lindberg ordered the motion to be filed under seal. *See* Tab 24. The name and field of expertise of the proposed consulting expert are shown on page one of the motion. This motion was ordered by Judge Lindberg to be filed under seal. *See* Tab 24. The OnBase history report confirms that the document was coded as sealed and electronically delivered by the Clerk of the Court only to Division 6.

Jack Fields January 14, 2010 at 1:20 p.m. and 1:21 p.m. Viewed
Jack Fields January 18, 2010 at 11:28 a.m. Viewed

Tab 24 (Document Handle # 1921726): This Order grants the motion marked under Tab 23. The Order is titled "Order for Rule 15.9 Appointment" and is labeled "Under Seal." The Order identifies the consulting expert and her approved billing rate. The Order was signed by Judge Lindberg on January 13, 2010 and filed by the Clerk of the Court on January 14, 2010. The Order states, "The Clerk is directed to file this motion and Order in a sealed part of the file." The Clerk's distribution stamp reflects that the Order was distributed to defense counsel, the YCAO and Victim Services. The OnBase history report reflects that the Clerk of the Court electronically delivered the document to the YCAO, Victim Services and the Public Defender even though the document was coded as sealed.

Barb Paris January 14, 2010 at 3:03 p.m. and 3:05 p.m. Viewed
Seretha Hopper January 15, 2010 at 7:08 a.m. Printed
Paula Glover January 15, 2010 at 2:29 p.m. Viewed; 2:30 p.m. Mailed
Joe Butner viewed a hard copy.

Tab 25 (Document Handle # 1921725): This Order grants the motion marked under Tab 22. The document is titled "Order For Rule 15.9 Appointment" and is labeled "Under Seal." The Order was signed by Judge Lindberg on January 13, 2010 and was filed with the Clerk of

the Court on January 14, 2010. The paralegal firm approved by the court to assist the defense team is identified in the Order. The Order provides that "The Clerk is directed to file this motion and Order in a sealed part of the file." The distribution stamp on the Order reflects that the Order was distributed to defense counsel, the YCAO and Victim Services. The document was coded as sealed, but electronically delivered by the Clerk of the Court to the YCAO, Victim Services and the Public Defender.

Barb Paris January 14, 2010 at 3:03 p.m. and 3:05 p.m. Viewed
Seretha Hopper January 15, 2010 at 7:08 a.m. Printed
Paula Glover January 15, 2010 at 2:29 p.m. Viewed; 2:31 p.m. Mailed
Copy found in "core file."

Tab 26 (Document Handle # 1921724): This Order grants the motion marked under Tab 21, is titled "Order For Rule 15.9 Appointment" and is labeled "Under Seal." The Order was signed by Judge Lindberg on January 13, 2010 and was filed by the Clerk of the Court on January 14, 2010. The Order provides that "The Clerk is directed to file this motion and Order in a sealed part of the file." The distribution stamp reflects that the Order was distributed to the YCAO, Victim Services and the defense team. The OnBase history report confirms that the document was electronically delivered by the Clerk of the Court to the YCAO, Victim Services and the Public Defender even though the document was coded as sealed.

Barb Paris January 14, 2010 at 3:04 p.m. and 3:05 p.m. Viewed
Seretha Hopper January 15, 2010 at 7:08 a.m. Printed
Paula Glover January 15, 2010 at 2:29 p.m. Viewed; 2:31 p.m. Mailed
Joe Butner viewed a hard copy.

Tab 27 (Document Handle # 1967037): This document is titled "Defendant's Application for Rule 15.9 Appointment of Shoeprint Impression Expert." The motion is labeled "Ex Parte, In Camera, Under Seal." The motion was filed on February 11, 2010, and was delivered only to Judge Lindberg. The name of the proposed consulting expert is set forth on page one of the motion and his resume is attached to the motion. This document was coded as sealed and electronically delivered only to Division 6 according to the OnBase history report. No member of the YCAO viewed this document using OnBase.

Tab 28 (Document Handle # 1969403): This Order grants the motion marked under Tab 27. Judge Lindberg signed the Order on February 19, 2010 and it was filed on the same day. The Order identifies the appointed expert and his hourly billing rate. The Order is labeled "Under Seal." The Order was distributed to the YCAO, Victim Witness and the defense team according to the distribution stamp. The OnBase history report confirms that the document was electronically delivered by the Clerk of the Court to the YCAO, Victim Services and the Public Defender despite being coded sealed.

Seretha Hopper February 22, 2010 at 7:00 a.m. Printed
Anthony Camacho February 22, 2010 at 7:43 a.m. Viewed
Pamela Spear February 22, 2010 at 7:57 a.m. Printed
Copy found in "core file."

Tab 29 (Document Handle # 2014006): This document is titled "Defendant's Motion Rule 15.9 Appointment of Dr. Anne Kroman." The motion was filed on March 15, 2010 and is labeled "Ex Parte, In Camera, Under Seal." Judge Lindberg ordered this motion to be filed under seal. *See* Tab 30. Obviously, the motion identifies the name of the proposed expert and her field of expertise. The motion was delivered only to Judge Lindberg. The OnBase report reflects that the document was initially coded as public and then coded as sealed two days later. The document was electronically delivered only to Division 6. The OnBase history report shows that no one in the YCAO viewed the document using OnBase.

Tab 30 (Document Handle # 2033124): This Order grants the motion marked under Tab 29. It is titled "Order For Rule 15.9 Appointment" and is labeled "Under Seal." The Order provides that "The Clerk is directed to file this motion and Order in a sealed part of the file." The Order was signed by Judge Lindberg on March 25, 2010 and was filed on March 29, 2010. The Order was distributed by the Clerk of the Court to the YCAO, Victim Services and the defense team according to the distribution stamp. The document was coded as sealed, but electronically delivered by the Clerk of the Court to the YCAO, Victim Services and the Public Defender according to the OnBase history report.

Barbara Genego March 29, 2010 at 7:48 a.m. Printed
Paula Glover March 29, 2010 at 8:10 a.m. Viewed
Barb Paris March 29, 2010 at 2:20 p.m. Viewed
Rhonda Grubb – See ¶ 161.
Copy found in "core file."

Tab 31 (Document Handle # 2075024): This document is "Defendant's Motion Rule 15.9 Appointment of Dr. Thomas Reidy" and is labeled "Ex Parte, In Camera, Under Seal." The motion was filed on April 13, 2010 and a copy was delivered only to Judge Lindberg. The name and field of expertise of the proposed consulting expert are set out on page one of the motion. Dr. Reidy's resume is attached to the motion. Judge Lindberg ordered that this motion be filed under seal. *See* Tab 32. The document was coded as sealed and not electronically delivered to anyone according to the OnBase history report. That report reflects that the document was not viewed by anyone in the YCAO using OnBase.

Tab 32 (Document Handle # 2074988): This Order grants Tab 31's motion. It is titled "Order For Rule 15.9 Appointment" and is labeled "Under Seal." The Order provides that "The Clerk is directed to file this motion and Order in a sealed part of the file." The Order was signed by Judge Lindberg on April 19, 2010 and was filed on April 21, 2010. The distribution stamp reflects that the Clerk of the Court distributed the Order to the defense team, the YCAO and Victim Services. Although the document was coded as sealed, the Clerk of the Court electronically delivered it to the YCAO, Victim Services and the Public Defender according to the OnBase history report.

Seretha Hopper April 22, 2010 at 6:59 a.m. Printed
Paula Glover April 22, 2010 at 12:41 p.m. Viewed; 12:44 p.m. Mailed

Tab 33 (Document Handle # 2116280): This document is titled "Defendant's Motion For Rule 15.9 Appointment of Darko Babic" and is labeled "Ex Parte, In Camera, Under Seal." The motion was filed on April 23, 2010 and a copy was delivered only to Judge Lindberg. Mr.

Babic's resume is attached to the motion. The motion was ordered to be filed under seal. *See* Tab 34. The OnBase history report shows that the document initially was coded as restricted and then on April 26, 2010, changed to sealed. No one from the YCAO viewed the document using OnBase. The document was electronically distributed only to Division 6.

Tab 34 (Document Handle # 2122796): This Order grants the motion marked under Tab 33. The Order is titled "Order For Rule 15.9 Appointment" and is labeled "Under Seal." The Order provides that "The Clerk is directed to file this motion and Order in a sealed part of the file." The Order was signed by Judge Lindberg on April 27, 2010 and was filed the next day. The Order was distributed by the Clerk of the court to the defense team, the YCAO and Victim Services according to the distribution stamp and that is consistent with the information in the OnBase history report. That report shows that the document was coded as sealed.

Anthony Camacho April 30, 2010 at 7:12 a.m. Viewed
Barbara Genego April 30, 2010 at 7:34 a.m. Printed
Paula Glover April 30, 2010 at 8:44 a.m. Viewed; 8:45 a.m. Mailed
Barb Paris May 3, 2010 at 12:33 p.m. Viewed
Barb Paris May 4, 2010 at 4:38 p.m. Viewed
Rhonda Grubb – *See* ¶ 161.
Jack Fields October 9, 2010 at 2:53 p.m. Viewed
Jack Fields October 10, 2010 at 1:12 p.m. and 1:13 p.m. Viewed

Tab 35 (Document Handle # 2140992): This minute entry is dated May 13, 2010 and relates to an "ex parte in-chambers hearing re: funding issues." Judge Lindberg ordered "that the minute entry from this hearing shall be sealed and not distributed." The hearing apparently was about payment for transcription of jail conservations. Judge Lindberg denied the request. There is no distribution stamp on this document. The OnBase history for this document is contained in Exhibit 517. It shows that the document was coded as sealed, but is now a public document. When accessed by Ms. Grubb, the document was a public document. The history does not reflect any electronic distribution. Therefore, the document should not have appeared in any OnBase user's query results although the timing of Ms. Moreton's viewing is consistent with a review of the document as part of the morning query.

Pamela Moreton May 14, 2010 8:54 a.m. Viewed
Jack Fields October 9, 2010 at 2:51 p.m. Viewed
Rhonda Grubb March 9, 2012 at 9:02 a.m. Viewed and Printed

Tab 36 (Document Handle # 2209410): This document is titled "Reply to Supplemental Request Regarding Sanctions Based on the State's Destruction of Biological Evidence, False Reporting of Biological Evidence Results and Defiance of Court Orders." The reply is labeled "Ex Parte Under Seal" and was filed on June 23, 2010. A copy was delivered only to Judge Lindberg. The document was coded as sealed and electronically delivered only to Division 6 according to the OnBase history report. Because this pleading was not electronically delivered to the YCAO and should not have been because it is a responsive pleading as opposed to an Order, the document should not have appeared in the YCAO's result list of a daily query.

Pamela Spear July 7, 2010 at 8:17 a.m. Viewed

Jack Fields October 9, 2010 at 2:47 p.m. Viewed
Jack Fields October 10, 2010 at 1:05 p.m. Viewed

Tab 37 (Document Handle # 2222956): This document is titled "Defendant's Request for Conference with the Court" and is labeled "Ex Parte, In Camera, Under Seal." The motion was filed on July 8, 2010. A copy of the motion was delivered only to Judge Darrow. The OnBase history report shows that this is now a public document, but was coded as sealed from the time it was filed until December 5, 2011. The document was electronically delivered to PTB – Pro Tem Division B.

Jack Fields October 10, 2010 at 1:02 p.m. Viewed

Tab 38 (Document Handle # 2470529): The document is titled "Notice of Filing" and the transcript of an *ex parte* hearing held on July 10, 2009 is attached. The notice and transcript were filed on September 17, 2010. The notice is labeled "Ex Parte, Under Seal." The transcript reflects that Judge Lindberg stated:

My direction to the clerk would be that if Mr. Sears and Mr. Hammond have filed defendant's motion for determination of indigency and 15.9 appointments, that that also is filed under seal, but that also is to be sealed by the clerk, not to be opened except on further order of the Court, and is to be made available to the appellate court, if there is any conviction and if there is any appeal on the case.
See p. 3, ls. 5 – 12.

The July 10, 2009 minute entry directs that the motion, Defendant's financial affidavit and the minute entry "be sealed in the file, shall not be scanned into the computer system and shall not be distributed." *See Exhibit 697.* The OnBase history report reflects that the document was coded sealed and electronically distributed to Division 6 and PTB – Pro Tem Division B.

Jack Fields October 8, 2010 at 5:31 p.m. Viewed

52. As noted above, all fourteen of the signed Orders granting Rule 15.9 applications bore a distribution stamp as shown below. *See Exhibit 513, Tabs 2, 4, 6, 7, 9, 15, 19, 24, 25, 26, 28, 30, 32 and 34.*

23 DATED this 10 day of August, 2009.

24

25

26

27 APPROVED: Dean Trebesch

28

Honorable Thomas B. Lindberg
YAVAPAI COUNTY SUPERIOR COURT

County Atty. [] Def Atty. [x] Sears
Victim Witness. [] Osborn Metedon
[] APD. [] YSCO/Jail [] YSCO/arrivals
[] BOC [] Div w/tlc TOIAL
[] Other [] Other Dean Trebesch (PD)
[] Dispo Clk w/tlc [] Obligations

AUG 11 2009

53. At a status conference on July 21, 2011, Judge Darrow advised counsel that he had reviewed sixteen Rule 15.9 Orders and that fourteen contained distribution stamps showing that hard copies of the orders were given to the YCAO. *See* Exhibit 579, pp. 9, 12 – 13. Counsel stated that they were not aware of this. *Id.*

54. Jack Fields is an attorney and served as Chief Civil Deputy and supervised the civil department of YCAO. In addition to supervising the civil division attorneys, Mr. Fields also acted as general counsel to several County departments, including the Yavapai County Sheriff's Office and Yavapai County Public Fiduciary.

55. In 2006 or 2007, Mr. Fields submitted a request to MIS for a higher level of access to documents on OnBase so that he could view restricted and sealed documents filed in mental health, adoption and fiduciary/probate cases. His request was approved. According to the Clerk of the Court, this request should not have been approved without an Administrative Order (AO) from the Presiding Judge. No AO was requested or issued. As a result of being granted access to closed case types (mental health, adoption and probate), Mr. Fields also gained unrestricted access to criminal case documents on OnBase.

56. To Mr. Fields, "sealed" meant that the document was unavailable to the public, generally available to the parties, and, very rarely, only available to one party. He knew that *ex parte* communications occurred in temporary guardianship and conservatorship proceedings and could happen in civil cases (for example, a request for appointment of a receiver or for a provisional remedy without notice) with notice later given to the other side of the *ex parte* contact.

57. On January 13, 2010, Judge Lindberg signed an order relating to Defendant's conditions of confinement in the Yavapai County Jail. *See* Exhibit 531. That Order provided that the Sheriff had to provide Defendant additional jail resources, including a private room, a computer, computer equipment, and a private telephone line. The Order provided that if the Sheriff was opposed to the provisions of the Order, the Sheriff could file an objection by January 15, 2012.

58. Mr. Fields consulted with the Sheriff or the Jail Commander about Judge Lindberg's Order. Mr. Fields was instructed to file an objection to the Order because the Sheriff believed the Order adversely impacted jail operations and jail safety. In preparing the opposition, Mr. Fields used OnBase to view the motions related to the issue and to ascertain any history that might relate to the issue of Defendant's conditions of confinement. Mr. Fields also had a brief discussion about the issue with one of the attorneys on the prosecution team.

59. Because of the generic document titles appearing on the index of documents for the DeMocker case on OnBase, Mr. Fields opened many documents that had no bearing on the conditions of confinement issue. *See* Exhibit 541. In Mr. Fields' words, his OnBase review was "hit or miss" because of the lack of information in the document titles in the OnBase index. If, after a brief scan of an opened document, the document was not relevant to the confinement issue, Mr. Fields closed the document and continued his OnBase search.

60. Among the documents Mr. Fields viewed during this OnBase search in January 2010, were nine of the subject documents. *See* Exhibit 513, Tabs 9, 10, 12, 14, 16, 17, 18, 22 and 23. He has no recollection of seeing any of those documents because none had anything to

do with the conditions of confinement issue. Nor does he have any recollection of speaking to anyone associated with the DeMocker prosecution team about any of those documents.

61. On January 21, 2010, Mr. Fields filed the Sheriff's opposition to Judge Lindberg's Order. *See* Exhibit 532. Mr. Fields wrote that "Democker [sic] has a defense team consisting of over a dozen individuals, including investigators, experts, paralegals, and three attorneys." *Id.*, pp. 2, 5, 7.

62. On October 5, 2010, Western News & Info, Inc. (WNI) moved to intervene in the DeMocker case for the purpose of requesting the court to unseal various sealed documents. *See* Exhibit 525. WNI publishes *The Daily Courier*. WNI's motion states that based on a review of the file, "the Court has sealed about 65 of the approximately 400 case records posted online, and has closed at least some portion of 16 of the first 51 days of trial." *Id.*, p. 3. WNI noted that many records "have been 'purged from the file.'" *Id.*, p. 7. WNI requested that Judge Darrow "review the sealed records and proceedings pursuant to the procedural and substantive requirements prescribed by the First Amendment and Arizona law." *Id.*, p. 8. Attached to the motion was a printout of the online docket with the sealed documents identified.

63. The YCAO viewed WNI's motion as a public records request. The matter was assigned to Mr. Fields to formulate a response.

64. Again, Mr. Fields turned to OnBase and between October 8 and October 10, 2010, Mr. Fields viewed a number of documents in the DeMocker file on OnBase. *See* Exhibit 541. Mr. Fields viewed five of the documents in issue. *See* Exhibit 513, Tabs 34, 35, 36, 37 and 38. Mr. Fields does not recall either seeing any of those documents or talking about the content of the documents with anyone.

65. Mr. Fields' OnBase history is set out in Exhibit 541. Based on that report, the Court finds the following (the Tab numbers relate to Exhibit 513):

On January 14, 2010, between 1:20 p.m. and 2:39 p.m., Mr. Fields viewed seventy-one (71) documents on OnBase. Eight of those documents were documents in issue. Tab 23 was viewed at 1:20 p.m. In that same minute, Mr. Fields viewed Tab 17. Following those two views, Mr. Fields viewed two more documents at 1:20 p.m.

During 1:21 p.m., Mr. Fields viewed six documents, two of which are at issue – Tabs 22 and 23. One other document was viewed before those two documents and three after.

At 1:28 p.m., Mr. Fields viewed Tab 12. He viewed three documents during that one minute and five other documents during the next minute, 1:29 p.m.

At 1:30 p.m., Mr. Fields viewed Tab 9. He viewed three documents at the same time before viewing Tab 9 and one document after viewing Tab 9.

At 1:35 p.m., Mr. Fields viewed Tab 10. Between 1:31 p.m. and the viewing of Tab 10, Mr. Fields viewed fourteen (14) documents on OnBase. After viewing Tab 10, Mr. Fields viewed two more documents at 1:35 p.m.

At 2:35 p.m., Mr. Fields viewed Tab 14. He viewed two more documents at 2:35 p.m. following viewing Tab 14.

At 2:39 p.m., Mr. Fields viewed Tab 18. During that one minute, Mr. Fields viewed four documents on OnBase. Between viewing Tab 14 and 18, Mr. Fields viewed eleven (11) documents. Mr. Fields continued to view documents on OnBase after viewing Tab 18 and viewed three more documents at 2:39 p.m.

On January 18, 2010, between 11:26 a.m. and 11:31 a.m., Mr. Fields viewed fourteen (14) documents including Tabs 22 and 23. Those two documents were viewed at 11:28 a.m. along with four other documents.

Beginning on October 8 and continuing through October 10, 2010, Mr. Fields viewed one hundred (100) documents on OnBase. Five of those documents are at issue – Tabs 34, 35, 36, 37 and 38.

Tab 38 was viewed at 5:31 p.m. on October 8, 2010. In that same minute, another document was viewed before Tab 38. Mr. Fields viewed no other documents on OnBase after viewing Tab 38 so the length of time that Mr. Fields viewed Tab 38 cannot be determined from the report.

Mr. Fields viewed Tabs 35 and 36 on October 9, 2010. Each document was viewed for one minute or less.

Mr. Fields viewed Tab 34 at 2:53 p.m. on October 9, 2010. After viewing Tab 34, Mr. Fields viewed no additional documents on OnBase on October 9, 2010.

On October 10, 2010, Mr. Fields viewed Tabs 36 and 37 in the span of four minutes along with thirteen (13) other documents. Seven minutes later, he viewed Tab 34 twice in the span of one minute along with nine other documents.

66. Mr. Fields viewed twelve of the documents at issue for one minute or less – Tabs 9, 10, 12, 14, 17, 18, 22, 23, 34 (10/10/2010 viewing), 35, 36 and 37. Because Mr. Fields viewed no other documents on OnBase after viewing Tab 34 (10/09/2010 viewing) and Tab 38, the Court cannot determine from Exhibit 541 how long Mr. Fields viewed those documents.

67. In his interview with Detective Jarrell, Mr. Fields stated that “part of my job function was to take a look at what, in this case, the press was asking for in the form of a motion, and determining whether or not it would impact either the investigation, any ongoing investigation or the – or it would reveal information that’s privileged, either of victims or of the defendant or of other people.” *See* Exhibit 673, pp. 8 – 9. Mr. Fields told Detective Jarrell that he “did review some of the files that they had dealing with, I think, some of the records that were requested to be released.” *Id.*, p. 10. In doing this research regarding the public records requests, Mr. Fields accessed on OnBase the items “the newspaper and TV station listed” along with “other similar things before and after those dates.” *Id.*, p. 13. Mr. Fields described the content of “the stuff that was ex parte” as dealing “with the cost of the defense” and, while not specific, he did learn that the defense “had a conference in chambers, and this is what we’re

going to do, and we're going to allow this expert. Most of that stuff, to my understanding, was disclosed later on." *Id.*, p. 15.

68. Regarding the sealed transcript (Exhibit 541, Tab 38), Mr. Fields did not read anything except the notice of filing of the transcript and the cover page of the transcript.

69. On October 11, 2010, Mr. Fields filed a response to WNI's motion. *See* Exhibit 526. In that response, Mr. Fields highlighted the sealed documents related to jurors. *Id.*, p. 2. Other than those documents, Mr. Fields did not mention any sealed documents apart from agreeing "it is appropriate for the Court to review its Orders sealing the records to either unseal them or make findings as required by law." *Id.*, p. 3.

70. On October 14, 2010, Mr. Fields filed a pleading that, among other things, requested that the Court review *in camera* the sealed documents identified by WNI that related to (1) Renee Girard and (2) "the July 21, 2009 interview of Steven DeMocker." *See* Exhibit 527, p. 2. Those documents related to the new charges arising from the alleged false email. Mr. Fields advised the court that Defendant objected to release of those records to the media because "such a disclosure would interfere with Mr. DeMocker's rights to a fair and just jury trial, and that disclosure would constitute a violation by YCAO of the Arizona Rules of Professional Conduct ("ARPC") in general, and ARPC 3.8 in particular." *Id.*, p. 3. Mr. Fields advised the court that the YCAO believed that the records "are public records," but suggested "that the Court is in the best position to determine if release of the requested records does constitute a threat to DeMocker's rights." *Id.*

71. None of the pleadings filed by Mr. Fields in response to WNI's motion mention the July 2009 indigency hearing or transcript.

72. WNI's motion was not the first from the media for release of records in the case. Both ABC and CBS requested records. On February 4, 2009, Jack Fields filed the YCAO's "Amended Motion for Hearing and Ruling on Public Records Request and for *In Camera* Review of Records." It appears that the YCAO and counsel for ABC reached an agreement regarding release of certain documents. In this motion, Mr. Fields requested the Court to review the documents *in camera* and consider Defendant's "objection" to release of the documents. *See* Exhibit 643.

73. Mr. Fields also filed pleadings related to disputes with a member of the public, William E. Williams. *See* Exhibits 649 and 650.

74. Mr. Fields assumed that if he was able to view a document on OnBase, he was authorized to see the document. Therefore, he did not attempt to determine if the YCAO had any of the documents at issue nor did he report his reviewing of any of these documents to the Clerk of the Court or the Court.

75. None of the documents at issue made an impression on Mr. Fields because they were not relevant to the issues he was researching. Regarding those that dealt with cost issues, none of the documents were surprising because he assumed that Defendant would be asking the Court to appoint experts.

76. During these OnBase searches, Mr. Fields viewed fourteen of the documents at issue. He noticed that the documents reflected that there were many *ex parte* communications taking place regarding cost issues. During a brief conversation with Jeff Paupore, Mr. Fields mentioned that there seemed to be a lot of *ex parte* communications occurring in the case.

According to Mr. Fields, Mr. Paupore seemed surprised and responded, "I don't want to know anything about it, keep it on the civil side." Mr. Paupore has no recollection of this conversation.

77. Jack Fields understood that he had access to "sealed" documents in OnBase regarding civil matters such as adoptions, mental health matters, and probate cases. He did not understand that he had access to "sealed" documents in OnBase regarding criminal cases.

78. Jack Fields assumed that he had authority to access any document made available to him in the OnBase system. He did not expect that he could access documents that he was not authorized to view.

79. Beginning in January 2009 and into February 2010, Mr. Fields attended seven court hearings in the case. *See* Exhibit 668. The hearings dealt with matters such as public records, Defendant's request for a new probable cause determination, Defendant's arraignment on the supervening indictment, withdrawal of Defendant's first defense team and appointment of new counsel, Defendant's solitary confinement and release conditions, Defendant's motion for mistrial, unsealing of documents, reassignment of the case to Judge Darrow, release of exhibits, preparation of transcripts, release of interview transcripts, victim's rights, release of personal property and preclusion of experts and experts' qualifications.

80. Joe Butner was a lawyer with the YCAO for approximately fourteen years. He retired from the YCAO in 2011. From 1999 to 2002, he served as an elected Justice of the Peace in the Verde Valley. For two years, he was employed as the Chief Judge of the Yavapai Apache Tribal Court. Prior to joining the YCAO, he practiced law in Maricopa County for fourteen years. Mr. Butner's private practice in Maricopa County was primarily civil, but he did do some criminal defense work including two felony trials.

81. As a prosecutor with the YCAO, Mr. Butner handled all types of criminal cases from DUI's to first-degree murder cases. He estimated that he handled five death penalty cases during his tenure at the YCAO.

82. Mr. Butner was assigned to the DeMocker case in May 2009 after Mark Ainley left the YCAO for personal reasons. At the time of his assignment to this case, Mr. Butner had a full caseload of felony cases. That later changed when all his cases, except DeMocker, were reassigned. For several months, he was the only attorney assigned to DeMocker. In approximately August 2009, Jeff Paupore volunteered to assist on the DeMocker case.

83. Prior to DeMocker becoming his only case, Mr. Butner's office was in the Verde Valley. After DeMocker became his only case, Mr. Butner was assigned a small office in Prescott. While he kept his office in the Verde Valley, he rarely visited it, spending the majority of his time in his Prescott office.

84. When Mr. Butner was first assigned to this case, he realized that there had been no disclosure on behalf of the State done by Mr. Ainley. He recognized that he was "way behind the power curve" and was "playing catch-up." The voluminous materials were unorganized. Along with paralegal Deborah Cowell, Mr. Butner's initial focus was preparing the State's initial disclosure statement.

85. Although Mr. Butner knew that OnBase was a tool to access Clerk of the Court records and had been trained how to use the program, he never used it.

86. Mr. Butner assumed that case related documents that he received had been sent to him by opposing counsel or delivered to him by one of the YCAO's runners after the document was filed with the Clerk of the Court. He did not realize that some of the documents were being printed by the YCAO staff from OnBase and then routed to him.

87. Mr. Butner had retired by the time the unauthorized viewing of sealed documents became an issue. Jeff Paupore disclosed to the Court that he had found the "core file" in a banker's box from Mr. Butner's Verde Valley office in which some of the documents at issue were located. See Exhibit 523.

88. This "core file" contained eleven of the documents at issue. Mr. Butner recalls seeing seven of those documents as described below:

1. Regarding the Order marked as Exhibit 523, Tab A, Mr. Butner remembers seeing it. (See also Exhibit 513, Tab 2.) He never paid attention to the Clerk's distribution stamp. While "under seal" appears on the Order, Mr. Butner had no reason to believe that he was not entitled to see it because he believed he had received the Order in the ordinary way from the Clerk of the Court's Office. This Order appointed document imaging and transcription companies to assist Defendant.

2. Mr. Butner received the Order marked as Exhibit 523, Tab B. (See also Exhibit 513, Tab 4.) It gave him no insight into the defense strategy. The Order does not identify any consulting expert.

3. Mr. Butner received the Order dated August 19, 2009 and marked as Exhibit 523, Tab C. (See also Exhibit 513, Tab 6.) The Order identified three consulting experts appointed to assist Defendant. Mr. Butner did not investigate the named experts or instruct anyone else to investigate them in response to receiving this Order. Two of the experts named in this Order (Peter Barnett and Gregg Curry) were disclosed approximately four months later by Defendant as testifying experts in Defendant's disclosure statement dated December 22, 2009. See Exhibit 542, p. 30-009. In those four months, Joe Butner did not alter the State's prosecution strategy in response to his viewing this Order.

The third expert, a neuropsychologist, revealed in the Order dated August 19, 2009 was not disclosed as a testifying expert. In Defendant's application (see Exhibit 513, Tab 5), Defendant requested appointment of the neuropsychologist as a potential witness "in mitigation." *Id.*, p. 2. In February 2010, Mr. Butner did not request that Defendant undergo a prescreen evaluation (see Exhibit 687) because of information contained in this Order, but because Arizona law required a determination of Defendant's IQ in order to seek the death penalty. See A.R.S. § 13-753 (B).

4. Mr. Butner received the Order dated August 20, 2009 and marked as Exhibit 523, Tab D. (See also Exhibit 513, Tab 7.) The Order related to one of the experts identified in Exhibit 523, Tab C. Again, Mr. Butner did not investigate the named expert or instruct anyone else to investigate him in response to receiving this Order. The named expert was disclosed on December 22, 2009.

5. Mr. Butner received the Order dated September 2, 2009 and marked as Exhibit 523, Tab E. (*See also* Exhibit 513, Tab 9.) Mr. Butner did not investigate the named expert or instruct anyone else to investigate the expert in response to receiving this Order.

6. Mr. Butner received the Order dated January 13, 2010 and marked as Exhibit 523, Tab H. (*See also* Exhibit 513, Tab 26.) He circled the name of the expert and put a question mark next to the circle because he was curious about the expert's field of expertise and intended to ask Mr. Sears about it. Mr. Butner did not investigate the named expert or instruct anyone else to investigate her in response to receiving this Order. Defendant disclosed the named expert, Dr. Norah Rudin, as a testifying expert on February 5, 2010. *See* Exhibit 542, p. 30-013. After Dr. Rudin was interviewed, she was disclosed as an expert witness for the State. *See* Exhibit 543, p. 31-0133.

7. Mr. Butner received the Order dated January 13, 2010 and marked as Exhibit 523, Tab I. (*See also* Exhibit 513, Tab 24.) He circled the name of the expert and put a question mark next to the circle because he was curious about the expert's field of expertise and intended to ask Mr. Sears about it. Mr. Butner did not investigate the named expert or instruct anyone else to investigate her in response to receiving this Order. Defendant disclosed the named expert, Dr. Galloway, as a testifying expert in a disclosure statement dated February 5, 2010. *See* Exhibit 542, p. 30-012.

91. Regarding the Orders that Mr. Butner did see, he did not inquire about why he was receiving sealed orders, but not the underlying motions or applications. He never gave much thought to why the county was paying defense costs while, at the same time, Defendant had privately retained defense lawyers. However, he does recall asking Mr. Sears about the county's involvement and was told that the defense had worked out an agreement with the county for payment of defense costs. Mr. Butner knew that a capital case had recently been reversed because of lack of funding by the county for defense costs, so Mr. Butner assumed that the county was now being more cautious with death penalty cases.

92. Mr. Butner later told Ms. Polk that he did see Rule 15.9 Orders, but he paid no attention to them and simply put them in a pile to deal with at an appropriate time.

93. On behalf of the State, Mr. Butner signed numerous disclosure statements identifying expert witnesses for the State. *See* Exhibit 543. The selection and identification of these experts were independent of Defendant's Rule 15.9 applications and orders. In other words, Mr. Butner's reading of the seven Rule 15.9 orders found in his core file did not have anything to do with selection and identification of the State's experts.

94. No one in the YCAO told Mr. Butner that they had viewed Defendant's Rule 15.9 applications or orders nor did anyone give him any information about those documents. Mr. Butner did not request that anyone go on OnBase and attempt to get confidential or sealed information.

95. Mr. Fields did not tell Mr. Butner about his (Mr. Field's) OnBase searches or share any information with Mr. Butner regarding any of the documents Mr. Fields viewed.

96. Mr. Butner learned about the defense's *ex parte* contacts with Judge Lindberg after Mr. Paupore reviewed the court file on November 24, 2010. After Mr. Paupore viewed the

file, he reported to Mr. Butner that there had been numerous *ex parte* hearings (between 28 and 29) and that the pleadings were sealed. This concerned Mr. Butner because he had not known that the defense team had met so many times with Judge Lindberg. As a result, on December 3, 2010, Mr. Butner filed a motion for change of judge for cause. *See* Exhibit 597.

97. In that motion for change of judge for cause, Mr. Butner wrote that the State had learned of twenty-nine *ex parte* motions and orders when Mr. Paupore reviewed the outside of the sealed envelopes on November 24, 2010. *See* Exhibit 597, p. 2. The motion argued that the *ex parte* proceedings violated victims' rights, Rule 15.9 and the Code of Judicial Conduct. Attached to the motion were several exhibits including Mr. Paupore's affidavit in which he recounts his review of the court file. Exhibit F to that motion is a "List of Sealed Documents and Orders" that Mr. Paupore compiled from the labels on the outside of the sealed envelopes.

98. While Mr. Butner believed that Jeffrey Paupore had volunteered to assist with this case in August 2009, (*see* ¶ 82), Mr. Paupore testified that he was assigned to the case in January 2010. Prior to being assigned to this case, Mr. Paupore served as a supervisor in the criminal division of the YCAO. Because this case was so demanding, he could not continue to act as a supervisor. His role was to assist Joe Butner wherever needed.

99. At a status conference, Judge Darrow stated that there would be no more *ex parte* conferences. Because Mr. Paupore was unaware of any *ex parte* conferences having taken place, he was not sure what Judge Darrow was talking about.

100. On July 12, 2011, Judge Darrow advised counsel that he had seen in the file that a number of Rule 15.9 Orders had been routed by the Clerk of the Court to the YCAO. *See* ¶ 53. Judge Darrow asked Mr. Paupore to attempt to locate those documents. *See* Exhibit 579, p. 24.

101. Mr. Paupore conducted a search of the case files and found the "core file" in a file box from Mr. Butner's Verde Valley office. In that core file, Mr. Paupore found the Rule 15.9 Orders marked as Exhibit 523. No Rule 15.9 motions or applications were found. Mr. Paupore reported his finding to Judge Darrow. *See* Exhibit 551. Prior to finding these documents, Mr. Paupore had not been told by anyone at the YCAO that they had viewed sealed documents on OnBase.

102. In November 2010, Mr. Paupore wanted to view the Clerk of the Court's files regarding the case. The YCAO was planning to take the case back to the grand jury. As a result of the investigation stemming from Mr. Sears' revelation that the life insurance proceeds had been paid, Mr. Paupore believed that \$350,000.00 had been transferred from Carol Kennedy's testamentary trust into Defendant's checking account by his daughter. Mr. Paupore believed the bank records showed that Defendant received the money in July 2009 when Defendant was declared indigent by the court, so Mr. Paupore wanted to see the financial affidavit to determine if there was sufficient evidence to support a charge of perjury. He could not find the financial affidavit on OnBase, something he found curious.

103. Unable to find Defendant's financial affidavit on OnBase, Mr. Paupore contacted the Clerk of the Court's Office regarding viewing the court file. Because the Clerk of the Court did not have the file, Mr. Paupore was directed to Judge Darrow's division. He emailed Judge Darrow's Judicial Assistant, Robin Gearhart, requesting that juror contact information be unsealed. After consulting with Judge Darrow regarding Mr. Paupore's request, Ms. Gearhart responded and told Mr. Paupore that he would need to file a written motion requesting a court

order to unseal that information. In response to Mr. Paupore's email request, a minute entry was issued memorializing this policy. *See* Exhibit 696. Mr. Paupore then called Judge Darrow's division and spoke with Ms. Gearhart. Mr. Paupore requested to see that portion of the file spanning a certain time period. Ms. Gearhart again consulted with Judge Darrow. She called and told Mr. Paupore that Judge Darrow gave his permission for Mr. Paupore to see the public files, but that if he wanted to see any sealed documents, he would need to file a written motion. Mr. Paupore came to the division on November 24, 2010. There, he was given two volumes of the court file along with an "expando file" containing numerous manila envelopes. Ms. Gearhart had placed the files in the division's jury room. Mr. Paupore saw in the court files twenty-nine white pages indicating that documents had been "purged" from the file. On the manila envelopes were handwritten labels giving a brief description of the document in each envelope. Mr. Paupore realized that the "purged" documents were the documents placed in the manila envelopes.

104. Mr. Paupore did not find Defendant's financial affidavit during his file review.

105. Mr. Paupore did not open any of the sealed envelopes, but made a list of the titles of the documents by reading the labels on outside of the envelopes. *See* Exhibit 599; also Exhibit F to Exhibit 597. This "List of Sealed Documents and Orders" that Mr. Paupore compiled on November 24, 2010 has twenty-nine entries. Fifteen of those entries contain no name of a consulting expert or area of expertise. *See* Titles 1, 3, 4, 5, 6, 8, 11, 14, 16, 18, 20, 23, 25, 26 and 27. Eight of the entries contain the area of expertise of a proposed expert or litigation support person – "financial forensic expert," "consulting neuropsychologist," "consulting forensic expert on foot print and tire impressions," "expert jury and trial consultant," "victim outreach specialist," "specialist," "field researcher" and "additional paralegal" – but not the name of the person proposed to be appointed. *See* Titles 2, 7, 10, 12, 13, 15, 19 and 24. The remaining six entries contain the names of proposed or appointed consulting experts – Peter Barnett, Norah Rudin, Allison Galloway, Anne Kroman and Darko Babic. *See* Titles 9, 17, 21, 22, 28 and 29. Defendant disclosed Peter Barnett as a testifying expert on December 22, 2009. *See* Exhibit 542, p. 30-009. Defendant disclosed Dr. Galloway and Dr. Rudin as testifying experts on February 5, 2010. *Id.*, pp. 30-012 – 30-013. Defendant disclosed Dr. Kroman as a testifying expert on April 10, 2010. *Id.*, p. 30-018. Defendant disclosed Mr. Babic as a testifying expert on April 23, 2010. *Id.*, p. 30-024. Defendant had disclosed to the State all of the experts identified by name in the sealed document labels no less than seven months before Mr. Paupore saw the labels on the sealed envelopes.

106. Ms. Gearhart acknowledged that it was a mistake for her to have given Mr. Paupore the file folder containing the envelopes in which documents had been sealed.

107. Mr. Paupore did not file a written motion to view the sealed document envelopes nor did he obtain a court order to do so. However, he believed he was granted access to the file folder by the court because Judge Darrow's Judicial Assistant gave the file folder to him.

108. After Mr. Paupore told Ms. Gearhart that he had finished reviewing the files, she retrieved the files from the jury room. Although she did not inspect the files, the files appeared to be in the same condition as when she left them for Mr. Paupore to review.

109. Mr. Paupore was "surprised" and "dumbfounded" by what he found in the court file. He spoke with Mr. Butner and Sheila Polk. He then prepared the affidavit used in support of the State's motion for change of judge. *See* Exhibits 597, 598.

110. Because he did not obtain a copy of Defendant's financial affidavit, Mr. Paupore did not bring any criminal charge based on the affidavit.

111. Count III of the December, 2010 indictment is not related to the financial affidavit supporting Defendant's indigency request.

112. The viewing of sealed documents by other members of the YCAO did not make "one iota" of a difference in how Mr. Paupore prosecuted the case.

113. Robin Gearhart served as Judicial Assistant to both Judge Lindberg and Judge Darrow from the Fall of 2009 through December, 2010. During that period of time, the Clerk of the Court's file for this case was located in Division 6. She maintained the file by placing documents in the file that were sent to her by the Clerk of the Court's office. Maintenance of a court file by a division Judicial Assistant was unusual, but she was directed to do so by the judges she worked for. The Clerk of the Court retrieved the file early in December 2010.

114. Stephen Young was assigned to this case in April 2011 following the retirement of Mr. Butner. Mr. Young had been with the YCAO for approximately fourteen years at that time. He was a supervisor of one of the two trial groups in the Prescott office.

115. After Judge Darrow told counsel about the routing stamps on some of the Rule 15.9 Orders, Mr. Young saw some of the 15.9 Orders. In helping prepare the State's response to Defendant's Motion to Disqualify the YCAO, Mr. Young did compare the Orders with the disclosure statements and saw that most of the experts had been disclosed. He does not recall who was not disclosed. He did no research regarding the experts not disclosed by the defense. The Orders gave him no insight into the defense strategy.

116. Mr. Young never reviewed any sealed transcript.

117. Mr. Young assumed that the YCAO was authorized to have the Orders; he assumed that the documents were sealed only from the public.

118. No one in the YCAO asked Mr. Young to try to find Defendant's Rule 15.9 applications. No one, including Jack Fields or anyone in Victim Services, told Mr. Young that they had seen any of the documents at issue or discussed the contents with him. To his knowledge, there was no deliberate attempt to access confidential information or make use of any confidential information regarding the defense strategy.

119. Mr. Young made no use of any confidential information.

120. Anthony "Tony" Camacho retired at the rank of Master Sergeant after twenty-five years in the Marines. He worked for two years as a bailiff for a Yavapai County Superior Court Judge. At the time of the events in question, he was employed as a Notification Clerk in the Victim Services Division of the YCAO. He now works as a Victim Advocate in that division.

121. Paula Glover now works as a legal secretary for the YCAO. From January 2003 to February or March 2010, she worked as a Notification Clerk in the Victim Services Division of the YCAO. She and Tony Camacho worked as a team.

122. Barbara Paris has worked for two and one-half years as the Misdemeanor Secretary for the Verde Valley and Bagdad Justice Courts. Prior to that, she worked as an Administrative Assistant in the Victim Services Division of the YCAO. She described the

position as essentially a front desk person. She backed up and assisted the Notification Clerks in the Victim Services Division.

123. Each morning, in a process much like that described in paragraphs 14 and 31, Mr. Camacho, Mrs. Glover and Mrs. Paris would run an OnBase query to retrieve all the documents distributed to Victim Services by the Clerk of the Court the day before. The query would generate a list of documents that they would then review for hearing dates. The number of documents in the daily OnBase query result would range from thirty-five to over two hundred.

124. Each would review each of the documents generated by the OnBase query looking for future hearing dates and, if a hearing was set, the type of hearing. If a document reflected a future hearing date, the YCAO's P2 database would then be used to find whether the case had a victim. If there were one or more victims, a letter would be generated notifying each victim of the future hearing date. If a document did not contain a hearing date, the contents of the document had no interest to any of them. They would close the document and move on to the next document on the query's results list.

125. Generally, none of these three individuals would read the document's title or notice the "under seal" notation if a document did not set a hearing. Because they were interested only in finding future hearing dates, "under seal" or "*ex parte*" did not jump out at them.

126. None of these three were aware of what OnBase access level they had. Each assumed that if the document showed up in the query's results list, they had the authority to view the document.

127. Mr. Camacho viewed six of the documents in issue. *See* Exhibit 513, Tab 9 and Exhibit 689, Tabs 1, 2, 7, 28, 34. He has no recall of seeing any of the documents. He would have visually scanned each of the documents looking for a hearing date. Because none of the documents contained a future hearing date, none of the documents would have been of any interest to him. Because none of the documents contain a hearing date, it is unlikely he even read the titles of the documents or noticed "under seal" or "*ex parte*" on the documents.

128. Mr. Camacho did not speak with or convey any information from any of the documents that he did view to any of the prosecutors or paralegals working on this case.

129. Paula Glover viewed thirteen of the documents at issue. *See* Exhibit 513, Tabs 2, 4, 6, 7, 9, 15, 19, 24, 25, 26, 30, 32 and 34. She not only viewed certain documents, she also emailed the documents under Tabs 2, 6, 19, 24, 25, 26, 32 and 34. Although she now has no specific recall of to whom she emailed the documents, she believes the only one to whom she would have emailed documents was the assigned Victim Advocate, Marie Higgins. Mrs. Glover was firm that she did not email the documents to any lawyer or paralegal involved in this case.

130. Mrs. Glover also printed the documents under Tabs 7 and 9. She did not routinely print documents. She has no recall of what she did with the printed documents, but was sure that she did not give the documents to any lawyer or paralegal involved in this case.

131. Marie Higgins (fna Martinez) has worked as a Victim Advocate in the Victim Services Division of the YCAO for approximately seven years. She is and has been the assigned Victims Advocate for this case. In that capacity, she has attended numerous court hearings and, using OnBase and the information from the Notification Clerks, has given the victims notifications regarding information mandated by the Victims Rights statute.

132. The victims in this case include Ruth Kennedy (mother of the decedent), and Katie and Charlotte DeMocker (the daughters of the decedent). Ms. Higgins was not aware that there was tension between Victim Services and Katie and Charlotte DeMocker.

133. Ms. Higgins received notification letters generated by the Notification Clerks. She generated notification letters based on information received from the Notification Clerks. Ms. Higgins had many communications with the victims, including conversations about court hearings.

134. Ms. Higgins viewed two of the documents at issue. *See* Exhibit 513, Tab 10; Exhibit 689, Tab 14. Tab 10 is Defendant's request for appointment of a victim outreach specialist. Ms. Higgins viewed that document five times in the span of approximately six minutes, something she attributes to computer or OnBase crashes or problems. She has no recollection of seeing the document and does not believe she would have paid any attention to it because it does not contain a future hearing date. She believes she would have skimmed the document starting from the bottom of the last page because that is the place where hearing dates are generally set out. She probably did not read the first page and would not have read the attached resume. She had no interest in who was being proposed for appointment as the victim outreach specialist. Because the document is just a motion and not something she was required to share with the victims, the motion would not have been of interest to her.

135. Ms. Higgins viewed Tab 14 on November 16 and 17, 2009. She has no recollection of seeing the document and does not know why she would have viewed the document twice. She believes she would have skimmed the document from back to front looking for future hearing dates.

136. Ms. Higgins received twenty to thirty minute entries directly from the Clerk of the Court, not through OnBase, that were each in an envelope marked "file under seal." These minute entries were about closed or sealed hearings that she had attended. The hearings were closed to the public and media, but not the victims. The judge told her that it was okay to share information about these closed hearings with the victims. There is no contention that any of these minute entries include any of the documents at issue.

137. To Ms. Higgins, "sealed" meant "not open to the public." She knew that "*ex parte* hearing" meant a hearing where both sides were not present with the judge. She was not aware that *ex parte* motions had been filed and *ex parte* hearings had occurred until she read Defendant's motion to disqualify the YCAO.

138. Ms. Higgins did not assist Joe Butner in preparing the State's motion for change of judge for cause or give Joe Butner any document attached to that motion.

139. Ms. Higgins did not share any of the information from the two documents she viewed with any of the lawyers or paralegals in the DeMocker case. No one asked her to find confidential defense information or Rule 15.9 materials. She did not offer any opinions about the case to the prosecutors or attend any meetings about the case.

140. Pamela Moreton is the Director of Victim Services. She began with Victim Services in 1996 and held various positions including secretary, restitution advocate, misdemeanor advocate and victim advocate, before becoming the Director. She supervises a staff of twelve.

141. The OnBase report reflects that Ms. Moreton viewed one document in issue. *See* Exhibit 689, Tab 35. She has no recollection of seeing the document. Because the document was filed on May 13th and viewed by her on May 14th in the morning, she suspects that she viewed the document while assisting with the morning OnBase query to retrieve documents scanned the day before by the Clerk of the Court. The OnBase history report for this document (*see* Exhibit 517) does not reflect whether this document was electronically distributed to the YCAO. She would have visually scanned the document looking for a future hearing date. Because there was no hearing date in the document, she would have done nothing in regard to it. She did not talk with anyone about this document. She was never asked to search for confidential defense information.

142. Dennis McGrane has been the Chief Deputy County Attorney for Yavapai County for twelve years. He began practicing law in October 1993 with a firm in Prescott. He joined the YCAO in 1995.

143. As the Chief Deputy County Attorney, he oversees the YCAO's budget and supervises the civil and criminal divisions of the YCAO as well as the investigators and the Victim Services Division. One civil division supervisor and four criminal division supervisors report to him. He reports directly to the County Attorney, Sheila Polk.

144. Although Mr. McGrane filed some pleadings in this case, he has never been a member of the prosecution team. Most of his time was spent on administrative work and some on appellate work. In the DeMocker case, he was involved in a sanction issue or if the issue was ripe for appeal.

145. Mr. McGrane does not use OnBase. He does not know how to look up a criminal case on OnBase. He did not use OnBase to keep abreast of the DeMocker case.

146. Mr. McGrane did not ask anyone to search OnBase for Rule 15.9 Orders. He recalls a "water cooler conversation" where Joe Butner mentioned a "Darko," but he was not aware at the time that the name may have come from a Rule 15.9 Order.

147. Mr. McGrane had seen the Clerk of the Court's distribution stamp on documents. He assumed that if the Clerk of the Court routed the document to the YCAO, then the YCAO was allowed to see it.

148. Mr. McGrane believed that "under seal" meant that the document was to be kept from the public and media, but not the parties.

149. Mr. McGrane's name does not appear in any of the OnBase history reports.

150. On May 21, 2010, Mr. McGrane filed a motion for sanctions against the attorney representing Defendant's two daughters in their capacity as victims. *See* Exhibit 692. In that motion, Mr. McGrane accused the victims' attorney of unethical conduct by making a statement about the case to the media and of lying about statements made by Ms. Polk.

151. One of the pleadings Mr. McGrane filed is partially titled "State's Motion for Reconsideration of Sanction Imposed July 26, 2010." *See* Exhibit 571. That motion was filed on September 8, 2010. In it he referenced the sealed transcript of the July 10, 2009 indigency hearing and wrote:

"Upon information and belief, Judge Lindberg conducted an ex parte hearing in which he found Defendant to be indigent. * * * At the conclusion of that hearing,

it appears that Judge Lindberg ordered that the County pay the fees for defense experts, expert costs, transcription, and possibly attorney fees.”

152. Mr. McGrane learned about Defendant’s indigency status from Julie Ayers, the County Administrator. Over four months before Mr. McGrane filed the above motion for reconsideration, Dean Trebesch, the Yavapai County Public Defender and Indigent Defense Contract Administrator, informed Ms. Ayers of Defendant’s indigency status in an email dated April 16, 2010. *See* Exhibit 691. Mr. McGrane was shown that email by Ms. Ayers. Ms. Polk was present during this conversation with Ms. Ayers. Mr. McGrane did not learn about this from Jack Fields. Ms. Ayers also told him that the County was paying Defendant’s attorney’s fees.

153. On October 12, 2010, Mr. McGrane filed a motion to correct some of the statements in his September motion for reconsideration. Mr. McGrane wrote that the State did have Defendant’s initial Rule 15.9 application “for an *ex parte* proceeding on July 6, 2009” as well as the court’s “July 6 and 10, 2009 minute entries.” In that pleading McGrane wrote that “[a]lthough the State can only speculate as to the entire extent of the [July 10, 2009] hearing, it is clear that at least a finding of indigency was made at that time.” This statement too was based on the information he received from Ms. Ayers.

154. Mr. McGrane did not read the sealed transcript of the July 10, 2009 hearing, nor did Jack Fields or any member of the YCAO tell Mr. McGrane that they had reviewed the transcript.

155. On October 24, 2012, Mr. McGrane notified Judge Mackey that a paralegal had partially viewed an *ex parte* petition on OnBase filed in *State v. Wiesner*. *See* Exhibit 609. He filed that notice to alert Judge Mackey that OnBase was still not working properly and to raise the issue of whether Rule 15.9 was being properly used.

156. Rhonda Grubb was at the relevant times a paralegal with the YCAO. She has a college degree and, prior to joining the YCAO, spent five years as a paralegal with the Maricopa County Attorney’s Office.

157. Carol Landis was her first supervisor. Ms. Grubb recalls no specific training regarding confidential documents, but does know that certain documents can be confidential.

158. Ms. Grubb became a member of the DeMocker prosecution team in January 2010. At first, Deb Cowell was the lead paralegal and Ms. Grubb assisted her. When Ms. Cowell became ill, Ms. Grubb became the lead paralegal.

159. In order to “get up to speed” on the case, Ms. Grubb used OnBase, the Clerk of the Court’s high profile case website and the Arizona Supreme Court’s high profile case website to review documents. She found using these data bases easier than reviewing the hard copy of the file.

160. Ms. Grubb looked at documents in this case using OnBase at least twice a day. She assumed that if a document was available for viewing on OnBase, she was authorized to see it.

161. Using OnBase, Ms. Grubb saw two of the “under seal” Orders granting Defendant’s requests for appointment of consulting experts. She saw the Orders concerning Darko Babic (Exhibit 513, Tab 34) and Dr. Anne Kroman (Exhibit 513, Tab 30). These two

documents likely were routed to her by the legal clerk that ran each of the daily queries in which each Order appeared.

162. At one point, Ms. Grubb said in a rather flip manner to Ms. Cowell, “If it’s supposed to be sealed and I’m getting access, I’m looking at it and printing it.”

163. Defendant’s “Motion to Dismiss for Prosecutorial Misconduct or Motion to Disqualify the Yavapai County Attorney’s Office” was filed on May 2, 2011. Attached to the motion were numerous exhibits including the first page of *ex parte* motions and *ex parte* Rule 15.9 applications. The first page of Defendant’s “Motion for Determination of Indigency and for Rule 15.9 Appointments” was included wherein Defendant requested that the court declare him indigent and “appoint a mitigation expert, investigators, paralegal, consulting forensic computer expert, consulting DNA expert, consulting cell phone tower expert, consulting blood spatter and crime scene expert, consulting fingerprint expert, and a consulting forensic pathologist.” Also included as exhibits to the motion were the first pages of Rule 15.9 applications in which Defendant requested appointment of the following consulting experts: (1) Darko Babic “to consult on matters relating to materials testing and failure analysis,” (2) Dr. Thomas Reidy “to consult with counsel in matters relating to future dangerousness and violence risk assessment,” (3) Dr. Anne Kroman “to consult with counsel in matters relating to biomechanics of bone, cranial biomechanics and forensic anthropology,” (4) “a consulting shoe print impression expert,” (5) “additional paralegal assistance,” (6) Dr. Norah Rudin “to consult with counsel in matters relating to DNA,” (7) Dr. Alison Galloway “to consult with counsel in matters relating to forensic anthropology,” (8) Angela Mason as “a defense based victim outreach specialist,” (9) Karen McClain as a paralegal assistant, (10) Peter Barnett “to consult with counsel in matters relating to blood spatter and the crime scene, as well as footprint and tire impressions,” (9) Kindra Helferich “to conduct field research,” (10) Joe Guastaferrero as “an expert jury and trial consultant,” (11) to appoint “consulting neuropsychologist, financial forensic expert and consulting footprint and tire impression forensic expert,” and (12) AVTranz and Teris as “transcription and document experts.”

164. Following the filing of Defendant’s “Motion to Dismiss for Prosecutorial Misconduct or Motion to Disqualify the Yavapai County Attorney’s Office,” the County Attorney launched “a fact-finding mission” to explore the allegations made in Defendant’s motion. Detective James Jarrell carried out this investigation. Detective Jarrell was an investigator in the YCAO. Detective Jarrell interviewed a number of people and those interviews were summarized in a report referred to as the “Jarrell Report.” *See* Exhibit 581.

165. The State’s response to Defendant’s motion to disqualify is dated May 27, 2011. Dennis McGrane signed the motion. Jeffrey Paupore and Steve Young’s names also appear on the first page. On page five, lines 9 – 15 of the response, based on counsel’s review of the attachments to Defendant’s motion, the State wrote:

A close inspection of the complained about sealed and *ex parte* documents reveals that many of these documents involved Defendant seeking appointment of various experts and consultants, such as: mitigation specialist, investigators, paralegals, transcriptionist, computer forensic expert, DNA expert, blood spatter expert, crime scene expert, cell phone tower expert, materials testing expert, fingerprint expert, forensic pathologist, neuropsychologist, shoeprint expert, tire print expert, pathologist, forensic anthropologist, bone biomechanics expert, financial expert,

jury and trial consultant, victim outreach specialist, violence risk assessment expert, field research assistant to challenge Arizona death penalty, etc.

166. Sheila Polk has served as the Yavapai County Attorney since 2000. She graduated from law school in 1982, clerked for an Arizona Supreme Court Justice for one year, then joined the Office of the Arizona Attorney General and later the Yavapai County Attorney's Office.

167. The YCAO currently has 85 to 90 employees and an approximately \$7 million budget. The office is divided into three divisions – Civil, Criminal and Victim Services – and has four investigators.

168. Ms. Polk encourages all members of the YCAO to adhere to the highest ethical standards. In 2006, Ms. Polk attended training at the Holocaust Museum and that experience for her “took ethics to a new level.” Beginning in 2007, Ms. Polk brought the training to her office and mandated that many of her staff attend. She did the same in 2010. Since 2012, she has taught this training two times per month. She has attempted to instill in all her staff that they are ministers of justice with significant ethical obligations to protect the rights of the State and each criminal defendant.

169. Prior to the issue coming up in this case, the YCAO did not have a written policy dealing with what should be done if someone in the office viewed a document labeled “*ex parte*.”

Conclusions of Law⁴

170. In its Decision Order, the Court of Appeals found that “the members of the County Attorney’s Office interfered with petitioner’s relationship with his counsel by viewing and/or printing sealed documents and other documents petitioner’s counsel filed *ex parte* and under seal.” *See* p. 4. The Court of Appeals remanded the case for “‘a hearing to determine how, if at all, defendant was prejudiced by the state’s intrusion, with the burden on the state to prove’ that petitioner has not been prejudiced.” *See* p. 5. The Court of Appeals suggested that:

“the superior court may consider and make findings with respect to the prosecution’s motive in viewing and printing the confidential documents, any use the prosecution made of the documents, whether the prosecution’s interference with petitioner’s right to counsel was deliberate, whether the State ‘benefitted in any way’ from the prosecution’s unauthorized acts and, of course, ‘whether defendant was, in fact, prejudiced.’”

Those factors come from *State v. Warner*, 150 Ariz., 123, 129, 722 P.2d 291, 297 (1986) where the Arizona Supreme Court wrote:

The trial court should make separate and detailed findings regarding the motive behind the seizure of defendant's papers, the use made of them, whether the interference with the attorney relationship was deliberate, whether the state

⁴ This Court intends that any statement in this section that may be deemed a “fact” not previously included in the Findings Of Fact section to be considered a finding of fact made by this Court.

benefited in any way from the seizure, if the papers were used how any taint was purged in defendant's trial and whether defendant was, in fact, prejudiced.

171. The State's burden of proof is "beyond a reasonable doubt" or proof that leaves the Court "firmly convinced" that the State did not directly or indirectly benefit from the conduct in question and that Defendant's right to a fair trial was not prejudiced. If on the other hand, after consideration of all the evidence, the Court believes "there is a real possibility" that the State did benefit from the conduct thereby prejudicing Defendant, the Court must grant Defendant's motion in whole or in part. *State v. Portillo*, 182 Ariz. 592, 596, 898 P.2d 970, 974(1995); Standard Criminal 5b(1), Revised Arizona Jury Instructions – Criminal, 3D. Therefore, this Court must be "firmly convinced" that the viewing, printing and emailing of the documents in issue by members of the YCAO did not directly or indirectly benefit the State and did not directly or indirectly prejudice Defendant. "The trial court must be convinced beyond a reasonable doubt that defendant will be able to obtain a fair trial." *State v. Warner*, 150 Ariz. 123, 128, 722 P.2d 291, 296 (1986) (also referred to as *Warner I*). If this Court has a reasonable doubt that the conduct of the YCAO directly or indirectly benefitted the State or prejudiced Defendant, the Court must grant, in whole or in part, Defendant's pending motion.

172. The State contends "the Clerk of the Court's failure to maintain the confidentiality of DeMocker's Rule 15.9 documents does not prejudice DeMocker's Sixth Amendment rights." In other words, the State contends that no constitutional right of Defendant was impacted by the conduct in question. The Court rejects this argument for two reasons. First, the Court of Appeals in its Decision Order impliedly, if not expressly, found that the conduct in question impacted Defendant's constitutional right to counsel. Second, in *Warner I, supra*, at 150 Ariz. 128, our Supreme Court wrote:

The right to counsel is guaranteed to a defendant in a criminal case by both the sixth amendment to the United States Constitution and art. 2, § 24 of the Arizona Constitution. A defendant's right to counsel includes the protection against improper intrusions by the prosecutor or other government agents into the confidential relationship between a defendant and his attorney. *Gershman, supra*, at § 1.6. This right must be carefully guarded by the courts of this state. Both Arizona case law and the Rules of Criminal Procedure state that the right to counsel includes the right to consult in private with an attorney. *State v. Holland*, 147 Ariz. 453, 455, 711 P.2d 592, 594 (1985); Rule 6.1(a), Ariz.R.Crim.P., 17 A.R.S. Effective representation is not possible without the right of a defendant to confer in private with his counsel. *State v. Holland, supra*.

Thus, the Arizona Supreme Court advised all trial judges to carefully protect a criminal defendant's right to counsel. While the rights to file sealed documents and have *ex parte* communications with the trial judge may not expressly be found in the Constitution, the Court is of the opinion that those rights are a reasonable extension of a defendant's Sixth Amendment right to counsel. Defendant is constitutionally entitled to the effective assistance of counsel. It strikes this Court that pursuing appointment of consulting experts and support personnel utilizing

a procedure provided for by the Arizona Rules of Criminal Procedure is a strategy of an effective defense attorney.

173. How it came to be that members of the YCAO were able to view, print and email sealed documents using OnBase is relevant on the issue of the motive of those who did see the documents. It is obvious that the Clerk of the Court and the OnBase administrator's failures were the proximate cause of this situation. Although documents were coded as sealed, the Clerk of the Court electronically distributed many of the documents to the YCAO and Victim Services. The Clerk of the Court mistakenly allowed access to sealed documents in criminal cases to persons other than judicial officers. Lastly, the Clerk of the Court's failure to control the court file resulted in a Judicial Assistant mistakenly allowing access to the envelopes containing the sealed documents.

174. Compounding those mistakes was the fact that there was no common understanding of who was permitted access to a "sealed" document. The Clerk of the Court believed that once a document was ordered "sealed," no one could view that document without a court order. Unfortunately, the Clerk of the Court failed to adequately train the Distribution Clerks, the Scanning Clerks and the OnBase administrator so that they too would have known that once a document was sealed, no one was to view the document without a court order.

175. Moreover, the Clerk of the Court's definition of a sealed document was not universally held by those in the YCAO. For example, the following people believed that a sealed document was accessible to the parties and their attorneys, but not the public or media: Susan Murphy Ahlquist (COC/MIS), Kathleen Durrer (YCAO), Sheila Polk (YCAO), Joe Butner (YCAO), Jeffrey Paupore (YCAO), Stephen Young (YCAO), Pamela Moreton (YCAO Victim Services), Dennis McGrane (YCAO) and Rhonda Grubb (YCAO). Barbara Paris (YCAO) who viewed one or more of the documents in issue simply did not know what "sealed" meant. To Jack Fields (YCAO) and Deborah Cowell (YCAO), there were two levels of sealed documents, one that prohibited access by the public, but not the parties, and a second that prohibited access to everyone except the court and the defense.

176. Even the court contributed to the varying definitions of "sealed." Certain "sealed" motions and orders were sent by opposing counsel or distributed by the court to all counsel, including the YCAO prosecution team with the intent that only the public and media not have access to the document. For example, Rhonda Grubb testified that she printed sealed documents from OnBase rather than finding them in the office's file; she testified that "there were a lot of sealed documents in this case." *See* Transcript for Day 9, p. 61; *see also* ¶ 7. The court held "sealed" proceedings from which only the public and media were excluded. The judge told the assigned Victim Advocate that it was okay to share information from the "sealed" hearings with the victims. The assigned Victim Advocate also testified that she received directly from the Clerk of the Court twenty to thirty envelopes labeled "file under seal".

177. The Court has been unable to find and counsel have not cited the Court to any Arizona rule, statute or appellate opinion defining “sealed.”

178. Given how the term “sealed” was applied by the court and counsel without express differentiation as to whose access was being precluded, it is no wonder that no one recognized that the intent of defense counsel was that no one have access to a subset of the “sealed” documents.

179. The addition of “*ex parte*” to some of the pleadings in issue did little to help because the same problem existed with the label “*ex parte*.” Some in the YCAO did not know the meaning of the term. Everyone believed that if the document was accessible on OnBase or routed to the YCAO, they were authorized to view it. Both Ms. Polk and Mr. Fields had experience in cases where pleadings filed *ex parte* were later disclosed to the opposing party. While those cases were in the civil arena (for example, TRO’s and provisional remedies without notice), those experiences contributed to how Mr. Fields reacted to seeing documents labeled “*ex parte*” in this case.

180. There are fourteen Rule 15.9 Orders among the documents at issue. *See* Exhibit 513, Tabs 2, 4, 6, 7, 9, 15, 19, 24, 25, 26, 28, 30, 32 and 34. While all were labeled “under seal,” only one (Tab 4) was labeled “*ex parte*.” That Order reflects that Defendant’s counsel prepared the proposed Order. There was no testimony regarding who prepared the other thirteen Orders for the judge’s signature. However, even though the accompanying Rule 15.9 application may have included the label “*ex parte*,” the preparer of thirteen of the proposed Rule 15.9 Orders failed to include “*ex parte*” on those Orders. Despite the fact that there were two categories of “sealed” documents for distribution purposes being followed by counsel (those sealed from the public and media, but exchanged between counsel, and those sealed from everyone but the defense), there is nothing in any of these Orders differentiating in which category these Orders fell.

181. Given these various beliefs of what “sealed” and “*ex parte*” meant, it is easy to understand why everyone involved believed that if the document was viewable on OnBase or received by them in hard copy, they were authorized to view the document. The signed Orders bore a distribution stamp showing that the YCAO was supposed to receive the documents; if anyone had noticed, the distribution stamps would have reinforced their belief that they were intended to receive the documents. The Court agrees with Sheila Polk’s assessment – given all the circumstances, people just did not appreciate that they were viewing documents that they should not have seen.

182. At the beginning of this evidentiary hearing, there were thirty-eight documents at issue. *See* ¶ 51. The facts show that nine of those documents were not viewed, printed or emailed by any member of the YCAO. *See* Exhibit 513, Tabs 3, 5, 11, 13, 21, 27, 29, 31 and 33. Even Defendant concedes that “if a document (or a related document) was not viewed by anyone in the YCAO it would not be an issue.” The Court agrees with Defendant’s assessment – nothing contained in those nine documents could have benefitted the State or caused prejudice to Defendant.

183. In determining if the State directly or indirectly benefited from viewing the documents at issue and whether Defendant was directly or indirectly prejudiced, the Court is of the opinion that it is important to consider what information was contained in each document along with who in the YCAO viewed the document.⁵ So, what information do the remaining twenty-nine documents contain? Who saw those documents and when? And could disclosure of the information have aided the State or prejudiced Defendant's right to a fair trial?

Tab 1: In this motion, Defendant requests that the Court approve funding for assistance "in transcribing the 65 CD's that contain an estimated 56.5 hours of interviews and the 1,617 jail calls with an estimated 340 hours of calls." *See* p. 2, ls. 4 – 5. Defendant also requested funding for "a document imaging and electronic discovery expert" to assist in labeling and printing "the 4000 color photos produced by the State electronically" and to assist in review of "67,000 pages of 'database' documents" produced by the State. *Id.*, ls. 19 – 24.

Even if one were to find that Anthony Camacho actually read the entire motion, it is difficult to imagine how Mr. Camacho's knowing this information could have aided the State. Obviously, the State already had the CD's, the photos and the "database" documents and it is reasonable to assume that defense counsel would be reviewing everything produced by the State.

Also, the evidence does not support the conclusion that Mr. Camacho intentionally searched out this motion, then digested the contents of the motion and passed his thoughts about the motion along to one of the prosecutors. The OnBase history report reflects that Mr. Camacho viewed this motion on August 11th at 9:45:35 a.m. Mr. Camacho viewed the Tab 2 document on August 11th at 9:49:43 a.m. At most, Mr. Camacho spent 4 minutes and 8 seconds viewing the motion, closing the document and then opening the Tab 2 document. Mr. Camacho did not print the motion or email it to anyone. If one were on a mission to discover confidential information about the defense, is it even plausible that after discovering something, one would spend only four minutes looking at the document and not print out the document? If Mr. Camacho were in league with the prosecutor to spy on the defense, why did Mr. Camacho not at least email the document to one of the prosecutors or the assigned paralegal? Also, to accept the proposition that Mr. Camacho lied when he testified that he did not recall seeing the document, did not tell the prosecutors anything about it and was not enlisted in a conspiracy to spy on the defense, the Court would be required to find that a man who served honorably in the US Marines for twenty-five years sold out his integrity, honor and ethics to aid Yavapai County for no discernable benefit to him. The Court is firmly convinced that Mr. Camacho's testimony was truthful.

⁵ Throughout this ruling, if this Court wrote only "benefited the State" or "prejudiced Defendant" or some variation, the Court's intent is that both direct and indirect benefits and prejudice are included.

Tab 2: This Order granted the Tab 1 motion. When the assigned prosecutor saw this Order, he would have learned the names of the companies appointed to provide transcription, imaging and “electronic discovery” services to the defense. So what? In view of the volume of financial documents and the number of jail phone calls, any prosecutor would not find it unusual in a death penalty case that the defense was requesting clerical assistance. The Court is firmly convinced that the Clerk of the Court’s mistake in making this Order available to the YCAO did not result in Mr. Butner or subsequent prosecutors assigned to this case altering the prosecution strategy. The State did not benefit nor was the Defendant prejudiced.

Tab 4: This Order grants Defendant’s “Motion for Reimbursement of Costs Incurred to Provide Appointed Experts with Necessary Disclosure.” There is no expert named in the Order. Even if one were to find that Mr. Butner lied when he testified that the Order gave him no insight into the defense strategy, a review of the Order shows that there is nothing in the Order that could have aided the State or caused prejudice to Defendant.

Tab 6: This Order, dated August 19, 2009, disclosed to Mr. Butner that three consulting experts had been appointed by the Court and the experts’ names. Two of those experts were later disclosed as testifying experts. Tab 5 is the motion requesting appointment of these experts. No member of the YCAO viewed that motion. In that motion, Defendant requested appointment of a forensic accountant because “[t]he State has identified two financial forensic expert witnesses.” *See* Tab 5, p. 2, l. 12. Likewise, Defendant’s request for a shoeprint and tire impression expert was in response to the State having “identified experts on those topics.” *Id.*, p.3, l. 10. The timing of Defendant’s requests supports the State’s position that the viewing of this Order did not benefit the State or alter the prosecution strategy.

The third consulting expert, a neuropsychologist, was requested by Defendant because Defendant’s “neurological and/or psychological condition . . . bear on his case in mitigation.” *Id.*, Tab 5, p. 2, l. 24. Therefore, this witness would have come into play only in the mitigation phase of the capital trial if Defendant were found guilty of first-degree murder in the liability phase. The State disclosed a rebuttal expert some five months later on January 29, 2010. *See* Exhibit 543, p. 31-0085. Mr. Butner testified that he did nothing in response to seeing this Order. The Court finds that testimony credible. The Court is firmly convinced that the prosecutors did not alter the prosecution strategy in reaction to distribution of this Order to the YCAO and that Defendant’s right to a fair trial was not prejudiced. However, even if one were to conclude that Mr. Butner disclosed the rebuttal witness in reaction to seeing this Order, the remedy is not disqualification of the YCAO or dismissal of the case as requested by Defendant. In *Warner II, supra*, 764 P.2d at 1106, the Court wrote:

We noted that the United States Supreme Court's approach to remedying Sixth Amendment violations has been to identify and neutralize any taint

resulting from the violation by tailoring relief that will assure the defendant of the effective assistance of counsel and a fair trial. *Id.* (citing *United States v. Morrison*, 449 U.S. 361, 365, 101 S.Ct. 665, 668, 66 L.Ed.2d 564 (1981), *reh'g denied*, *United States v. Morrison*, 450 U.S. 960, 101 S.Ct. 1420, 67 L.Ed.2d 385 (1981)). We did not believe that every case in which a violation occurred must result in dismissal. “Absent [prejudicial] impact on the criminal proceedings, ... there is no basis for imposing a remedy in [a] proceeding, which can go forward with full recognition of defendant's right to counsel and to a fair trial.” *Warner I*, 150 Ariz. at 128, 722 P.2d at 296 (quoting *Morrison*, 449 U.S. at 365, 101 S.Ct. at 668, 66 L.Ed.2d at 568–69).

The appropriate remedy would be preclusion of the State’s rebuttal witness at the time of sentencing if he were called to testify, a remedy not requested at this time by Defendant.

Tab 7: This Order altered the hourly rate of one of the consulting experts appointed by the Tab 6 Order. This Order provided no additional information to Mr. Butner.

Tab 8: This is Defendant’s motion for appointment of a jury consultant. No member of the prosecution team saw this motion. A clerical person in the YCAO who was assisting Victim Services with scanning documents looking for future hearing dates so that crime victims would be properly notified viewed this motion one time. The Court is firmly convinced that the clerical person did not communicate anything about this motion to anyone on the prosecution team. The Court is firmly convinced that this one viewing by clerical staff had absolutely no impact on Defendant’s right to a fair trial nor did it benefit the State in any way.

Tab 9: This Order granted the Tab 8 motion, appointed a jury consultant for Defendant and set forth the consultant’s name and hourly fee. While seven people in the YCAO viewed this Order, the Court is firmly convinced that no one in the YCAO took any action in response to seeing this Order.

Tab 10: This is Defendant’s motion requesting appointment of “a defense based victim outreach specialist.” The request for this specialist was made to counter the possible influence of the YCAO’s Victims Advocate on the victims. Defense counsel wrote that “defense counsel make a mistake if they cede exclusively to the prosecution the opportunity to develop a relationship with the survivors.” *See* Tab 10, p. 2, ls. 21 – 22. The motion was denied. No prosecutor assigned to the case saw this motion. No one in Victim Services reacted to the motion. Jack Fields saw the motion, but he did not talk to any prosecutor about the motion. The State proved beyond a reasonable doubt that the viewing by members of the YCAO of Defendant’s request for a victim outreach specialist did not benefit the State or prejudice Defendant’s right to a fair trial.

Tab 12: This document relates to the Tab 10 motion. Mr. Fields is the only member of the YCAO that viewed this document. On January 14th, the longest that Mr. Fields viewed the document was two minutes each of the times he saw it on OnBase. The Court is firmly convinced that Mr. Fields' viewing of this document did not benefit the State or prejudice Defendant.

Tab 14: This motion to expand Mr. Barnett's consulting areas to include "blood spatter" was not viewed by any prosecutor assigned to the case. Defendant's reason for this request was that "[t]he State has identified a blood spatter expert." *See* p. 2, l. 7. Defendant's motion was filed on November 12, 2009. The State had disclosed its blood spatter expert on June 19, 2009. *See* Exhibit 543, p. 31-0016. The sequence of these events belies any claim that the State benefited from the viewing of this document by staff in the YCAO. The Court is firmly convinced that the viewing of this motion by three members of the YCAO did not benefit the State or prejudice Defendant.

Tab 15: Only one person in the YCAO, the assigned Victim Advocate, viewed this Order appointing a "field researcher". The State proved beyond a reasonable doubt that the people in Victim Services did not influence the prosecution team in any way.

Tab 16: This Order denied the Tab 11 motion. No prosecutor assigned to the case viewed this Order. The Court is firmly convinced that the viewing of this Order by Mr. Fields and a paralegal did not benefit the State or prejudice Defendant.

Tab 17: This is Defendant's motion to obtain paralegal assistance. No prosecutor assigned to the case viewed this Order. The Court is firmly convinced that the viewing of this Order by Mr. Fields and a paralegal did not benefit the State or prejudice Defendant.

Tab 18: In this motion, Defendant requested the court to reconsider its denial of Defendant's request for a victim outreach specialist. Only Mr. Fields saw this motion. This Court has concluded that Mr. Fields had no direct or indirect influence on the prosecution of this case. *See* ¶ 189.

Tab 19: This Order appointed an investigator as requested by the Tab 15 motion. This Order was printed as part of the YCAO's daily query and presumably routed to the assigned prosecutor or paralegal although it was not found in the "core file" when Mr. Paupore conducted his search. The assigned Victim Advocate viewed the Order on OnBase. The Court is firmly convinced that this conduct did not benefit the State or prejudice Defendant.

Tab 20: This Order denied Defendant's Tab 18 motion. Only a clerical person in Victim Services viewed this Order. Again, this Court is firmly convinced that

Victim Services' staff did not have any perceptible influence on the way the prosecutors handled the case.

Tab 22: This is Defendant's motion requesting additional paralegal assistance. Mr. Fields is the only member of the YCAO who viewed this motion. This Court has concluded that Mr. Fields had no influence on the prosecution of this case.

Tabs 23 and 24: Defendant requested appointment of a forensic anthropologist in this motion. The motion was granted. Defendant's motion was prompted because "[t]he State has disclosed Dr. Keen, a forensic pathologist, and Dr. Fulginiti, a forensic anthropologist, as expert witnesses." *See* pp. 1 and 2. Therefore, any argument that the viewing of the motion by Mr. Fields or the Order by Mr. Butner influenced the State's strategy is contradicted by the sequence of events.

Tab 25: This Order granted Defendant's request for additional paralegal assistance. Two clerical staff and the assigned Victim Advocate viewed the Order. It appears that Ms. Hopper routed the printed copy to Mr. Butner in that the Order was found in the "core file," but that Mr. Butner never saw it. Although one would be hard pressed to find anything in the Order that would have aided the State or caused prejudice to Defendant even if a prosecutor had seen the Order, it is easy to conclude beyond a reasonable doubt that the viewing by the three non-attorney staff members of the YCAO did not benefit the State or prejudice Defendant.

Tab 26: This Order appointed Dr. Norah Rudin as a consulting expert for Defendant and is dated January 13, 2010. No member of the YCAO saw the supporting motion (Tab 21) which is dated January 11, 2010. Defendant requested Dr. Rudin's services "to review, analyze and understand the State's anticipated argument that this DNA was the result of an incidental or contact transfer of DNA." *See* Tab 21, p. 2, ls. 9 – 11. On November 10, 2008, the State disclosed at least one, if not more, DNA experts. *See* Exhibit 542, pp. 31-0002 and 31-0007. In other words, the State had its DNA experts on-board over one year before Joe Butner saw the Order thus confirming Mr. Butner's testimony that his viewing of the Order had no influence on how the case was prosecuted.

Tab 28: This Order granted Defendant's motion for appointment of a shoe print expert. Although the motion (Tab 27) was not viewed by any member of the YCAO, the motion states that Defendant's request was prompted because "[t]he State has identified an FBI expert witness regarding this new allegation." *See* Tab 27, p. 2. The sequence of events supports the State's argument that seeing the Order had no influence on the State's strategy and did not prejudice Defendant.

Tab 30: This Order appointed Dr. Kroman as a consulting expert. Defendant's motion (Tab 29) requesting this appointment was not seen by any member of the YCAO, but it recites that Defendant's request was a reaction to the State's

disclosures of three expert witnesses. *See* p. 2. Like other items, the sequence of events supports the State's argument that even if the Order had been seen by any member of the prosecution team, it did not benefit the State or prejudice Defendant because the State had already selected its expert witnesses.

Tab 32: Dr. Thomas Reidy was appointed as a consulting expert by this Order. No member of the YCAO saw the motion (Tab 31). The motion states that Dr. Reidy is needed "to prepare for the penalty phase" to offer testimony regarding Defendant's "future dangerousness and violence risk." *See* p. 2. Having presided over capital case jury trials, this Court knows that such testimony is not uncommon during the sentencing phase to attempt to persuade the jury that a life sentence should be imposed because the defendant would not present a risk to other inmates and guards if imprisoned for life. Because the death penalty is no longer in play, there will be no jury-sentencing phase. Should Defendant be convicted of first-degree murder, Defendant will be sentenced to either natural life in prison or life in prison with the possibility of parole after 25 calendar years. The Court, when reviewing the State's disclosure statements in evidence, did not find that any rebuttal expert on this topic had been disclosed by the State. Therefore, it does not appear that the State reacted to seeing this Order. Even if the State had disclosed such an expert in response to viewing this Order, the proper remedy, in this Court's opinion as noted above under Tab 6, would be preclusion of the State's witness, not disqualification of the YCAO or dismissal of the case.

Tab 34: This Order granted Defendant's motion (Tab 33) to appoint Darko Babic as a consulting expert. Defendant requested Mr. Babic's appointment "to review and analyze the golf club materials and failure that has been alleged to be the murder weapon." *See* p. 2. No member of the YCAO saw the motion. However, the Order was printed as part of the YCAO's daily query so it is reasonable to assume that a copy of the Order was routed to a paralegal or the assigned prosecutor. Defendant disclosed Mr. Babic as a testifying expert, but later withdrew him as a witness. The State proved beyond a reasonable doubt that the State's prosecution strategy was not altered as a result of members of the YCAO viewing this Order.

Tab 35: In this minute entry, Judge Lindberg "decline[d] to authorize further payment" for "the cost of transcribing jail conversations." No member of the prosecution team saw this minute entry. The Court is firmly convinced that the viewing of this minute entry did not prejudice Defendant or benefit the State.

Tab 36: In this pleading, Defendant responds to the State's "suggestion . . . that counsel's fees are being paid for by Yavapai County taxpayers." Filed "*ex parte* and under seal" without any written reason given as to how that procedure would actually serve as a "response" to the State, the pleading contains no confidential information. It simply reminds the trial judge that Defendant was determined to be indigent and that experts had been appointed pursuant to Rule 15.9. No

member of the prosecution team saw this pleading. Even if one had, they would not have learned any confidential information from the pleading.

Tab 37: In this one paragraph pleading, Defendant requests “a brief ex part [sic], in camera conference” with Judge Darrow. There is no confidential information in the pleading; it is completely innocuous. In addition, no member of the prosecution team saw this pleading. Viewing this pleading could not have caused any prejudice to Defendant nor could it have benefited the State.

Tab 38: The first two pages of the pleading constitute the “Notice of Filing.” Attached to the Notice is the transcript of the July 10, 2009 indigency hearing and conference with defense counsel. Jack Fields is the only member of the YCAO who accessed this document on OnBase. He testified that he read only the Notice and the cover page of the transcript. As previously noted, the Court finds Mr. Fields’ testimony credible. The Court is firmly convinced that no member of the YCAO read the sealed transcript.

184. The Court concludes beyond a reasonable doubt that the viewing, printing and emailing of the documents in issue by non-attorney staff of the YCAO and Victim Services had absolutely no impact on Defendant’s right to a fair trial, did not prejudice Defendant in any other way and did not benefit the State in its prosecution effort in any way. The actions of Seretha Hopper, Barbara Genego, Pamela Spear, Anthony Camacho, Paula Glover, Barbara Paris, Marie Higgins and Pamela Moreton had no impact on the way this case has been prosecuted. None of those persons played any direct role in the prosecution effort. At the times of their viewing, printing or emailing of any document at issue, they were performing a clerical task or working on victims’ rights compliance. At most, they visually scanned documents for future hearing dates they needed to calendar and notify the victims about. They paid no attention to the substantive content of the documents. They did not relate any of the information in the documents to the assigned prosecutors or paralegals other than by routing documents to them. The Court concludes beyond a reasonable doubt that their conduct did not prejudice Defendant in any way nor did it benefit the State in any way. In addition, the Court is firmly convinced that none of these individuals was enlisted by any member of the YCAO to systematically spy on the defense.

185. The Court reaches the same conclusion about the conduct of the YCAO’s paralegals, Rhonda Grubb, Deborah Cowell and Kathleen Durrer. While they played a more intimate role in the prosecution effort than the non-attorney staff of the YCAO, it appears to this Court that they had their hands full assisting counsel with maintaining the voluminous case file, assisting with the preparation of disclosure statements, and researching and drafting responses to the avalanche of defense motions. Although they viewed several of the documents in issue, they paid little attention to them because they were not required to take any action in response. The Court is firmly convinced that they viewed these documents doing their job of monitoring the case, not for the purpose of spying on the defense. The Court concludes beyond a reasonable doubt that the viewing

and printing of sealed or *ex parte* documents by the YCAO's paralegals did not directly or indirectly benefit the State or prejudice Defendant.

186. Some amount of criticism might be leveled at Mr. Butner, an experienced prosecutor. It does strike the Court as a bit unusual that receipt of Rule 15.9 Orders labeled "sealed" and naming consulting experts for Defendant did not give Mr. Butner pause to at least question why he was receiving those Orders. However, the circumstances in which Mr. Butner was operating at the time must be considered to understand why he did not appreciate that he should not have been receiving those Orders.

In May 2009, Mr. Butner took over a high profile, first-degree murder case in which the death penalty was being sought that, from all appearances, was somewhat in disarray on the State's end. The file materials already were massive and the file was disorganized. Mr. Butner quickly learned that the former prosecutor assigned to the case had done no comprehensive disclosure in the approximately eight months that the case had been pending. The trial judge set a deadline for the State's disclosure and Mr. Butner, the only prosecutor assigned to the case, was understandably focused on getting the State's initial disclosure prepared. Mr. Butner acknowledged that he was way behind and playing catch up. When asked by Ms. Polk about his receipt of the Rule 15.9 Orders, Mr. Butner candidly told her that he did not pay much attention to them and just put them in a pile of other papers. That statement is consistent with his testimony at this hearing. While he noted the names of the experts identified in the Orders and asked defense counsel about one, he did nothing in response. He did not conduct any investigation about those named nor did he alter his prosecution strategy. Mr. Butner was focused on fulfilling his disclosure obligations and preparing the State's case. The experts revealed in the Rule 15.9 Orders got onto his radar only when they were disclosed as testifying experts. Also, because a number of sealed pleadings had been exchanged between opposing counsel (in other words, sealed only from the public and media), "sealed" or "under seal" on a Rule 15.9 Order understandably may not have raised any red flag. The Court is firmly convinced that Mr. Butner did not alter the State's prosecution strategy as a result of seeing the Rule 15.9 Orders. The Court finds beyond a reasonable doubt that the viewing of the documents in question by Mr. Butner did not directly or indirectly benefit the State or result in any prejudice to Defendant.

187. In what was described as unusual by Ms. Gearhart (the Court also finds it unusual), the Clerk of the Court allowed the court file, including the sealed documents, to be kept in Division 6 where the Judicial Assistant maintained the file by filing documents sent to the division by the Clerk of the Court. There was no testimony why the Clerk of the Court made that arrangement. However, it was that arrangement that led to unauthorized access by one of the prosecution team to the envelopes containing the sealed documents. Not only was it a mistake for the Judicial Assistant to have made the file folder containing those envelopes available to counsel, the Court is of the opinion that it was a mistake for the Clerk of the Court to have let the case file out of her control. Ms. Gearhart told Mr. Paupore that he would have to file a written motion requesting access to sealed documents. Following that communication, Ms. Gearhart allowed Mr. Paupore access to the file folder containing the sealed documents. Therefore, given that

Mr. Paupore knew that Ms. Gearhart knew the policy for viewing sealed documents, it is understandable why Mr. Paupore believed that Judge Darrow had given Mr. Paupore permission to view the files made available to him by Ms. Gearhart.

188. Moreover, the Court concludes beyond a reasonable doubt that Mr. Paupore's viewing of the labels on the sealed document envelopes did not benefit the State or prejudice Defendant in anyway. As noted in paragraph 105 above, a majority of the labels contained no information useful to the prosecution. Other labels contained information that would not have aided the prosecution. For example, it would not be unexpected in a death penalty case, that the defense was requesting support assistance in the form of paralegals, transcription services or an investigator such as a "field researcher." Those labels that identified consulting experts by name provided information that Defendant had disclosed to the YCAO months before Mr. Paupore read the labels.

189. Jack Fields was involved in two issues collateral to the prosecution of Defendant. Mr. Fields worked on public record requests and Defendant's request to improve the conditions of his confinement. Neither of those issues related in any way to the liability, aggravation or penalty phases of Defendant's trial. While Mr. Fields' testimony is a bit inconsistent with the statement he gave to Detective Jarrell, the State proved beyond a reasonable doubt that Mr. Fields did not influence the manner in which the prosecution team prosecuted the criminal charges. Even if one were to find, despite this Court's determination of the credibility of Mr. Fields, that Mr. Fields actually read the sealed transcript, the State has proved beyond a reasonable doubt that any reading played no role in the prosecution of Defendant. *See* ¶ 197. Also undermining the contention that Mr. Fields engaged in unethical conduct, the Court notes that on two occasions, Mr. Fields urged the court to consider Defendant's rights when deciding whether to unseal documents. *See* ¶s 70 and 72. The Court concludes beyond a reasonable doubt that Mr. Fields' viewing of documents on OnBase did not directly or indirectly benefit the State or directly or indirectly prejudice Defendant.

190. Like Mr. Fields, Dennis McGrane was involved in the DeMocker case on issues collateral to the prosecution of the charged offenses. Mr. McGrane was not a member of the prosecution team. Because he oversaw the YCAO's budget, he became involved in the case when the defense requested over \$49,000.00 in sanctions because the State had violated a court order by consuming a DNA sample during testing. He also filed a motion for sanctions against the victims' attorney, a motion to unseal documents and he was involved in responding to the pending motion. None of those motions impacted the prosecution of the charged offenses. The Court finds Mr. McGrane's testimony credible and, therefore, concludes beyond a reasonable doubt that Mr. McGrane did not view the sealed transcript of the indigency hearing nor was he told anything about the contents of that transcript. The Court also concludes beyond a reasonable doubt that Mr. McGrane's conduct did not directly or indirectly prejudice Defendant in any way.

191. Steve Young joined the prosecution team in April 2011, after the mistrial had been declared. Although he did see Rule 15.9 Orders, the Court finds his testimony credible that the information did not give him any insight into the defense strategy nor did the information cause a change in the prosecution strategy. The Court concludes beyond a reasonable doubt that Steve Young's viewing of sealed and/or *ex parte* documents did not directly or indirectly benefit the State or prejudice Defendant.

192. The contention that charges in the December 10, 2010 indictment resulted from someone in the YCAO reading the sealed transcript of the *ex parte* indigency hearing has been disproved beyond a reasonable doubt. Firstly, the indictment does not contain any charge for fraud or perjury related to Defendant's financial affidavit or indigency claim. Secondly, the charges relating to Defendant's alleged acquisition of the insurance proceeds and payment of those to defense counsel stemmed from the investigation conducted after Mr. Sears disclosed during his opening statement that the insurance proceeds had been paid by the insurance company. The Court is firmly convinced that there is no charge in the December 10, 2010 indictment resulting from some member of the YCAO reading the sealed transcript of the indigency hearing.

193. Opinions have been expressed that the assigned judge improperly handled the indigency hearing and Rule 15.9 applications. Whether there is merit to those opinions, this Court need not decide. By at least September 17, 2010, the YCAO knew or should have known that Defendant was declared indigent. *See* Exhibit 572. The YCAO did not challenge that indigency finding. When the YCAO discovered in November 2010 that there had been numerous *ex parte* hearings, the YCAO did not file a special action to request review of the appropriateness of the manner in which those hearings came about, but instead chose to attempt to remove the judge from the case. Those beliefs by members of the YCAO that the assigned judge and defense counsel acted improperly do not, in this Court's opinion, justify or excuse the interference with Defendant's relationship with his counsel. However, having said that, the Court does conclude beyond a reasonable doubt that the conduct of the members of the YCAO, including Victim Services, was not malicious or done with the intent of discovering confidential information about Defendant or the defense strategy. While the viewing, printing, emailing and distribution of the documents in issue within the YCAO was, in most instances, purposeful, the purposes were not to spy on the defense, but to keep abreast of what was happening in the case (that was the purpose of the paralegals), to calendar future hearing dates or to give required notifications to the victims. The State has proved beyond a reasonable doubt that there simply was no improper motive behind the conduct at issue.

194. As noted, most of the viewing of the documents by the members of the YCAO was purposeful, but some was accidental. Because of the generic titles of documents on OnBase, several documents may have been opened before finding the one desired. In other words, it was often necessary to open multiple documents with labels similar to the one desired in order to find the document of interest. If one got interrupted, it was not uncommon to open a document more than once, only to recognize again that it was not the one being searched for.

195. In footnote 1 of the Court of Appeals' Decision Order, the court referenced ER 4.4(b) of the Arizona Rules of Professional Conduct. ER 4.4 is titled "Respect for Rights of Others" and provides:

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden any other person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender and preserve the status quo for a reasonable period of time in order to permit the sender to take protective measures.

The Comment to ER 4.4 reads:

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of others. It is impracticable to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from others and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[2] Paragraph (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that a document was sent inadvertently, then this Rule requires the lawyer to stop reading the document, to make no use of the document, and to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes of this Rule, "document" includes e-mail or other electronic modes of transmission subject to being read or put into readable form.

[3] Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to return such a document voluntarily is a matter of professional judgment ordinarily reserved to the lawyer. See ERs 1.2 and 1.4.

195. The Court of Appeals noted that "[t]he record in this case does not reveal one way or the other whether members of the County Attorney's Office notified the court or the defense that they had received sealed or *ex parte* documents." The evidence is that no one in the YCAO notified the court, the Clerk of the Court or defense counsel that

they had viewed on OnBase or received hard copies of sealed or *ex parte* documents.⁶ Although this Court need not decide whether the conduct of the members of the YCAO violated ER 4.4, the ER has been considered by the Court in assessing the motive of members of the YCAO in viewing the documents in issue over an extended period of time. Defendant contends that members of the YCAO did not notify anyone because they were afraid of professional sanctions. That contention has been disproven beyond a reasonable doubt.

The obligation to report arises only when the person receiving the document “knows or reasonably should know that the document was inadvertently sent.” Given all the circumstances mentioned above, including, but not limited to, the varied use of “sealed” by counsel and the court, the failure to put “*ex parte*” on most of the Rule 15.9 Orders, the fact that levels of access to OnBase were granted by the Clerk of the Court and not controlled by members of the YCAO, the electronic distribution of the documents by the Clerk of the Court to the YCAO, and the very visible distribution stamp on the Rule 15.9 Orders clearly showing distribution to the YCAO and Victim Services, this Court, if sitting as the Disciplinary Judge, would have a difficult time finding that anyone involved in the YCAO actually knew or had a reason to know that the Clerk of the Court had mistakenly distributed the documents to the YCAO.

196. Defendant cites the Court to several ethics rules – ER 3.8 and ER 5.3.⁷ As noted above, this Court is of the opinion that it is not within the jurisdiction of this Court to determine whether any member of the YCAO violated any ethics rule. However, even assuming for the sake of argument that members of the YCAO violated all of those ethics rules, the bottom line for this Court is that the Court is firmly convinced that the viewing, printing and emailing of the documents at issue did not benefit the State or prejudice the Defendant.

197. Like most evidentiary hearings and trials, there were some inconsistencies not fully explained by the evidence. Similarly, the defendant on appeal after the evidentiary hearing following *Warner I*, contended “that the trial court ‘completely ignored’ the defense witnesses.” *State v. Warner*, 159 Ariz. 46, 50, 764 P.2d 1105, 1109 (1988). In resolving that issue, our Supreme Court wrote:

⁶ Ironically, the Court notes that the Clerk of the Court via the distribution stamp notified the defense and the County’s Contract Administrator that the Rule 15.9 Orders were distributed to the YCAO and Victim Services.

⁷ Defendant also cited ER 3.4 and argued that the YCAO’s failure to disclose that Jack Fields would testify at this hearing that he did not read the transcript of the indignity hearing constitutes a violation of ER 3.4. How an alleged disclosure violation related to the pending motion is relevant to the issues to be addressed by this Court on remand escapes this Court. In addition, this Court allowed sufficient time for Defendant’s counsel to interview members of the YCAO, including Mr. Fields. It is a mystery to this Court as to why Mr. Fields was not asked during his interview whether he had read that transcript given that Defendant has cast Mr. Fields as the main “vigilante.”

We disagree with appellant on both the facts and the law. The facts do not suggest that the trial court “completely ignored” the defense witnesses. Rather, they suggest that the trial court listened to all of the testimony and found the State's witnesses more credible on this point. Even if we accept the proposition that conflicting evidence creates some degree of doubt, the law certainly makes no presumption that conflicting evidence always creates a reasonable doubt. If this was so, no criminal defendant whose case involved any disputed facts could ever receive a guilty verdict. To the contrary, the law presumes that the credibility of witnesses is an issue to be resolved by the trier of fact. *State v. McDaniel*, 136 Ariz. 188, 195, 665 P.2d 70, 77 (1983); *State v. Hunter*, 112 Ariz. 128, 129, 539 P.2d 885, 886 (1975).

Moreover, it is not the function of an appellate court to retry conflicts in evidence. *State v. Ford*, 108 Ariz. 404, 408, 499 P.2d 699, 703 (1972), *cert. denied*, 409 U.S. 1128, 93 S.Ct. 950, 35 L.Ed.2d 261 (1973). “Appellate review of the trial court's findings of fact is limited to a determination of whether those findings are clearly erroneous.” *State v. Burr*, 126 Ariz. 338, 339, 615 P.2d 635, 636 (1980).

The Court has considered these inconsistencies, even in the light most unfavorable to the State, in deciding whether the State met its burden of proof. While the information in all the exhibits was largely uncontroverted, how and why the information was acquired and used and whether the State benefited or Defendant was prejudiced turned wholly on credibility determinations. The Court resolved all the evidentiary inconsistencies based on the Court's observations of the demeanor of each of the witnesses, the Court's determination of the credibility of each witness and the totality of the evidence. The Court is of the opinion that even if the inconsistencies were resolved against the State, the sheer weight of the evidence still leaves this Court firmly convinced that the conduct of the members of the YCAO in question did not directly or indirectly benefit the State or prejudice Defendant. In other words, these inconsistencies did not create a reasonable doubt in this Court's mind.

198. The Court has carefully considered Defendant's argument that “[t]he YCAO deliberately and systematically invaded the attorney/client relationship.” In essence, Defendant argues that at the direction of the assigned prosecutors, numerous members of the YCAO systematically acted in concert to obtain confidential information about Defendant's defense strategy, did so by viewing, printing and emailing sealed and *ex parte* court documents and communicated with the assigned prosecutors what they had gleaned from those documents. Having had the opportunity to observe each of the witnesses while testifying and having evaluated their testimony in light of all the other evidence, including the numerous exhibits, the Court is firmly convinced that no one in the YCAO intentionally embarked on a scheme to gather confidential information about the defense. The Court is firmly convinced that no member of the YCAO directed any other member of the YCAO to intentionally gather confidential information about the defense. Defendant's assertion that members of the YCAO intentionally gathered confidential information, freely shared that information with the prosecutors and that the

prosecutors used that information to somehow bolster the State's case has been disproved beyond a reasonable doubt.

A key component of Defendant's argument is that Jack Fields read the sealed transcript of the indigency hearing, shared the information with one or more of the prosecution team who then changed the prosecution strategy in some way as well as brought an additional criminal charge against Defendant.⁸ There are at least three flaws in this argument. First, in order to accept this assertion, the Court would have to conclude that there is not one honest attorney in the YCAO among those who testified at the hearing. Mr. Fields is the only member of the YCAO who viewed the document to which the transcript was attached using OnBase. He testified under oath that he read only the notice of filing and the cover page of the transcript. The Court has found his testimony credible. All the other member of the YCAO who were asked if Mr. Fields shared with them any information from that transcript said, "No." Defendant believes Mr. Fields and all the other witnesses lied on this point. This Court does not.

The second flaw in Defendant's assertion is that the State proved beyond a reasonable doubt that the sequence of events do not support the conclusion that, even if Mr. Fields read the entire transcript, the prosecution strategy changed in any way. The Court has read the July 10, 2009 hearing transcript several times. Without revealing the details, the first part of the hearing was the indigency hearing, after which Defendant left the courtroom. Judge Lindberg and defense counsel then discussed the Rule 15.9 process in Yavapai County and Dean Trebesch and Bill Culbertson's roles in the process. Then there was a rather wide-ranging discussion regarding consulting experts, why each was being requested and support Defendant was receiving from his family. The areas of expertise defense counsel indicated were needed included forensic accounting, cell tower technology, blood spatter, footprints and tire impressions, DNA, forensic pathologist and support staff including a paralegal, an investigator and a mitigation specialist. The hearing concluded with a discussion regarding how the consultants would be paid and Rule 15.9. Mr. Fields did not access the notice of filing on OnBase until October 8, 2010. Months prior to that date, Defendant disclosed the names of testifying experts in the fields of forensic accounting, footprint, tire impression and blood spatter, forensic pathology, forensic anthropology, DNA, cell phone tower technology, shoe prints, latent prints and materials. With the exception of the support staff, Defendant had disclosed as testifying witnesses persons in all the fields mentioned during the July 10, 2009 hearing months before Mr. Fields allegedly read the transcript. Months before Mr. Fields saw this document on OnBase, the State had disclosed experts in the fields of forensic pathology, DNA, latent prints, tire tracks, computer forensics, hair examination, forensic accounting, blood spatter, lighting and visibility, handwriting, tracking, criminology and behavior, forensic psychiatrist for mitigation rebuttal, Sprint cell tower technology and firearms. The Court is firmly convinced that even if Mr. Fields read the sealed transcript, that reading did not influence the prosecution in anyway or prejudice Defendant's right to a fair trial.

⁸ The Court has considered Defendant's "smoking gun" argument regarding Defendant's claim that Mr. Fields did read the entire transcript of the indigency hearing as part of the second part of paragraph 198.

And the third flaw is that this Court has concluded beyond a reasonable doubt that Court III in the December indictment was a result of the investigation initiated after Defendant's counsel revealed information about payment of the life insurance proceeds in opening statement.

199. Defendant cites the Court to *State v. Hyde*, 186 Ariz. 252, 921 P.2d 655 (1996) for the proposition that if a witness cannot recall something, it is like no witness at all. Therefore, according to Defendant, this Court may not consider as credible the witnesses who testified that they could not recall seeing the documents in question. Like much of Defendant's closing arguments, the legal proposition was taken out of context. The issue in *Hyde* was stated as:

On appeal, defendant claims that the trial court erred in sustaining Commissioner Gerst's issuance of a complaint and warrant against him. He mainly rests his evidentiary arguments on Det. Chambers's testimony at the suppression hearing that he could not recall whether Commissioner Gerst questioned him about the nature of the "information and belief" on which the complaint against defendant was based. Based on this testimony, defendant argues that Commissioner Gerst failed to inquire into the source of the detective's information and the basis for his belief. Neither party, however, called Commissioner Gerst to testify at the suppression hearing.

186 Ariz. 265, 921 P.2d 668.

In resolving that issue, the Arizona Supreme Court wrote:

Erdman has been cited for the proposition that a complaint upon information and belief requires a magistrate to inquire into the foundation of the complaint. *State v. Lynch*, 107 Ariz. 463, 464, 489 P.2d 697, 698 (1971); *Kuhn*, 154 Ariz. at 26, 739 P.2d at 1343. The case also demonstrates, however, that a defendant must present evidence to show that the magistrate did not fulfill his or her duty. In *Erdman*, the defendant did not present *any* evidence to show whether the magistrate questioned the police officer. Although the defense here did elicit Det. Chambers's lack of memory through his testimony, a witness who cannot remember is equivalent to no witness at all and does not constitute a prima facie case for suppression. The defense's interpretation of Det. Chambers's lack of memory, without more, was not sufficient.

In *State v. Raboy*, the defendant filed a motion to suppress drugs and other evidence that the state had obtained under a search warrant. The defendant argued that the state's use of information provided by an unidentified informant in its affidavit for the search warrant was unreliable, and therefore that the warrant could not have been issued upon probable cause. 24 Ariz.App. 586, 587-88, 540 P.2d 712, 713-14 (1975). At the suppression hearing, defendant called 4 witnesses, each of whom testified that he or she was not the informant and that no one else could have been the informant. Although the affiant, a police officer, testified for the state at the hearing, defendant failed to cross-examine him. The court of appeals held that defendant did not make a prima facie case for suppression because the evidence that defendant had presented regarded peripheral issues and did not address the only issue before the court on the motion to suppress: whether the affidavit supported a finding of probable cause. *See* 24 Ariz.App. at 588-90, 540 P.2d at 714-16. Here, defendant's evidence, like the evidence in *Raboy*, did not sufficiently pertain to whether Commissioner Gerst performed her required function when she issued the warrant. Rather than resting on Det. Chambers's lack of memory, defendant should have called Commissioner Gerst on that issue.

Unlike what occurred in *Hyde*, there was ample evidence beyond “I don’t recall” on the relevant issues. Plus, it is not unexpected or surprising that people who viewed up to several hundred documents a day would not recall several years later seeing a particular document. The fact that they did not recall viewing the documents is significant in that it supports the argument that the viewing was just a part of their usual daily activity, not part of an orchestrated plan to spy on the defense strategy. However, it is not unexpected that the same witnesses had a specific recollection of more significant allegations such as whether they aided the prosecution team, were asked to seek out confidential information and talked to the prosecutors about what they saw in the documents.

200. In his closing argument, Defendant described the conduct of the members of the YCAO as “situational dishonesty” and “vigilante justice.” While the argument is colorful, it is also fanciful in that there is no evidence to support Defendant’s assertions. Defendant’s theory that the YCAO was on a quest to disqualify the defense team, remove the trial judge and negate “devastating” rulings by the trial judge by using information gleaned from viewing, printing and emailing of sealed and *ex parte* documents is, again, both colorful and fanciful; there is no evidence to support the theory.

201. Defendant contends that the State filed a motion to determine Defendant’s IQ only because Mr. Butner had seen the Rule 15.9 Order appointing a neuro-psychologist. Mr. Butner testified that the motion was filed because an IQ determination was required in order for the State to seek the death penalty.

A.R.S. §13-753 provides, in part, that:

A. In any case in which the state files a notice of intent to seek the death penalty, a person who is found to have an intellectual disability pursuant to this section shall not be sentenced to death but shall be sentenced to life or natural life.

B. If the state files a notice of intent to seek the death penalty, the court, unless the defendant objects, shall appoint a prescreening psychological expert in order to determine the defendant's intelligence quotient using current community, nationally and culturally accepted intelligence testing procedures. The prescreening psychological expert shall submit a written report of the intelligence quotient determination to the court within ten days of the testing of the defendant. If the defendant objects to the prescreening, the defendant waives the right to a pretrial determination of status. The waiver does not preclude the defendant from offering evidence of the defendant's intellectual disability in the penalty phase.

It is obvious that in all death penalty cases, Arizona law mandates an IQ determination unless the defendant objects. While Defendant contends that the timing of the State’s motion is consistent with his contention that the State was reacting to Mr. Butner’s viewing of the Rule 15.9 Order appointing a neuropsychologist, the Court is firmly convinced that the timing is more consistent with the fact that Mr. Butner and the prosecution team were overwhelmed with this case and overlooked important steps. In addition, the dismissal of the notice of death has mooted any taint that may have resulted from the filing of the motion even if one were to assume that

Mr. Butner perjured himself. Lastly, as noted above, should this become an issue at sentencing and additional evidence is presented, the Court then can decide whether it would be appropriate to preclude any witness called by the State to rebut the neuropsychologist's testimony.

202. In summary, the Court concludes as follows:

- (1) The Court is firmly convinced that there was no ill or improper motive in viewing and printing the sealed and *ex parte* documents.
- (2) The Court is firmly convinced that the prosecution made no use of the information in those documents.
- (3) The Court is firmly convinced that the prosecution's interference with Defendant's right to counsel was not deliberate.
- (4) The Court is firmly convinced that the State did not benefit in any way from viewing and printing the sealed and *ex parte* documents.
- (5) The Court is firmly convinced that Defendant has not been directly or indirectly prejudiced.
- (6) The Court is firmly convinced that Defendant can receive a fair trial with the YCAO as the State's representative.

Therefore,

IT IS HEREBY ORDERED denying Defendant's "Motion to Dismiss for Prosecutorial Misconduct or Motion to Disqualify the Yavapai County Attorney's Office."

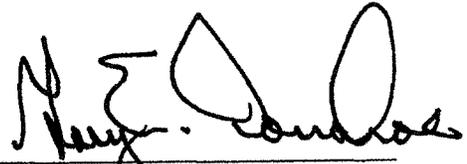
IT IS FURTHER ORDERED staying this ruling until **May 10, 2013**, which should be sufficient time for any Special Action to be filed. After that date, this Court will proceed with oral argument on the pending motions *in limine* and confirm the new trial date unless an appellate court enters a stay.

Because of renovations taking place at the Yavapai County Courthouse, the Court anticipates setting the start of jury selection on **July 8, 2013**.

Regarding a new trial date, it is the Court's expectation that during the nearly one year that it has taken to resolve Defendant's motion, all expert witnesses have completed their work and will promptly supplement their opinions if they have not already done so. Counsel should immediately contact all witnesses to determine their schedules and complete any needed interviews.

IT IS FURTHER ORDERED setting oral argument on all pending motions *in limine* on **May 17, 2013 at 10:00 a.m.** At that time, the Court also will confirm the proposed new trial date and establish any needed discovery deadlines.

DATED THIS 10th DAY OF APRIL, 2013.



Hon. Gary E. Donahoe
Judge of the Superior Court

cc: Georgia A. Staton/Russell R. Yurk – Jones, Skelton & Hochuli, 2901 N. Central Avenue,
Suite 800, Phoenix, AZ 85012 (e)
Craig Williams – P.O. Box 26629, Prescott Valley, AZ 86312 (e)
Greg Parzych – 222 N. Central Avenue, Phoenix, AZ 85004 (e)
David J. Bodney/Peter S. Kozinets/Chris Moeser – Steptoe & Johnson,
201 E. Washington Street, Suite 1600, Phoenix, AZ 85004 (e)
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Phoenix, AZ 85003 (e)
Melody Harmon – Law Office of Melody G. Harmon, 120 W. Osborn Road, Suite A,
Phoenix, AZ 85013 (e)
Victim Services (e)

APPENDIX G

May 8, 2014 Minute Entry summarizing
the May 8, 2014 evidentiary

IN THE SUPERIOR COURT

PINAL COUNTY, STATE OF ARIZONA

2:35 p.m. Hearing starts
4:13 p.m. Hearing ends

Date: 05/08/2014

THE HON PETER J CAHILL

Courtroom: 4A

Court Reporter: LAURIE MILLER

CHAD A ROCHE, CLERK

By Deputy Clerk: JACKIE K. GREATHOUSE

THE STATE OF ARIZONA,)	<u>S1100CR201201764</u>
)	
	Plaintiff,)	MINUTE ENTRY ACTION:
)	
vs.)	<u>CONTINUED EVIDENTIARY HEARING</u>
)	
RICHARD TRAY WILSON,)	
	Defendant(s).)	
)	

PRESENT: Plaintiff appearing by counsel, Sue Eazer and Patrick Chapman, Deputy County Attorneys.

Defendant appearing in person in the custody of the Pinal County Sheriff/DOC and with counsel, Bret Huggins and James Soslowsky.

THE RECORD MAY SHOW this is the time set for CONTINUED EVIDENTIARY HEARING ON PENDING MOTIONS.

Gregory Hazard is called forward, sworn, examined, and is excused.

Counsel for the defendant renews his previous request that he be allowed to call additional witnesses: Matthew Long, Jason Easterday, Ron Harris and Richard Wintory.

Counsel for the State presents an objection to the calling of the additional witnesses.

Arguments of counsel.

The Court addresses the parties and advises that it believes that it has been presented with enough evidence to adequately address the issue; therefore, IT IS HEREBY ORDERED denying defense counsel's request to call the witnesses mentioned this date.

The Court advises the parties that it believes that the issue with regard to access to sealed records has been adequately corrected within the Clerks' Office. The Court states that it has not heard any testimony that would warrant dismissal, nor does it believe that relieving the Pinal County Attorney's Office is warranted.

Counsel for the defendant requests that he be allowed to brief the issue.

Counsel for the State addresses the Court.

The Court states that it will allow counsel an opportunity to brief the issue. If after reviewing the pleading by the defense, the State believes the record would be incomplete if counsel were not allowed to respond, counsel may request to respond. The Court may be able to make a ruling upon receipt of defense counsel's pleading.

The Court requests that Defense counsel address any insufficiency he thinks there is in the Court's remedy.

Discussion of the Court and counsel regarding the need to set this matter for further hearing.

The Court encourages counsel to work with each other regarding a case management plan as referred to by the State. The Court will have court staff notify counsel of any further setting.

IT IS FURTHER ORDERED defense counsel shall submit, within ten (10) days, his Memorandum in Support of Sanctions. The Court will review the same and determine whether further briefing is necessary. If the State believes that a Response is mandated, a request may be made.

THE RECORD MAY SHOW State's Exhibit #14 is marked for identification as reflected on the attached Exhibit List. Said Exhibit is not admitted.

Mailed/distributed copy: 5/12/2014

BRET HUGGINS

JAMES A SOSLOWSKY

HON PETER J CAHILL
1400 ASH
GLOBE AZ 85501

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COUNTY ATTORNEY/S EAZER

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COUNTY ATTORNEY/P CHAPMAN
VICTIMS ASSISTANCE
PCSO-JAIL