GEORGE E. SILVA
SANTA CRUZ COUNTY ATTORNEY
2150 N. Congress Dr., Suite 201
Nogales, AZ 85621
520-375-7780
William Moran II, Special DCA (SBA No. 036027, PAN No. 93948)
Mathew Cannon, DCA (SBA No. 031990, PAN No. 67210)

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

| | |
|---|---|
| THE STATE OF ARIZONA,<br><br>Plaintiff,<br><br>vs.<br><br>RICARDO LORENZO GARCIA,<br><br>Defendant. | Case No. CR2023-0574-001<br><br>RESPONSE TO MOTION TO DISMISS INDICTMENT<br><br>[Hon. J. Alan Goodwin] |

COMES NOW the State of Arizona, by and through GEORGE E. SILVA, Santa Cruz County Attorney, and his undersigned Deputy County Attorney, and hereby makes this response to Defendant's Motion to Dismiss Indictment. The motion should be struck for gross failure to comply with the form and page limit requirements of Ariz. R. Crim. P. 1.6 and 1.9.[1] Further, the contentions in the defense motion are meritless consisting of either arguments already raised with the Court last year or the legal equivalent of "phantom fouls," and in no event has Defendant been left irreparably prejudiced by these alleged Due Process violations.

## ARGUMENT

**KEY FACTS**

On the night of December 17-18, 2022, Defendant sexually assaulted G.R. who, by third-party testimony, was visibly too drunk to consent to intercourse and even unresponsive

[1] On Nov. 18, State learned the motion to exceed pages was granted, which Defense failed to inform the State about. Still, the filing does not comply with Rule 1.6 and is unduly long.

at relevant points. G.J. Transcript, 9/11/23 ("G.J.") at 21:24 - 22:10. To wit, the second time Dep. Aquino entered the room, G.R.'s head was in Defendant's naked crotch but she was reported to not be moving "more or less… like jello… just laying there like a blob." *Id.* The third time Aquino entered the room, G.R.'s bra was undone, her panties were dangling off one leg, she had her head in between two pillows with her rear unnaturally propped up while she was unconscious. *Id.* at 11:8-22, 15:4-23. Defendant was told numerous times by Aquino that she was "just too drunk, too intoxicated" to consent to any sexual act. *Id.* at 16:1-6.

Notwithstanding G.R.'s incapacitated state, Defendant engaged in intercourse with her which is known by defendant's statement (he told her), circumstantial evidence from Dep. Aquino's observations, and DNA evidence including of bodily fluids from G.R.'s pants interior crotch ("38 quadrillion times more probable" that the sample traced to Defendant). *Id.* at 43:12-15; 59:9-17. G.R.'s incapacitated condition was corroborated by a recording after Aquino's wife arrived at which point G.R. struggled to form words, had to be told her underwear was on only one leg, and needed aid to get dressed. SCCA-000139 to 000145.

G.R. reported to Det. Hilborn that she suffered a memory blackout prior to the sexual assault due to intoxication starting around 11PM and that "she didn't remember anything up until when she was in the car with the deputy [the next morning]." G.J. at 41:19-24. The morning of the sexual assault, G.R. was asked about whether she had consented to any sexual acts that night and then she was driven home by a deputy who collected items she was wearing. Mtn. to Remand at 14:5-17. Later that day, Defendant told G.R. in a phone call that they did have sex and witness Aquino told her on the phone "that something happened and that [he] would be there for her." G.J. at 18:12-13; 39:20-25; 43:12-15.

## LAW AND ANALYSIS

### I. This Court Should Strike the Motion for Violating Rules 1.6 and 1.9.

This Court should strike the motion for disregarding the page-limit and form requirements set out in the rules, albeit with leave to re-file in proper length and format.

The rules are clear that "unless the court orders otherwise" a pretrial motion "may not exceed 11 pages." Ariz. R. Crim. P. 1.9. Further, except for "headings, quotations, and footnotes," text must be double-spaced and may not exceed 28 lines per page. The Court has authority to require a defendant to comply with these page limit and form requirements. *See State v. Gwen*, No. 1 CA-CR 18-0775, 2020 WL 207072, at *6 (Ariz. Ct. App. Jan. 14, 2020).

An unspoken rule in legal practice is that when an attorney makes a good-faith effort to state arguments concisely but then realizes upon drafting that they need a couple additional pages, they can get away with "granting their own motion" by concurrently filing a request to exceed page limits. This is even provided for in Ariz. R. Crim. P. 1.9(d) which states that "the court may waive a requirement specified in the rule, or it may overlook a formal defect."

By contrast, where an attorney takes it upon themselves to double or triple the page limit without first receiving leave of the court, or distort the form of the filing to artificially lower the page count, there had better be good reason otherwise that filing will likely be stricken. *See e.g., State v. Johnson*, 247 Ariz. 166, 211 (striking brief nearly 4x limit; providing leave to re-file at 1.5x limit in complex case); *State v. Bolton*, 182 Ariz. 290, 298 (1995) (striking text not in proper form as "attempt[] to evade our page limits").

Here, defense neither sought nor obtained an order to exceed page limits before filing their motion that is nine-pages too long. The motion contains 51-lines of single-spaced text, in violation of Ariz. R. Crim. P. 1.6(b)(1)(F), or two extra pages worth. The motion also contains lengthy footnote arguments across 82-lines, or equivalent to three pages. In sum, accounting for Rule 1.6 and the exorbitant footnotes, the motion is roughly 25-pages in length.

Further, this deviation from the prescribed length was not due to complexity but rather caused by excess repetition and recycling of claims. For example, the argument that the defense investigator was denied access to PCSD personnel is argued six times in the motion plus twice more in exhibits of counsel's letters. Mot. at 2, 7-10, 12, 17, 23-28. Worse, that issue was addressed a year ago in Defendant's Motion for State to Certify Compliance with

Disclosure Obligations and the State's response thereto. There was no good reason for defense to exceed the page limits by a magnitude of 2.5x to rehash the same things eight times over.

## II. Defendant Fails to Show a Pattern of Due Process Violations and Dismissal with Prejudice Under Ariz. R. Crim. P. 16.4(b) is not Warranted.

Ariz. R. Crim. P. 16.4(b) provides that, upon a defendant's motion, a court must order dismissal of the prosecution if the indictment "is insufficient as a matter of law." "Dismissals with prejudice occur only when the evidence is irrevocably tainted or there exists a pattern of misconduct that is prevalent of continuous." *State v. Young*, 149 Ariz. 580, 585 (App. 1986) (internal quotation omitted). "A dismissal of an indictment with prejudice on the ground of prosecutorial misconduct **is rare**." *Id.* (internal quotation omitted) (emphasis added). Indeed, as explained in *State v. Huffman*, "[d]ismissal of a prosecution [under the precursor to Rule 16.4] shall be without prejudice to commencement of another prosecution, unless the court order finds that the interests of justice require [otherwise]." 222 Ariz. 416, 420 (App. 2009); *see also Young*, 149 Ariz. at 585 (Barring "egregious" conduct by prosecutors, "[defendants] are not entitled to the reward of permanent immunity regarding their criminal conduct.").

Nonetheless, relying on *Young,* defense erroneously seeks to extend the grounds for dismissal under Rule 16.4(b) to "any ground recognized by law." 149 Ariz. at 587. Defense misreads *Young* mistaking the arguments by defendant in that case with the ruling of the Court which stood for the opposite proposition. *Id.* The *Young* Court explained, by reference to a comment to then-Rule 16.5(b), that "[the rule] is not intended to create any new grounds for dismissing a prosecution." *Id.* Further, *Young* is inapposite because, as the Court explained, that case was governed by Rule 12.9 rather than the precursor to Rule 16.4(b), because the defendant there sought to challenge the validity of the grand jury proceeding. *Id.*

Still, a rule can be gleaned from *Young*, *Huffman*, and cases cited in each that a dismissal for alleged Due Process violations is uncommon and that it is all but verboten that such dismissal be with prejudice absent a circumstance so extreme that the ability to mount a defense is left irreparably impaired. In *U.S. v. Field*s, cited in *Young*, the court explained:

> Even when a Prosecutorial arm of the government unlawfully obtains evidence, we normally limit the permissible sanction to suppression of the illegally obtained evidence. **It is only in the rare case, where it is impossible to restore a criminal defendant to the position that he would have occupied vis-a-vis the prosecutor, that the indictment may be dismissed.**

592 F.2d 638, 648 (2d Cir. 1978) (emphasis added). The *Fields* Court went on to explain they "have approved this extreme sanction [of dismissal] only when the pattern of misconduct is widespread or continuous." *Id.* This is in accord with another case cited in *Young*, where a court declined to dismiss with prejudice despite finding that prosecutors had deliberately misled grand jurors to create a false impression of guilt because it had "not prejudiced defendants' case on the merits." *U.S. v. Lawson,* 502 F. Supp. 158, 163, 173 (D. Md. 1980).

Looking to the motion, Defendant requests that the Court dismiss this case with prejudice because of what they allege is a pattern of Due Process violations consisting of:

(A) PCSD denying access to personnel during the pre-charging phase - Mot. at 7-10;

(B) Adverse media coverage from two-years ago - Mot. at 8.

(C) Remarks by some officers that the case should have been farmed out - Mot. at 3-4;

(D) Deficiencies in PCSD disclosures to the Attorney General ("AGO") - Mot. at 11-13;

(E) That officers tainted G.R.'s statements by "feeding" her information - Mot. at 5-7.

None of these alleged violations leave the defense irreparably prejudiced and, as chronicled *infra*, some of these spurious allegations border on the non-existent.

**A. Defense has been provided access to PCSD witnesses without issue.**

Defendant contends that his Due Process rights have been violated because, prior to charging, PCSD initially denied a defense investigator access to their personnel. Mot. at 7-10. In support of this proposition, Defendant cites to cases that provide a prosecutor shall not deny defense access to the State's witnesses. These cases are inapposite because they do not stand for the proposition that this obligation attaches pre-charging and Defendant has suffered no prejudice as defense interviews have not been denied (nor does defense claim otherwise).

Rule 15.1(b)-(c) provide that "no later than 30 days after arraignment," the State must

provide "the name and address of each person the State intends to call as a witness" to allow a fair opportunity for defense to investigate or interview prospective witnesses. While witnesses may refuse defense counsel interviews, the Courts have made clear that "**the district attorney**" or "**the prosecution**" cannot "prevent a defendant's access to a witness." *Mota v. Buchanan*, 26 Ariz. App. 246, 249 (1976) (emphasis added). Indeed, a "**defendant** and his counsel certainly have the right to talk with any witness having knowledge [about the case]." *State v. Moncayo,* 115 Ariz. 274, 277 (1977) (emphasis added); *see also State v. Chaney*, 5 Ariz. App. 530, 535 (1967) ("State's counsel was guilty of improper conduct in discouraging police officers from discussing the case with **defendant's** attorney") (emphasis added). Indeed, as defense notes, "**Attorneys** for the **parties** and their staff" are forbidden by the ABA Rules from advising witnesses "who have relevant information or material to refrain from discussing the case with opposing counsel." ABA Standards for Criminal Justice: Discovery, Standard 11-4.4 (4th ed. 2020) (emphasis added). Fair access to witnesses goes to the heart of the process that is due, to both the State and the defense, in a criminal proceeding.

Here, defense makes libelous insinuations of prosecutorial misconduct by conflating PCSD's pre-charging remarks to a defense investigator with access to witnesses during the post-charging phase. Mot. at 15-16. Specifically, defense contends that there was a Due Process violation because Lt. Bernstein initially told PCSD Officers not to reply to a defense investigator and Cpt. Cornidez told said investigator the same. Mot. at 7-10, 14. Looking to defense Exhibit A, it is known that these remarks occurred on or before December 22, 2022, or four days after the sexual assault giving rise to this case, based on the date stamp on defense counsel's letter to Cpt. Cornidez addressing this issue. Mtn. at 23-24. However, Defendant was neither arrested nor was a case initiated until on or around January 18-19, 2023. When this alleged violation occurred on or around December 22, 2022, there could not have been a prosecutor denying the Defendant access to witnesses because there was neither a prosecutor or a defendant at that time – the case had not even been brought yet.

Notably, nowhere does defense contend that they have been denied an opportunity to interview witnesses since this or that any denial has been upon instruction of the prosecutor, nor can they because they cite in their motion to interviews of at least six PCSD officers. Mot. at 3-4, 6. To that effect, for purposes of Due Process, Defendant would be hard-pressed to argue that their defense was irreparably prejudiced by PCSD's initial denial to the defense investigator because he has had full access to these witnesses since.

Further, defense cites no authority for the proposition that it is a violation of a prosecutor's ethical obligations under the ABA model rules, or a violation of Due Process, for a defense investigator to be denied access to officers prior to charging, before witness disclosure deadlines, or in advance of the prosecutor's involvement in a case. Nonetheless, defense hurls these allegation eight times over in this filing after doing the same last year.

Similarly, the argument that there is somehow a disclosure violation with respect to Lt. Bernstein's remarks to PCSD officers, or that such a violation would have resulted in irreparable prejudice for purposes of Due Process, is without merit. Defense knew that their investigator was denied access to PCSD personnel on or around Dec. 22, 2022 because, as they note, Cpt. Cornidez said this point-blank to said investigator, an agent of the defense. Mtn. at 23-24. It strains credulity that something expressed directly to an agent of the defense is somehow left undisclosed but regardless Lt. Bernstein's remarks were disclosed and included in a State's filing a year ago in this case. Defense is beating a dead horse at this point.

**B. The Defendant is not unfairly prejudiced by the media coverage from two years ago which defense attributes to "leaks" by PCSD.**

Defense contends there was a Due Process violation because there has been purportedly unfair or excess media coverage. Mot. at 8, 12, 16. Defense points to a headshot of the Defendant released on January 19, 2023 showing him in an orange inmate uniform. Mtn. at 8, 34. Defense also points to a video of his arrest on January 18, 2023.[2] Mtn. at 8. Far

[2] https://www.kold.com/video/2023/01/19/watch-pima-county-sheriffs-department-sergeant-arrested-sexual-assault-charge/

from deprecating the defendant, the foggy footage shows a man wearing a blue sweater getting into the front seat of an unmarked white car with one man wearing black holding the door and another man assisting with the seatbelt. At a facial level, Defendant has not been portrayed more unfavorably than countless other arrestees and it is bonkers to contend that this coverage from nearly two-years ago would inhibit the Court's ability to impanel an impartial jury.

Nonetheless, defense string-cites to *State v. Tison*, 129 Ariz. 526 (1981); *State v. Bible*, 175 Ariz. 549 (1993); and *Sheppard v. Maxwell*, 384 U.S. 333 (1966) for the general proposition that adverse media can result in a deprivation of a defendant's Due Process rights. However, upon closer reading, the *Tison* decision stands for the inverse of the proposition cited by Defendant with the court there noting that change of venue (not dismissal with prejudice) was not warranted because "pretrial publicity not only tapered off near the appellant's trial date, but, in addition, only a few newspaper articles written could be said to be inflammatory." 129 Ariz. at 535. Further, the *Bible* decision explains that the burden to show that pretrial publicity is prejudicial rests with the defendant and is an "extremely heavy" burden with courts "rarely presum[ing] prejudice due to [even] outrageous pretrial publicity." 175 Ariz at 564. Indeed, the "rare and unusual cases where this difficult showing has been made" involve overwhelming publicity in a county with a population of 7000 or televised confessions seen by many jurors. *Id.* at 565 (collecting cases). This ain't that.

Indeed, Defendant fails to point to any media coverage at all in the past year and far from establishing the heavy burden of prejudice vis-a-vis a prospective jury, the defense does not even use the words "juror" or "jury" except for a stray unrelated reference to "grand jury." Mot. at 10. Additionally, not only has coverage of this case tapered off, but this is not a small county where fielding an impartial jury unaware of the facts may be difficult – Pima County's population is over one million people. Finally, in the event substantial prejudice from media coverage is shown, and for clarity it has not been here, the appropriate remedy would not be dismissal with prejudice, it would be a change of venue. *See e.g. Tison*, 129 Ariz. at 534.

**C. The officer quotes about referring out the investigation do not support a showing of bias towards or prejudice suffered by the Defendant.**

Defense contends that there was a Due Process violation because some PCSD officers opined that the investigation should have been referred out. Mot. at 2-5, 10, 13. As a threshold matter, the investigation of felonies within Pima County is a duty statutorily assigned to the Sheriff. A.R.S. §11-441(A)(2). Thus, opinions to the contrary lack salience to a Due Process inquiry absent a reason why the decision not to refer the case caused substantial prejudice.

Defense speculates that the reason for these remarks was concern about potential bias against the Defendant, but none of the officers quoted make any such assertion. Sgt. Garcia stated that there was "some debate as to whether or not this was going to be a TPD case. Mtn. at 3. Det. Siress stated, "I felt it was more appropriate to be handled by an outside agency." Mtn. at 3-4. Cpt. Cornidez stated, "I think we need to get a different agency to come in." Mtn. at 4. These officers did not state "why" they thought the case should be referred out nor did they state that the reason involved even speculative prejudice to the Defendant's cause.

One could argue instead that officers were concerned that PCSD risked bias in favor of Defendant, with whom the Department is a co-defendant in litigation versus the victim. By dollars and cents, PCSD has more to gain by the Defendant being acquitted, and that reality is not to Defendant's prejudice. Per *Young*, *Huffman*, *Fields* and *Lawson*, there can be no Due Process based dismissal absent such prejudice as to irreparably impair the defense. Here, defense offers no tangible basis for prejudice, only speculation that easily cuts the other way.

**D. PCSD's disclosures to AGO are not salient to Defendant's Due Process rights.**

Defense contends that there was a Due Process violation because the disclosure by prosecution in this case has apparently been so satisfactory that defense counsel was aware of certain details unknown to AGO Special Agent Special Desire Urbina. Mot. at 11-13, 19-20.

Ariz. R. Crim. P. 15.1 provides that prosecutors must make required disclosures to the Defendant, not to a third-party agency investigating a matter handled by a different office. The Santa Cruz County Attorney's Office, which has taken up this prosecution, has not been

tasked by the Pima County Board of Supervisors to formulate PCSD's response to the AGO. Regardless, Defendant does not aver that the prosecutor has withheld information from him that was only later learned via the AGO, but much the opposite. Defendant contends that the disclosure to him in this case is superior to that received by the AGO. It stands to reason that the superior disclosure received by Defendant would not be to his prejudice and, per *Young*, *Huffman*, *Fields* and *Lawson*, there can be no Due Process dismissal without such prejudice.

**E. There is no basis for the contention that G.R. was "fed" information and regardless her prospective testimony is such that there is no risk of taint.**

To review, a dismissal with prejudice may only be warranted where "the evidence is irrevocably tainted or there exists a pattern of misconduct that is prevalent or continuous." *State v. Young*, 149 Ariz. 580, 585 (App. 1986). The State has chronicled *supra* that defense has not shown misconduct, let alone a prevalent or continuous pattern thereof. However, defense raises a new issue here of whether testimony by G.R. would be tainted. Mot. at 7.

Defense contends that Aquino and officers allegedly "fed" victim a narrative against Defendant which will unduly influence her testimony. [Cite] Generally, this claim fails for the same reason that it failed in previous filings, because G.R. is not even an eyewitness to the acts of that night. G.R. has been resolute throughout that she has no memory of what happened that night after 11PM. However, defense now contends that a shadow has been cast on G.R.'s statement that Defendant called her the day after and told her that they had sex because she reported this only after an alleged "secret" meeting with the Sheriff. Mot. at 7.

As was learned in defense interviews, on or around Dec. 19, 2022, G.R. was called in for a meeting with Sheriff Nanos, for which no Supplement was cut. Mot. at 6-7. On one hand, it makes sense that an entity head (Nanos) might seek H.R.-type sit-down after learning one employee (G.R.) may have been raped by another employee (Defendant), and that a Supplement would not be cut for such a meeting. On the other hand, the defense is free to speculate at trial what was discussed given the absence of a contemporaneous record thereof.

Notwithstanding, the nature of G.R.'s statement about the call with Defendant, or any

related testimony, is of such a nature that it is not susceptible to taint from being "fed." To explain, this is distinct from an officer "feeding" a witness to shape their perspective, such as a cop implying a photo line-up shows the perpetrator. There, a witness's testimony would be irreparably tainted, their memory shaped by suggestion. If that same witness then incorrectly testifies that the wrong person did the deed, that is not perjury but mistaken identification. By contrast, whether Defendant called G.R. and told her that they had sex the night before is black and white in that it happened or it didn't irrespective of her meeting the Sheriff. In other words, this information is not of a kind whereby a suggestion may alter or shape some incomplete memory. Rather, if G.R. testified to this and it were untrue, that would be perjury.

Further, there is evidence independent of the call for the same proposition that sex acts occurred. Aquino provided his observations that night, G.R. was recorded in Defendant's room unaware her panties were only on one leg, there is a 38 quadrillion to one DNA match for bodily fluid found on G.R.'s pants interior crotch, and defense even earlier conceded this.[3] Therefore, dismissal is not warranted because there is no reason to think that G.R.'s statement, or any related testimony, was tainted nor is it the only evidence showing that sex acts occurred.

## CONCLUSION

For the foregoing reasons, the State requests that this Court either strike the Defendant's motion for failure to comply with Ariz. R. Crim. P. 1.6 and 1.9 or deny the motion outright for failure to articulate a pattern of Due Process violations or resulting substantial prejudice.

RESPECTFULLY SUBMITTED THIS 18th day of November 2024.

GEORGE E. SILVA
SANTA CRUZ COUNTY ATTORNEY

By: _____
WILLIAM MORAN II, ESQ.
SPECIAL DEPUTY

[3] "The grand jury must be informed that Mr. Garcia believed that any activities with G.R. on the night of December 17-18, 2022 were consensual." Def. Trebus Letter at 3.

Original of the foregoing filed
this 18th day of November, 2024:

Pima County Superior Court

Copy delivered this 18th day of Nov. 2024, to:

Louis S. Fidel, Esq.
Jefferson Keenan
*Counsel for Defendant*