

14 JAN 18 AM 10:18

WILLIAM G MONTGOMERY  
MARICOPA COUNTY ATTORNEY

Eric Basta  
Deputy County Attorney  
Bar Id #: 020365  
301 West Jefferson, 4th Floor  
Phoenix, AZ 85003  
Telephone: (602) 506-5780  
Mcaomjc1@mcao.Maricopa.Gov  
MCAO Firm #: 00032000  
Attorney for Plaintiff

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

THE STATE OF ARIZONA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
MARISSA SUZANNE DEVAULT	)	CR2009-030306-001
	)	
Defendant.	)	STATE'S PETITION FOR ORDER
	)	GRANTING IMMUNITY TO WITNESS
	)	AND ORDER
	)	
	)	(Assigned to the Honorable
	)	Roland J. Steinle, III, Div. Crj15-Mc Team D-
	)	Div. O)

The State of Arizona, pursuant to A.R.S. § 13-4064, petitions the Court for an order directing Allen Flores to testify fully, under penalty of contempt should he fail to do so in this matter, and as good cause therefore alleges:

1. A.R.S. § 13-4064 provides immunity from any use against the witness, of any testimony or evidence presented by him before this Court;
2. is to be called as a witness before this Court and it is stated upon information and belief that his testimony or other information may be necessary to the public interest;
3. Allen Flores has refused to testify or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

For purposes of a clear record, the letter provided by the United States Attorney's Office from the District of Arizona relating to immunity is attached as Exhibit A.

Submitted January 18, 2014.

WILLIAM G MONTGOMERY  
MARICOPA COUNTY ATTORNEY

BY: /s/ Eric Basta  
Eric Basta  
Deputy County Attorney

Copy mailed/delivered  
January 18, 2014,  
to:

The Honorable Roland J. Steinle, III, Div. Crj15-Mc Team D-Div. O  
Judge of the Superior Court

Alan Tavassoli  
Public Defender  
Ste. 4015  
620 W. Jackson St.  
Phoenix, AZ 85003  
Attorney For Defendant

BY: /s/ Eric Basta  
Eric Basta  
Deputy County Attorney

**ATTACHMENT**

**A**



U.S. Department of Justice

United States Attorney  
District of Arizona

Two Renaissance Square  
40 N. Central Ave., Suite 1200  
Phoenix, AZ 85004-4408

Main: (602) 514-7500  
Main Fax: (602) 514-7693

January 15, 2014

Sent Via E-mail to: [bastaeri@mcao.maricopa.gov](mailto:bastaeri@mcao.maricopa.gov)

Eric Basta  
Deputy County Attorney  
Maricopa County Attorney's Office

Re: State v. DeVault; Cooperating Witness Allen Flores

Dear Mr. Basta:

You have provided the United States with materials related to the above case (to wit: the Indictment; the transcript of a November 2009 interview with Mr. Flores; department reports of the Gilbert Police Department detailing the seizure of several items of digital evidence from Mr. Flores in February 2009, and the subsequent examination of the digital evidence; a November 2012 forensic analysis of the seized digital evidence by the Gilbert Police Department; and a Notice of Intent to Invoke the Fifth Amendment filed in January 2014 by Hector Diaz, counsel for Mr. Flores). Mr. Diaz, in his Notice, seeks federal use and derivative use immunity in order for his client to testify.

The Notice articulates only one set of facts that give rise to possible federal criminal liability, that is, the child pornography found on the computer hard drives seized from Mr. Flores in February 2009. Based on the specific facts and circumstances of this case,<sup>1</sup> and in consideration for the cooperation extended by Mr. Flores in the State's prosecution, the United States Attorney's Office for the District of Arizona agrees not to use any statements made, or other information provided, by Mr. Flores in the preparation for and testimony at the trial of defendant DeVault, or any information directly or indirectly derived therefrom, against Mr. Flores in any criminal case with respect to the digital evidence seized in February 2009, including any charges of possession, receipt or distribution of child pornography.

This letter immunity binds only the U.S. Attorney's Office for the District of Arizona. This letter immunity *excludes* any prosecution for an act of physical violence against the person of another at any time, or conspiracy to commit any such act of violence at any time, and *excludes* any prosecution for perjury, obstruction of justice or making a false statement after the date of this Agreement.

<sup>1</sup> The Gilbert forensic report concludes that the tiny volume of child pornography in comparison to the much larger volume of adult pornography, along with the absence of any evidence indicating that the child pornography was actually accessed by the user, likely preclude a finding that Mr. Flores *knowingly* possessed child pornography. For similar reasons, we do not have sufficient admissible evidence to obtain and sustain a conviction under federal law.

Letter to Deputy County Attorney Basta  
January 15, 2014  
Page 2

I anticipate that you will communicate directly with Mr. Diaz, and that you will provide this letter to Mr. Diaz and counsel for the defendant. Please let me know if you need further information from me.

Sincerely,

JOHN S. LEONARDO  
United States Attorney  
District of Arizona

*s/ Gary Restaino*

Gary M. Restaino  
Criminal Division Chief

WILLIAM G MONTGOMERY  
MARICOPA COUNTY ATTORNEY

Eric Basta  
Deputy County Attorney  
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Mcaomjc1@mcao.Maricopa.Gov  
MCAO Firm #: 00032000  
Attorney for Plaintiff

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

THE STATE OF ARIZONA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
MARISSA SUZANNE DEVAULT,	)	CR2009-030306-001
	)	
Defendant.	)	<b>ORDER</b>
	)	
	)	

Upon reading the foregoing petition and good cause appearing therefore,

IT IS HEREBY ORDERED that Allen Flores, the witness above-named, is hereby required to give testimony or produce evidence as to the within matter.

IT IS FURTHER ORDERED that such testimony or evidence or any information directly or indirectly derived from such testimony or evidence, shall not be used against said witness in any proceeding or prosecution for a crime or offense concerning which he gave answer or produced evidence under court order. The witness may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury, false swearing or contempt committed in answering, in failing to answer, or in producing, or failing to produce, evidence in accordance with this order.

DONE IN OPEN COURT this \_\_\_\_\_ day of \_\_\_\_\_, 2014.

\_\_\_\_\_  
The Honorable Roland J. Steinle, III, Div. Crj15-Mc  
Team D-Div. O  
Judge of the Superior Court

ANDREW P. THOMAS  
MARICOPA COUNTY ATTORNEY

Eric Basta  
Deputy County Attorney  
Bar Id #: 020365  
301 West Jefferson, 4th Floor  
Phoenix, AZ 85003  
Telephone: (602) 506-5780  
MCAO Firm #: 00032000  
Attorney for Plaintiff

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

THE STATE OF ARIZONA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
MARISSA SUZANNE DEVAULT,	)	CR2009-030306-001 SE
	)	
Defendant.	)	STATE'S ALLEGATION OF AGGRAVATING
	)	CIRCUMSTANCES OTHER THAN PRIOR
	)	CONVICTIONS
	)	
	)	(Assigned to the Honorable
	)	Silvia R. Arellano, Div. Crj23)

---

The State of Arizona, by and through undersigned counsel, pursuant to A.R.S. § 13-701 and Rule 13.5, Arizona Rules of Criminal Procedure, amends the Indictment in CR2009-030306-001 SE to allege the following aggravating circumstances. Any additional aggravating circumstances will be alleged in a reasonable time after they become known to the state.

- The offense(s) involved the infliction or threatened infliction of serious physical injury.
- The offense(s) involved the use, threatened use or possession of a deadly weapon or dangerous instrument during the commission of the crime, specifically a HAMMER.
- The offense(s) involved the presence of an accomplice.
- The defendant committed the offense(s) in an especially heinous, cruel, or depraved manner.
- The defendant committed the offense(s) as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value.

- The offense(s) caused physical, emotional or financial harm to the victim or, if the victim died as a result of the conduct of the defendant, caused emotional or financial harm to the victim's immediate family.

Finally, if the jury convicts the defendant of multiple felony counts that are not used to enhance the sentence under A.R.S. § 13-702.02 or the defendant has felony convictions that were not used to enhance the sentence under § 13-604, the state intends to allege the multiple convictions as an aggravating circumstance.

Submitted March \_\_, 2009.

ANDREW P. THOMAS  
MARICOPA COUNTY ATTORNEY

BY: /s/ \_\_\_\_\_  
/s/ Eric Basta  
Deputy County Attorney

Copy mailed\delivered  
March \_\_, 2009,  
to:

The Honorable Silvia R. Arellano, Div. Crj23  
Judge of the Superior Court

Alan Tavassoli  
Public Defender  
Ste. 4015  
620 W. Jackson St.  
Phoenix, AZ 85003  
Attorney For Defendant

BY: /s/ \_\_\_\_\_  
/s/ Eric Basta  
Deputy County Attorney



ANDREW P. THOMAS  
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Telephone: (602) 506-5780  
MCAO Firm #: 00032000  
Attorney for Plaintiff

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

---

THE STATE OF ARIZONA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
MARISSA SUZANNE DEVAULT,	)	CR2009-030306-001 SE
	)	
Defendant.	)	STATE'S ALLEGATION OF
	)	DANGEROUS OFFENSE
	)	
	)	(Assigned to the Honorable
	)	Silvia R Arellano, Div. Crj23)

---

The State of Arizona, by and through undersigned counsel, pursuant to A.R.S. §§ 13-105(13), 13-704, Rule 13.5, Arizona Rules of Criminal Procedure, and State v. Whitney, 159 Ariz. 476, 481, 768 P.2d 638, 643 (1989), amends the Indictment in CR2009-030306-001 SE, to allege the following:

**COUNT 1: FIRST DEGREE MURDER, A CLASS 1 DANGEROUS FELONY AND A DOMESTIC VIOLENCE OFFENSE**, as charged in the Indictment is a dangerous felony offense that involves the discharge, use, or threatening exhibition of a deadly weapon or dangerous instrument, to-wit: a HAMMER, and/or involves the intentional or knowing infliction of serious physical injury upon Dale Harrell.

Submitted March \_\_\_\_, 2009.

ANDREW P. THOMAS  
MARICOPA COUNTY ATTORNEY

BY: /s/  
/s/ Eric Basta  
Deputy County Attorney

Copy mailed/delivered  
March \_\_\_\_, 2009,  
to:

The Honorable Silvia R Arellano, Div. Crj23  
Judge of the Superior Court

Alan Tavassoli  
Public Defender  
Ste. 4015  
620 W. Jackson St.  
Phoenix, AZ 85003  
Attorney For Defendant

BY: /s/  
/s/ Eric Basta  
Deputy County Attorney

ANDREW P. THOMAS  
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MCAO Firm #: 00032000  
Attorney for Plaintiff

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

THE STATE OF ARIZONA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
MARISSA SUZANNE DEVAULT,	)	CR2009-030306-001 SE
	)	
Defendant.	)	STATE'S NOTICE OF DISCLOSURE AND
	)	REQUEST FOR DISCLOSURE
	)	
	)	(Assigned to the Honorable
	)	Silvia R. Arellano, Div. Crj23)
	)	

The State of Arizona, by and through undersigned counsel, hereby gives notice of disclosure pursuant to Rule 15.1, Arizona Rules of Criminal Procedure, and requests disclosure pursuant to Rule 15.2.

**Rule 15.1(b) Witnesses**

The State may call the following witnesses in the case in chief or as rebuttal witnesses:

- Gilbert Police Department**  
**1025 S. Gilbert Rd.**  
**Gilbert, AZ 85296**
- |                     |      |
|---------------------|------|
| Mike Bishop         | 1449 |
| Chris Dorenbush     | 3243 |
| Jason Casillas      | 2967 |
| Lt. Joe Ruet        | 170  |
| Sgt. Stan Mondragon | 1131 |
| Nolan McDermott     | 3438 |
| Clint Cobbett       | 2970 |
| Ryan Churchman      | 3006 |

David Morehouse	1144
Det. Janssen Redcay	2649
Det. Debra Hartin	2199
Det. Jason Biggs	2506
Jared Cooke	3096
Matthew Auerbach	3597
Det. Dave Landgraf	729
Lt. Mike Angstead	1482
Det. Duke Ledford	2996
Det. Chris Timmins	2660
Sgt. David Meyer	1753
Det. Brenda Tomory	1658
Tyler Groth	2650
Chris Timmins	2660
Det. Colten Pearce	1732
Det. Patrick Portee	1791
Joshua Johnson	3525
David Burleson	2978
Sgt. Sy Ray	1806
Rocky Forthofer	1429

**Custodian of Records**

MCSO  
 Probation Officer  
 Criminalist  
 Fingerprint Technician Examiner

**Civilians**

Danny Harrell	NOK
Rhiannon Skye DeVault Harrell	NOK - minor

Stanley Cook, Jr.

Allen W. Flores  
 1720 S. 131<sup>st</sup> Street  
 Gilbert, AZ 85233

Angel Seitz  
 Mesa Center Against Family  
 Violence  
 225 E. 1<sup>st</sup> Street, Suite 102  
 Mesa, AZ 85201

Dr. Zabramski  
 Scottsdale Osborne Hospital  
 7400 E. Osborn Road  
 Scottsdale, AZ 85251

Jeff Kerschen  
340 W. Loma Vista Dr.  
Gilbert, AZ 85233

Kelly Kerschen  
340 W. Loma Vista Dr.  
Gilbert, AZ 85233

Todd Smith  
Shelley, Bethea, Gillette, LLC  
3850 E. Baseline, Suite 125  
Mesa, AZ 85206

Kevin Wilson  
3850 E. Maplewood  
Gilbert, AZ 85297

Jennifer Lofgreen  
2148 E. Maplewood  
Gilbert, AZ 85297

Christopher Lofgreen  
2148 E. Maplewood  
Gilbert, AZ 85297

Tillie Morris  
2039 E. Maplewood  
Gilbert, AZ 85297

Darryl Reidhead  
2039 E. Maplewood  
Gilbert, AZ 85297

Steve McGibbon  
Blood spatter expert

Dr. Angellee Chen  
Medical Examiner  
701 W Jefferson St  
Phoenix, AZ 85007

The addresses of victims have been withheld pursuant to Rule 39(10).

1. Any custodian of records for any disclosed item or document.
2. Any witness from the defense disclosure.
3. Any individual named or referred to in the preliminary hearing transcript, grand jury transcript, police report, or other State's disclosure.

**Rule 15.1(b) Evidence**

The State may introduce into evidence:

**Crime/Crime Scene Evidence**

1. Pictures, reproductions, PowerPoint presentations, charts or diagrams of the crime, crime scene, or any damage or injuries that were a result of the crime.
2. All physical evidence taken from the defendant.
3. Any fingerprints, footprints, hairs, fibers, blood, bodily fluids, chemicals or other forensic evidence found as a result of the investigation of the crime and their analyses.
4. All physical evidence taken as a result of medical exams and the analysis of that evidence.
5. Any weapons, bullets, or bullet fragments and related ballistic or forensic examinations.
6. Any theft or burglary tools.

#### **Identification Evidence**

1. Any arrest/booking report or photograph of the defendant related to the charged offenses.
2. MVD records, prior conviction records or other records demonstrating a prior identification of the defendant.
3. Any photographic line-ups.
4. Any DNA and related examinations or statistical analyses.

#### **Victim Evidence**

1. Photographs of the victim.
2. All medical records of the victims, if relevant to the crime charged.
3. All statements made by witnesses for purposes of medical diagnosis or treatment, if relevant or applicable.
4. C.P.S records.
5. All evidence from a sexual assault evidence kit, including but not limited to physical or forensic evidence, and any statements made as a result of the kit.

#### **Document Evidence**

1. Any written instruments including but not limited to: checks, receipts, applications for credit, accounts, or check-cashing services.
2. Any computer or account access devices, including but not limited to: credit cards, debit cards, passwords, account numbers, password generators.
3. Any forgery devices, including but not limited to: computer software, check blanks, drivers license blanks, social security card blanks, laminator.
4. Samples of handwriting and related analyses.

5. Bank account records, credit account records, or other receipts or transaction records.

#### **Drug Evidence**

1. Illegal drugs and related laboratory analyses.
2. Packaging materials.
3. Ingestion materials.
4. Any drug ledger or other records of sales.
5. Any scales or other measuring devices.
6. Any rental agreement, deed, mail, receipt, or other indicia of residence, leasehold, or ownership.
7. Any pagers, cell phones, or records of communications by pager or cell phone.
8. Search warrant.
9. Any drug manufacturing materials, including but not limited to:
10. Money.

#### **Other Evidence**

1. Any statements of the defendant or of any co-conspirators mentioned or contained in the police reports or other disclosed materials.
2. Any writing or recording of the defendant or witnesses.
3. Any object, representation of an object, thing, or document referred to in the defense disclosure or disclosed by the defense or used or referred to at trial by the defense.
4. Any grand jury, preliminary hearing, or deposition transcript.
5. Any object, representation of an object, thing, or document referred to in the preliminary hearing transcript, grand jury transcript, police report, or in any of the State's disclosure, including but not limited to: Any and all evidence listed in Gilbert PD DR# 09-000000886 and all supplements.

#### **Rule 15.1(b) Notices**

1. Any other witnesses or evidence will be disclosed seasonably according to Rule 15.6.
2. The State has no obligation to provide witness telephone numbers. The only witness telephone numbers to be disclosed are those that are already included in police reports or other disclosure materials.

3. All of the listed witnesses' existing relevant written statements have already been provided in the police reports or are provided with this notice. Any other statement of a witness that any witness may remember may be obtained through witness interviews.
4. All existing written statements of the Defendant have already been provided in the police reports or are provided with this notice. Any other statement of the defendant that any witness may remember may be obtained through witness interviews.
5. Audio, video, or digitally recorded statements or images are available for review, and copies of such recorded statements or images will be provided upon request after sufficient arrangements are made, including providing blank tapes or compact disks and paying any reasonable costs associated with making copies.
6. Any exhibit presented to the grand jury has already been disclosed to the defense except insofar as disclosure may be prohibited by A.R.S. § 13-2812 or any other statute or rule. The State cannot identify for disclosure exhibits that were not admitted or presented to the grand jury.
7. Defense counsel shall be responsible for recording any witness statement made at an interview of the witness.
8. Experts to be called as witnesses in this case are listed in the witness list. The names and addresses of experts along with completed results of physical examinations, scientific tests, experiments, or comparisons have already been provided, are provided with this notice, or will be provided upon completion.
9. Any police officer listed above may be called as an expert witness with respect to an area within the officer's training and experience, including expert knowledge of illegal drugs, their possession or sale, useable amounts, or any other topic.
10. Any criminalist, fingerprint analyst, identification technician, or other similar witness will be called as an expert in his/her respective field.
11. If a witness becomes unavailable pursuant to Rule 804(a), the State will attempt to introduce prior statements under Rules 803(24) and 804(b)(5).



12. Unless otherwise indicated, the State wishes to be present during the interviews of all potential State's witnesses. The State's witnesses will be made available for defense interviews, except those who testified at a preliminary hearing or juvenile transfer hearing.

13. There was no electronic surveillance. There was a search warrant. There was no informant whose existence the defendant is entitled to know under Rule 15.4(B)(2).

14. All existing original and supplemental reports prepared by a law enforcement agency in connection with this case have already been provided or are provided with this notice.

15. The State is unaware of any existing material or information, unknown to the defense, that would tend to mitigate the defendant's guilt or punishment. Pursuant to *Kyles v. Whitley*, 514 U.S. 419, 437-438 (1995), the State will review any evidence in its possession, determine if any of it is exculpatory, and, if so, turn such evidence over to the defense. However, the State has no obligation to learn of existing exculpatory evidence. *Id.*

**Rule 15.1(d) Prior Felony Convictions**

1. The State intends to use at trial any prior felony convictions of the defendant or defense witness for impeachment purposes pursuant to Rule 609, Arizona Rules of Evidence, and for sentence enhancement under § 13-604.

2. The State has provided a list of the defendant's prior felony convictions in a separate allegation.

3. The State will provide a list of prior felony convictions of witnesses the state intends to impeach or call at trial thirty days before trial or thirty days after a request. The State cannot provide a list of felony convictions for defense witnesses without an accurate name, date of birth, and social security number for each defense witness.

4. The following witnesses may be called, and the following exhibits may be used to prove any prior conviction(s):

- a. A fingerprint technician/analyst.
- b. The fingerprints of the defendant.
- c. The original court files on the priors.
- d. The custodian of the original court files.

- e. The defendant's defense attorney on the prior(s).
- f. The arresting officers on the prior offenses.
- g. Any present/past Adult Probation Officers or Parole Officers of the Defendant.
- h. Any probation/parole files on the prior(s).
- i. Any booking photographs on the prior(s).
- j. Any prior fingerprints taken of the defendant.
- k. Any certified copies.
- l. Any "pen packs" from a State/Federal Prison/Penitentiary.
- m. Department of Corrections records custodian.
- n. MCSO Detention Officers.
- o. MCSO Custodian of Records.
- p. MCSO Booking Records/ Booking Photo(s).

**Other Evidence Upon Request**

1. The State will make recordings of existing 911 calls available to defense after a written request by providing an authorization form to be presented to the appropriate custodian of record.
2. Examination notes made by experts listed in Rule 15.1(b)(1) and 15.1(b)(4) shall be provided within thirty days of a written request.

**Evidence of Other Acts**

Pursuant to Rule 404(b), Rules of Evidence, the State intends to use evidence of other crimes, wrongs, or acts to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, or for any other relevant purpose and for impeachment purposes that is not otherwise contained in the police reports. The State will provide notice of the specific acts and the witnesses it intends to call at trial in a separate notice.

**State's Request for Disclosure**

1. The State requests a list of all papers, documents, photographs, and other tangible objects that the defendant intends to use at trial.

2. The State requests any completed written reports, statements and examination notes made by experts the defense intends to call at trial.
3. The State requests copies of any recorded statements made during interviews conducted without the presence of a Deputy County Attorney.
4. The State requests, pursuant to Rule 15.2(a)(3), that defendant submit to being fingerprinted, palm-printed, or foot-printed at any scheduled court hearing.

Submitted March \_\_\_\_\_, 2009.

ANDREW P. THOMAS  
MARICOPA COUNTY ATTORNEY

BY: /s/ \_\_\_\_\_  
/s/ Eric Basta  
Deputy County Attorney

Copy mailed\delivered  
March \_\_\_\_\_, 2009,  
to:

The Honorable Silvia R. Arellano, Div. Crj23  
Judge of the Superior Court

Alan Tavassoli  
Public Defender  
Ste. 4015  
620 W. Jackson St.  
Phoenix, AZ 85003  
Attorney For Defendant

BY: /s/ \_\_\_\_\_  
/s/ Eric Basta  
Deputy County Attorney

MICHAEL K. JEANES, CLERK  
BY *D. Newitt* DEP  
FILED

ANDREW P. THOMAS  
MARICOPA COUNTY ATTORNEY

09 FEB 27 PM 4: 17

Eric Basta  
Deputy County Attorney  
Bar Id #: 020365  
301 West Jefferson, 4th Floor  
Phoenix, AZ 85003  
Telephone: (602) 506-5780  
MCAO Firm #: 00032000  
Attorney for Plaintiff

DR 09000000886 - Gilbert Police Department  
CA2009008012

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

THE STATE OF ARIZONA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
MARISSA SUZANNE DEVAULT,	)	CR2009-030306-001 SE
	)	
Defendant.	)	466 GJ 460
	)	
	)	INDICTMENT
	)	
	)	COUNT 1: FIRST DEGREE MURDER, A
	)	CLASS 1 DANGEROUS FELONY AND A
	)	DOMESTIC VIOLENCE OFFENSE (DV)
	)	(MARISSA SUZANNE DEVAULT)
	)	

The Grand Jurors of Maricopa County, Arizona, accuse MARISSA SUZANNE DEVAULT, on this 27<sup>th</sup> day of February, 2009, charging that in Maricopa County, Arizona:

**COUNT 1:**

MARISSA SUZANNE DEVAULT, on or about the 14<sup>th</sup> day of January, 2009, intending or knowing that her conduct would cause death, with premeditation caused the death of DALE HARRELL, in violation of A.R.S. §§ 13-1101, 13-1105, 13-3601, 13-751, 13-702.01, and 13-801.

The State of Arizona further alleges that the offense charged in this count is a dangerous felony because the offense involved the discharge, use, or threatening exhibition of a HAMMER, a


deadly weapon or dangerous instrument and/or the intentional or knowing infliction of serious physical injury upon DALE HARRELL, in violation of A.R.S. § 13-704.

A True Bill  
("A True Bill")

ANDREW P. THOMAS  
MARICOPA COUNTY ATTORNEY

Date: February 27, 2009

  
/s/ ERIC BASTA  
DEPUTY COUNTY ATTORNEY

  
MARK STORY  
FOREPERSON OF THE GRAND JURY

EB/skd/OK

**COURT INFORMATION SHEET (CIS)**

County Attorney Case Number: CA2009008012

**STATE v. MARISSA SUZANNE DEVAULT**

Defendant's In Custody  
Last Known Address: 2149 East Maplewood Street  
Gilbert, AZ 85297

Defendant's Employer: UNKNOWN

Defendant's Attorney: Legal Defender

**DEFENDANT'S DESCRIPTION:**

Race: W Sex: F Hair: BRO Eyes: BRO Hgt: 505  
Wgt: 115 DOB: 11/6/1977 Soc Sec #: 526795307

Old LEJIS #: Unknown FBI #: 800018CD5 SID #: 20495839  
JMS Booking #: P514390 JMS LEJIS #: Unknown

**FILING STATUS:**

Grand Jury Indictment

Court #: CR2009030306001SE Filing Court: Superior  
Date Complaint Filed: 2/24/2009

Grand Jury #: 466 GJ 460 Service Type: NSI  
Date Indictment Filed: 2/27/2009

Superior Court #: CR2009030306001SE (Court Use Only)  
Adult/Statutory Juv/Juv Transfer  
(Circle Appropriate Choice)

**ATTORNEY:** ERIC BASTA Bar ID: 020365 Location: Downtown

**PRELIMINARY HEARING/GRAND JURY CHARGES:**

**COUNT 1: FIRST DEGREE MURDER, A CLASS 1 DANGEROUS FELONY AND A DOMESTIC VIOLENCE OFFENSE (DV) (MARISSA SUZANNE DEVAULT)**

Count	ARS	ARS Literal	Date of Crime
1	13-1105	Grand Jury Hearing	1/14/2009

**DEPARTMENTAL REPORTS:**

DR 09000000886 - Gilbert Police Department

**EXTRADITE:** OK

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CR2009-030306-001 SE

02/27/2009

COMMISSIONER CAROLYN K.  
PASSAMONTE

CLERK OF THE COURT  
D. Merkling  
Deputy

IN THE MATTER OF THE

466TH COUNTY GRAND JURY

WILLIAM A MOORE

TRUE BILL / ISSUE WARRANT

Present are the above-named Deputy County Attorney and 9 members of the 466th Maricopa County Grand Jury.

Court Reporter, Terry Masciola, is present.

Mark Story, Foreman, presents to the Court Indictment 466 GJ 460, a True Bill.

IT IS ORDERED assigning this cause a criminal number.

IT IS FURTHER ORDERED that a Warrant issue for the arrest of the Defendant to be delivered by the Clerk to the Sheriff.

IT IS FURTHER ORDERED pursuant to A.R.S. Section 13-3961 of the Arizona State Constitution, that the Defendant is not eligible for release on bond because the proof is evident or the presumption great that the Defendant committed the capital offense and that there exists at least one or more aggravating circumstances under A.R.S., Section 13-703 and therefore, the Defendant is nonbondable.

IT IS FURTHER ORDERED that these remain secret until the arrest of the Defendant.

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

STATE OF ARIZONA,

Plaintiff,

v.

MARISSA SUZANNE DEVAULT,

Defendant.

No. CR 2009-030306-001-SE

**MOTION TO DISMISS STATE'S  
NOTICE OF INTENT TO SEEK THE  
DEATH PENALTY BASED UPON  
VIOLATION OF EQUAL  
PROTECTION CLAUSE**

(Assigned to the Honorable SUSAN  
BRNOVICH)

**(Oral Argument Requested)**

The defendant, MARISSA SUZANNE DEVAULT, by and through her attorneys, requests this court dismiss the State's Notice of Intent to Seek the Death Penalty against Ms. Devault based upon a violation of the Equal Protection clause under the Fourteenth Amendment to the United States Constitution. This request is made pursuant to Rule



16.1 of the Arizona Rules of Criminal Procedure. Attorneys for Ms. Devault additionally support this request with the following Memorandum of Points and Authorities:

### **MEMORANDUM OF POINTS AND AUTHORITIES**

#### **Facts:**

Ms. Devault is accused of Count I, Premeditated First Degree Murder, a class 1 dangerous felony. The victim in the case, Dale Harrell, was Ms. Devault's spouse. The assault had occurred on January 14, 2009. Ms. Devault was initially indicted on charges of Attempted Second Degree Murder, a class 2 dangerous felony and a domestic violence offense on January 21, 2009. Mr. Harrell died from a pulmonary embolism on February 9, 2009, due in part to the injuries he had sustained, at which time the state dismissed the initial charges and filed new charges of Premeditated First Degree Murder on February 27, 2009. Although no new evidence was developed subsequent to the filing of the first indictment and the filing of new charges beyond the actual death of Mr. Harrell, the state did not file Second Degree Murder charges as expected, but instead filed First Degree Murder charges. The state filed its "State's Notice of Intent to Seek the Death Penalty, Notice of Aggravating Factors and Witnesses" on April 16, 2010.

#### **Law:**

The Equal Protection clause of the 14<sup>th</sup> Amendment to the United States Constitution states as follows:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person

of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The United States Supreme Court analyzes challenges based upon violations of the Equal Protection to the 14<sup>th</sup> Amendment by determining the class that the law is failing to protect. Depending upon the class of individuals affected by the law, or if the law infringes upon a fundamental right, the Court will employ different levels of scrutiny in the following way to determine if a violation has occurred:

**Strict scrutiny:** (if the law categorizes on the basis of race or national origin or infringes a fundamental right): the law is unconstitutional unless it is "narrowly tailored" to serve a "compelling" government interest. In addition, there cannot be a "less restrictive" alternative available to achieve that compelling interest.

**Intermediate scrutiny** (if the law categorizes on the basis of sex): the law is unconstitutional unless it is "substantially related" to an "important" government interest.

**Rational-basis test** (if the law categorizes on some other basis): the law is constitutional so long as it is "reasonably related" to a "legitimate" government interest.

**Argument:**

The process by which the State has sought the death penalty with regard to Ms. Devault's case violates the Equal Protection Clause. While the state has a right to bring forth charges against any citizen against whom it has probable cause to believe that the citizen in question has violated the law, the process for doing so must also guarantee those citizens the equal protection of laws. When it does not, that process itself must be subjected to scrutiny under the United States Constitution.

The process by which the County Attorney decides whether to file a Notice of Intent to Seek the Death Penalty begins with an indictment before a grand jury. If the

grand jury votes to indict, a true bill is returned and the defendant against whom the charges are filed will then be arraigned on those charges, at which time the case formally commences. If the defendant is charged with first degree murder, the state has sixty (60) days to file a Notice of Intent to Seek the Death Penalty against that defendant, if the state wishes to pursue the death penalty against that defendant. At that time, the state will file their notice of aggravating circumstances, which puts the defendant on notice of the additional elements that the state will seek to prove as part of a capital offense.

In Maricopa County, the County Attorney has a board of attorneys who make recommendations to the duly elected County Attorney in cases in which the death penalty will be sought. The County Attorney can choose to approve the recommendation, or reject or ignore that recommendation. At the time this case was filed, the Maricopa County Attorney was Andrew Thomas. Mr. Thomas is currently defending himself against charges before the Arizona State Bar that he used his office to file charges against certain county officials which were politically motivated, and faces disbarment if convicted.

This case received a lot of press coverage initially. Television producers from the show, "48 Hours" were interested in doing a segment on the case. There are many facts surrounding the case that make it extremely unusual, and therefore more interesting to the public and the media. The fact that a woman is facing capital murder charges in the death of her spouse draws more media attention and public interest in the case than if the case had been charged as a case of second degree murder.

I. **The State Violates Marissa Devault's Right to Equal Protection Under the Law by Filing a Notice of Intent to Seek the Death Penalty Against Her On the Basis of Her Sex:**

In Arizona, the last execution of a female occurred on February 21, 1930. Eva Duggan, then 49, was executed for the death of a Tucson rancher named Andrew J. Mathis, her employer, who had been robbed and murdered. Ms. Duggan had a disease which caused her neck muscles to become atrophied, and when the executioner released the trap to hang her, she was decapitated. Arizona never again used hanging as a method of execution (<http://www.capitalpunishmentuk.org>).

Of the 128 individuals in Arizona on death row, only three women are included: Debra Milke, Wendi Andriano and Shawna Forde (<http://www.azcorrections.gov>). The majority of men on death row are convicted of felony murder; whereas the manner in which women murder differs from that of men. In most cases, the types of murders committed by women are not considered death worthy (See Elizabeth Rapaport, *Capital Murder and the Domestic Discount: A Study of Capital Domestic Murder in the Post-Furman era*, 49 SMU L.Rev. 1507 (1996)). Domestic murderers who kill are generally not considered as blameworthy as other murderers, and are hence not punished as severely. This is due in large part to the fact that women are grossly over-represented as victims of domestic violence, and men are rarely represented. (See Joan Howarth, *Executing White Masculinities: Learning from Karla Faye Tucker*, 81 OR. L. Rev. 183, p. 10 (2002)). Further, Howarth posits that many women end up on death row due to the appropriation of the traditional male gender roles, a phenomenon called "gender

transgression” (Howarth at pp. 10-11). This is a way that the criminal justice system, through the office of the County Attorney, can reinforce notions of gender inequality by punishing those women who have transgressed the role of the murderer that has traditionally been committed by males; a detailed review of all of the women’s cases on Arizona’s death row arguably reveal that this is the case.

Indeed, a review of the remaining 125 individuals on death row indicates that the overwhelming majority of individuals are on death row for felony murder. Here is a list of the male individuals on death row for colorable domestic violence offenses that involve intimate partner violence:

Michael Apelt  
Eric Boyston  
David Gulbrandson  
Rodney Hardy  
Ronnie Joseph  
Alvie Kiles  
Israel Naranjo  
Wayne Prince  
Milo Stanley  
Eugene Tucker  
James Granville Wallace  
Joseph Wood

Of these individuals, Milo Stanley was given a death sentence for the murder of his daughter, and a life sentence for the murder of his wife, so he did not receive the death penalty for the death of his spouse (additionally, he committed multiple homicides). Michael Apelt had only married his wife two months prior in time to her death, and was convicted of conspiring with his brother to kill her for insurance purposes; a plan that was apparently hatched prior to the marriage. Eric Boyston, Rodney Hardy, Alvie Kiles,

Wayne Prince, Eugene Tucker, James Granville Wallace, and Joseph Wood all were convicted of multiple homicides in addition to the death of their intimate partners. Ronnie Joseph shot three people, and killed one. Israel Naranjo and David Gulbrandson killed their intimate partners, but were not residing with their intimate partner at the time their respective offenses were committed. Additionally, the victim's children were present in both cases, and in Naranjo's case, watched him kill their mother, and both Gulbrandson and Naranjo were disgruntled because the relationship with their intimate partner had been terminated by that partner.

Of the women on death row, the only one that qualifies as a domestic violence murder is the case of Wendi Andriano. Ms. Andriano was convicted of poisoning, stabbing and bludgeoning her husband multiple times. The victim, Joe Andriano, also had terminal cancer and was given a very short time to live.

Based upon the history of the death penalty in Arizona, it seems highly unlikely that a woman will receive the death penalty absent circumstances which indicate some form of "gender transgression." Debra Milke and Shawna Forde were also convicted of killing children. There are no other instances of individuals on death row who were living with their intimate partner when they killed them, apart from cases of multiple homicide, that have received the death penalty in Arizona since 1976. Therefore, for the state to opt to file a Notice of Intent to Seek the Death Penalty when there is very little chance of a successful conviction for capital murder begs the question, why file the Notice of Intent to Seek the Death Penalty in this particular case?

The answer to that question is directly related to the fact that Ms. Devault is a woman. Had she been male, the state would not have filed a Notice of Intent to Seek the Death Penalty in her case. As there are no known cases in which a male spouse or intimate partner has received the death penalty for killing their female spouse (absent situations of multiple homicide or bitter estrangement coupled with very violent situations in which the victim had been mutilated) as set forth above, the only reason for the state to file a Notice of Intent to Seek the Death Penalty is because the case is unusual; unusual because the defendant in this case is a woman. If the County Attorney can successfully prosecute a capital case against a woman under these facts, the office of the County Attorney would receive great political mileage with conservative voters. Had this case been charged on the same set of facts, and the genders of the victim and the alleged offender had been reversed, this case would not have received the media coverage that it has received, and there can be little doubt that the case would have been charged as a case of second degree murder.

In terms of the analysis for an equal protection challenge, state action is required. The state action in this case is the determination that this is a capital case, and the subsequent filing of a Notice of Intent to Seek the Death Penalty. Ms. Devault concedes that prosecutors are given wide latitude in determining the charges on the cases that they file, but a criminal defendant is still enjoys guarantees of constitutional due process despite such latitude (See *State v. Tsosie*, 171 Ariz. 683, 832 P.2d 700 (1992); *State v. Mieg*, 225 Ariz. 445, 239 P.3d 1258 (2010)). Although these cases deal with prosecutorial vindictiveness when the defendants in their respective cases had chosen to

exercise their constitutional rights, these cases are similar in the sense that equal protection under the laws is guaranteed by the constitution, and because Ms. Devault is a female, simply raising an equal protection claim should be enough to trigger a shift of the burden onto the state to overcome the presumption of treatment based upon sex.

Once it can be shown that Ms. Devault has been treated differently based upon her sex, the analysis requires the state to explain its rationale for the differential treatment. The United States Supreme Court has applied a level of scrutiny known as intermediate scrutiny to gender based classifications. The first example of the Court using intermediate scrutiny came in *Craig v. Boren*, 429 U.S. 190 (1976), which was the first case that determined that statutory or administrative sex-based classifications were subject to an intermediate standard of judicial review. Further, in *Mississippi University for Women v. Hogan* 458 U.S. 718 (1982), the United States Supreme Court ruled that the burden is on the proponent of the discrimination to establish an "exceedingly persuasive justification" for sex-based classification to be valid. The Court applied intermediate scrutiny in a way that is slightly less than strict scrutiny. In more recent decisions the Court has preferred the term "exacting scrutiny" when referring to the intermediate level of scrutiny under an equal protection analysis. (For examples where the Court applied exacting intermediate scrutiny when ruling on sex-based classifications, see *J.E.B. v. Alabama*, 511 U.S. 127, 114 S.Ct. 1419 (1994), and *United States v. Virginia*, 518 U.S. 515, 116 S.Ct. 2264 (1996), which held that the "Burden of justification for official classification based on gender under equal protection analysis is demanding, and it rests entirely on the state.")



Applying the exacting scrutiny standard to the governmental action, it is incumbent upon the state to then show that in justifying official classification based on gender under an equal protection analysis, the state must show that the challenged classification serves an important governmental objective, and that discriminatory means employed are substantially related to the achievement of those objectives (*Virginia* at 533). Under an equal protection analysis, benign justifications proffered in defense of categorical exclusions based on gender will not be accepted automatically. A tenable justification must describe the actual state purposes, not rationalizations for actions which are, in fact, differently grounded (*Virginia* at 535-536).

As Ms. Devault has been treated differently because she is a woman, and the state had presumably vetted this case through former County Attorney Andrew Thomas, who has a history of using the criminal justice system to benefit his own political agenda, Ms. Devault has met her burden of raising the claim under the equal protection clause through the 14<sup>th</sup> Amendment to the United States Constitution. The state must now be required to show why pursuing the death penalty in Ms. Devault's case serves an important governmental objective, when the state has not pursued the death penalty in cases where males are similarly situated (accused of a domestic violence homicide). The state must also explain why the discriminatory means employed must be substantially related to the achievement of those objectives.

As there is no rational basis for pursuing the death penalty against a female when a similarly situated male would not have the same Notice of Intent to Seek the Death Penalty filed against him, due in part to publicity due to the fact that Ms. Devault is

female, the Notice of Intent to Seek the Death Penalty in this case should be dismissed, as the state cannot meet the exacting scrutiny required to show a justification for the differential treatment that Ms. Devault has received based upon her sex.

**II. The State Violated Marissa Devault's Right to Equal Protection Under the Law by Filing a Notice of Intent to Seek the Death Penalty Against Her On the Basis of the County in Which She Resides:**

At the time Ms. Devault was arraigned, Maricopa County had over 120 capital cases pending trial. A Task Force was created by the Arizona Supreme Court to study the problem created by filing more capital cases than the system could handle, and a report was issued in September, 2007 indicating that the number of pending capital cases in Maricopa County at that time was approximately 140 (See *Arizona Supreme Court Capital Case Task Force Report of Recommendations to the Arizona Judicial Council*, September, 2007). The Arizona Supreme Court then created an Oversight Committee, which issued a report in November, 2008 (See *Joint Report of the Capital Case Oversight Committee and Maricopa County Superior Court to the Arizona Judicial Council*, November, 2008). As of July, 2008, there were only 155 capital cases statewide; Maricopa County accounted for 127 of those. The next highest number of capital cases by county was Pima County, which accounted for only 9 % of the total. Outlying counties accounted for the remaining 9 % of the capital cases in the State of Arizona (See *Oversight Committee Report*, p. 6).

Because Ms. Devault resides in Maricopa County and is a woman, a Notice of Intent to Seek the Death Penalty case has been filed by the Maricopa County Attorney's Office. Had she resided in any other county, there is little possibility that the state would file a Notice of Intent to Seek the Death Penalty in her case. While women offenders account for about 10% of all homicides, only one in forty-nine, or 2% of all death cases against women result in death verdicts (See Victor Streib, *Death Penalty for Female Offenders, January 1, 1973 Through June 30, 2009*). It is therefore highly unlikely for a county with limited financial resources to use those resources to seek a death verdict against a woman unless the offense was particularly egregious or heinous, and most domestic violence homicides do not fall under this category of homicide. As a result, had Ms. Devault, for example, resided in Navajo County, she would not be facing capital charges.

While it seems an academic exercise to theorize that if the offense for which Ms. Devault is being tried happened in another county, the charging outcomes might be vastly different, it is not merely proposing this hypothetical situation. The law requires uniformity with regard to meeting the requirement that citizens receive equal treatment and fundamental fairness under the laws of the state. Although the state action in the United States Supreme Court decision of *Bush v. Gore*, 531 U.S. 98, 148 L.Ed.2d 388, 121 S.Ct. (2000), held that the right to vote is a fundamental right, the right to life is even more fundamental. In that case, the Equal Protection Clause assured that no one person's vote is valued over another person's vote:

The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another... (*Bush v. Gore*, 531 U.S. at 104-105).

Due to the fact that Florida had no specific standards to assure a uniform determination of the intent of the voters from county to county, the disparate treatment of ballots among the counties denied the voters equal protection under law. The Court found the denial of equal protection not in the fact that local entities may develop different systems for carrying out elections, (and in parallel, that different county prosecutorial agencies would have the power to use their discretion to file capital cases) but in the failure of the Florida Court "with power to assure uniformity" to meet the requirements of equal treatment and fundamental fairness as those systems were implemented. (*Bush v. Gore* at 109). Therefore using this reasoning, the state is not allowed to value one life over another based upon which county a criminal defendant resides.

The right to life is fundamental, as recognized in the Fifth Amendment to the United States Constitution as well as the Arizona Constitution (Article 2, §4). The differing standards in the fifteen counties of Arizona that determine whether an accused should face a possible death sentence denies defendant, and all similarly situated capital defendants of the right to equal protection under the law.

In the *Bush v. Gore* case, the differing standards were substantial; a vote that would have counted in one county would not have counted in another county. The fundamental right to vote was therefore substantially affected from county to county.

Similarly, a Notice of Intent to Seek the Death Penalty filed in one county against a capital defendant affects the accused fundamental right to life. If an urban county has the human and economic resources, the county attorney of that urban county may use his/her discretion to file a Notice of Intent to Seek the Death Penalty. But if a rural county does not have such resources, then it becomes more than a question of discretion of whether or not a county attorney can or cannot file such a notice based upon those resources. The law on its face becomes improperly administered as applied. This is the current situation in the State of Arizona.

The Supreme Court of Arizona has dealt with the question of whether or not the lack of prosecutorial standards in filing a Notice of Intent to Seek the Death Penalty is constitutional (See *State v. Sansing*, 200 Ariz. 347, 26 P.3d 1118 (2001), and *State v. Smith*, 203 Ariz. 75, 50 P.3d 825 (2002)). While the Court has found that the lack of standards for a single prosecuting agency is constitutional, the Court has never seriously considered the lack of standards within the context of a statewide or uniform policy shared by state prosecuting agencies. As in *Bush v. Gore*, the Arizona Court has the power to assure uniformity to meet the requirements of equal treatment and fundamental fairness as proposed standards are implemented. This would not only require a set of uniform policies for state prosecuting agencies to follow, but allocating the resources to maintain and enforce these policies throughout the State of Arizona. As the lack of resources and its application has never been questioned on a county by county level, the Arizona Supreme Court has therefore never truly answered the question of whether the lack of standards as applied throughout the state violates constitutional precepts of equal

protection. Currently, the Arizona Supreme Court has a mechanism in place to address this issue outside of cases pending decision before it; the Oversight Committee has addressed similar issues as a result of their work on the Capital Case Task Force. If the right to life is fundamental, and the application of filing the Notice of Intent to Seek the Death Penalty varies from county to county because of substantial differences in the discretion to file such notices, this in and of itself should trigger a strict scrutiny analysis even if decided on a case by case basis. In contrast, in Arizona, our system is based on a dichotomy in which urban counties have discretion to file a Notice of Intent to Seek the Death Penalty and litigate a possible death sentence, whereas rural Arizona counties do not have such discretion due to a lack of resources. This inherently triggers a strict scrutiny analysis which would require a compelling government interest to overcome. The use of the death penalty can almost never be a compelling government interest as there is always a reasonable alternative to a death sentence, which is life with or without the possibility of parole, which accomplishes the same purpose as a death sentence without infringing in any way the fundamental right to life.

For all these reasons, we hereby ask this court to dismiss the Notice of Intent to Seek the Death Penalty in this case.

RESPECTFULLY SUBMITTED this 20<sup>th</sup> day of October, 2011.

By: /s/AlanTavassoli  
ALAN TAVASSOLI  
Deputy Public Defender

Copy of the foregoing mailed  
delivered this 20<sup>th</sup> day of  
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