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

THE STATE OF ARIZONA,	)	No. CR
	)	
Plaintiff,	)	MOTION FOR DISCLOSURE
vs.	)	OF CHILD PROTECTIVE
	)	SERVICES RECORDS AND
	)	RELATED MATERIALS
	)	
Defendant	)	Honorable
	)	Division

COMES NOW the defendant, \_\_\_\_\_, by and through his counsel, RICHARD L. LOUGEE, and pursuant to the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, the corresponding provisions of the Arizona Constitution, *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 [1963] and its progeny, Ariz. Rule Cr. Proc. 15.1a[7] and portions of the Inter-Agency Protocol for the Investigation of Child Abuse in Pima County [attached as Exhibit A], and respectfully moves this court for its order directing the Pima County Attorney's Office to obtain and to furnish to the defendant all Child Protective Services records generated during the investigation of this case. Although CPS records have purportedly been provided in this case, they are clearly incomplete and have been redacted so as to be virtually useless. [See attached Exhibit B.] Accordingly, this motion requests the complete and unredacted CPS records concerning that agency's

involvement in the investigation of this case and the records of any counseling and treatment providers available to, in the possession of or known to Child Protective Services.

Furthermore, a summary of the legal proceedings in the matter of \_\_\_\_\_, Superior Court No. D \_\_\_\_\_, attached hereto as Exhibit C, indicates unredacted and redacted copies of CPS records were provided to the Court during Ms. \_\_\_\_\_'s divorce proceedings. Ms. \_\_\_\_\_ is the mother of the alleged victim in the instant case. Exhibit C indicates that subpoenas were served on CPS worker \_\_\_\_\_ and Detective \_\_\_\_\_, the investigators in the instant case. Any records, notes, and/or transcripts of testimony by Detective \_\_\_\_\_ and CPS case worker \_\_\_\_\_ in the \_\_\_\_\_ divorce proceedings should be disclosed to the defendant in the instant case since police and CPS involvement in the divorce proceedings could only relate to their investigation of the allegations against the defendant herein. Furthermore, Exhibit C refers to psychological examinations conducted on Ms.

\_\_\_\_\_ and/or her children in the divorce proceedings. Any information in the psychological reports which contain inconsistent statements or which reflects upon the competency and/or credibility of the mother and/or her child is exculpatory and should be disclosed.

In addition to the records requested concerning the alleged victim, \_\_\_\_\_, CPS worker \_\_\_\_\_ had extensive contact with the defendant's daughter, \_\_\_\_\_. In fact, on information and belief,

Ms. \_\_\_\_\_ assisted the defendant's ex-wife, \_\_\_\_\_, to obtain a court order taking \_\_\_\_\_ from the lawful custody of \_\_\_\_\_, the defendant's mother, and transferring custody to Ms. \_\_\_\_\_, thereby effecting the sequestration of an important witness with a woman biased against the defendant, rendering the witness inaccessible to a neutral and objective investigation of the case and placing the child witness in an environment where she may well be convinced by the time of trial she is somehow "helping her daddy" by continuing to lie. [The accompanying memorandum explains that the child's custody was changed by Ms. \_\_\_\_\_ solely because of her concern that the child's trial testimony track her 1/16/02 interview.] This motion then, also requests any and all records in the possession of any investigating agencies, including CPS, related to contacts with \_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_ occurring during the investigation of the instant case and includes, but is not limited to, any evidence emanating from any custody proceedings involving \_\_\_\_\_.

A memorandum of points and authorities more particularly setting forth the factual and legal bases of this motion accompanies.

RESPECTFULLY SUBMITTED this \_\_\_ day of \_\_\_\_\_, 2002.

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Richard L. Lougee

Copies of the foregoing to mailed/delivered  
this \_\_\_ day of September, 2002, to:

Honorable  
Division , Pima County Superior Court  
110 W. Congress  
Tucson, AZ 85701

Deputy Pima County Attorney  
32 N. Stone Avenue  
Tucson, AZ 85701

## MEMORANDUM OF POINTS AND AUTHORITIES

The defendant, \_\_\_\_\_, is charged with eighteen counts of sexual conduct with a minor under 15, each class 2 felonies and dangerous crimes against children. The alleged victim in each count is \_\_\_\_\_ who was nine during the period when the alleged acts purportedly occurred from May 2001 until October 1, 2001.

The first report to the police of \_\_\_\_\_'s allegations for months of repeated sexual intercourse with the defendant supposedly ending October 1, 2001, was not made until November 20, 2001. A police report details how the victim's mother, \_\_\_\_\_, cavalierly explained how the "disclosure" occurred and why she delayed reporting the allegations to authorities:

**Um, my daughter had come to me a few weeks ago and, um, brought up in just general conversation that something had happened between her and my ex-boyfriend, \_\_\_\_\_, and I started questioning her about it and asking her, you, Well, what happened? And things of that nature and, and I felt it was worthy enough to call in a report.**

This casual account of "the disclosure" by \_\_\_\_\_ is telling. For the skimpy disclosure in this case lays bare a conspiracy between two women with separate agendas, \_\_\_\_\_ and \_\_\_\_\_, both of whom had reasons to fabricate or to support false charges against Mr. \_\_\_\_\_. Each woman had her daughter lie to achieve her goal. In \_\_\_\_\_, the assigned CPS worker, the women found someone willing [perhaps unwittingly] to accommodate this conspiracy by uncritically accepting the girls' stories and acting so as to impede any reliable investigation.

During a portion of the seven-month time period set forth in the indictment, Mr. [redacted] and his nine-year-old daughter, [redacted], lived with [redacted] and her three daughters, nine-year-old [redacted], seven-year old, [redacted], and five-year old [redacted]. Mr. [redacted] had legal and physical custody of [redacted] since his divorce from [redacted] in 1997. Ms. [redacted] resides in California. On January 16, 2002, [redacted], after having learned from her mother the details of [redacted]'s allegations against her father, was interviewed at the Southern Arizona Child Advocacy Center. Although [redacted]'s statement contradicted much of [redacted]'s "story," and was clearly coached, the authorities concluded the statement "corroborated" [redacted]'s allegations. Based upon these two statements alone, the defendant was charged with the instant allegations. [There is no medical or physical evidence supporting [redacted]'s claims.]

The defendant was sentenced to prison on November 27, 2001, for a domestic violence charge reported by [redacted] on August 30, 2001. He was arrested on August 30, 2001, and never returned to the residence after that date. [Note: the last 6 counts of the indictment charge him with offenses involving [redacted] during a time when he was precluded by a TRO and the conditions of release arising from the 8/30/01 arrest from having any contact with the [redacted]. Since all of the allegations purported to have occurred at the [redacted] residence and there is no suggestion he ever returned there between August 30, 2001, and his imprisonment on November 27, 2001, the last six counts are illustrative

of a investigation. These counts are based on 's statement alone and no further investigation appears to have been conducted.]

Between Ms. 's report of 's allegations to the police on November 20, 2001, and 's statement on January 16, 2002, Jessica lived in Tucson with her grandmother, . During this period and conveyed the details of 's "allegations" to . In her statement, says she discussed 's allegations with her mother with whom she talked regularly by telephone and whom she visited at least once.

Sometime in the latter part of February, 2002, agents of the state using an invalid and superceded 1997 custody order giving joint custody of to and the defendant, removed from the lawful custody of . [Joint custody was originally awarded to Mr. and Ms. and later changed to the joint custody of and . Thus, the joint custody order used by the state in February, 2002, was void and the child's removal from was unlawful.] Commencing on February 27, 2002, , working with began the tasks outlined for Ms. in her letter to Ms. on February 20, 2002. [Exhibit E.] Directed by , Ms. instituted in the Superior Court of Pima County legal proceedings to modify the custody and visitation arrangements involving . These proceedings sought legal custody in Ms. and ultimately resulted in an order prohibiting any visitation between

and her grandmother, . [The documents attached as Exhibit E appear never to have been notarized raising questions as to who filed them.] While was not at risk in Ms. 's home, [her father had been in prison for four months and has yet to complete his sentence] Ms. was apparently concerned that continued contact with the child's grandmother would unravel her case against the defendant if the child were to learn the consequences of the statement she had given on January 16, 2002. Ms. , a CPS worker known for her disdain for facts inconsistent with her preconceived and premature presumptions of guilt, thus manipulated 's removal to California to live with her mother, a drug addict, previously deemed unfit to have custody of the child. By so doing, Ms. placed with a woman eager to "please" CPS to keep custody of her child. Presumably in exchange for getting custody of , Ms. was required to sign an agreement by Ms. , which had the sole purpose in this case of requiring Ms. to encourage to stick to her story, to not make any statements to anyone indicating she disbelieved and to keep inaccessible to anyone truly interested in determining what, if anything, occurred in the residence.

Defense counsel avows that he has had two recent cases with CPS worker . Ms. 's conjunctive investigation with the police in each of those cases, although in accordance with the County Attorney's aforementioned Protocol, contaminated the reliability of

virtually all of the critical evidence and witnesses in those cases. For example, in each of the above-referenced cases, Ms. [redacted] summarily conditioned the custodial parent's continued custody of the alleged victim or child witness on the parent's signing an agreement precluding the parent from making **any** statements indicating he/she disbelieved the child's statements or permitting the parent from offering any explanation for the child's statement inconsistent with the guilt of the accused. That agreement, attached generically hereto as Exhibit G, in conjunction with records the court ordered be disclosed by CPS in those cases, reveal the investigative techniques of Ms. [redacted] include bullying reluctant witnesses and threatening to arrest the custodial parent if the child appears to deviate in an exculpatory manner, from her original story [adopted uncritically by Ms. [redacted] before there has been any investigation. See above: the impossibility of the last six counts]. Ms. [redacted]'s agreement also requires the parent, as the child's legal representative, to obtain Ms. [redacted]'s approval before allowing the child to be interviewed by anyone, including participating in a Rule 15 interview governed by statute.

Thus, the essential investigative facts in this case will not be found in police reports. Rather the facts essential to the defense of this case lurk in the shadows of Ms. [redacted]'s involvement at the fringes of the case and can only be gleaned from her case notes and investigative reports. Hopefully, these materials will document accurately details of Ms. [redacted]

's contacts and communications with Ms. and Ms. and their daughters and the pressures brought to bear on these individuals. [Mr. 's legal efforts to obtain custody of mysteriously ceased after Ms. 's name appeared as a witness in the case.]

Given her history, there is no doubt Ms. 's reports and records in this case will contain *Brady* material which relate directly to the motives and biases of the state's witnesses, whether freely by witnesses or caused by her intimidation and machinations.

It has long been the practice of the Pima County Attorney's Office to refer defense motions for Child Protective Service records to the Attorney General's Office. The court then conducts a hearing at which a representative of the Attorney General's Office appears to address the defense request. Contained in Exhibit A are portions of the Inter-Agency Protocol for the Investigation of Child Abuse in Pima County prepared by the Pima County Attorney's Office. The protocol states its creation was made possible by state funds provided to the Pima County Attorney's Office. Its intent is clear: "The Pima County Child Abuse Task Force is an interagency council comprised of representatives of those agencies with primary statutory responsibility for the investigation and prosecution of child abuse within Pima County." The expressed hope is the protocol will assist in "increasing successful prosecutions and convictions."

Furthermore, the protocol states repeatedly (as evidenced by the

attachment) that its purpose is to create an “inter-agency team” to investigate child abuse complaints. Upon receiving a complaint, the protocol directs CPS and the police to work conjointly while investigating the allegations. Any and all information obtained by the police or CPS is to be freely and immediately exchanged with all interested team participants including the Pima County Attorney’s Office. Thus, contrary to the position long taken by the Pima County Attorney’s Office that CPS records can only be obtained from the Attorney General’s Office, the protocol written by the County Attorney’s Office establishes that for over 10 years prosecutors have had free and unfettered access to critical evidence in these most serious criminal cases. \_\_\_\_\_, in counsel’s recent experience, is in fact the individual responsible for obtaining virtually all of the evidence obtained in cases of this type with law enforcement officials giving her free reign.

Thus, what defense counsel seeks in this motion are the conjoint law enforcement/CPS investigative records [in effect, on and the same] readily available to the prosecutor by the terms of the protocol. Such records include, but are not limited to the following as they relate to Ms.

and her children as well as to \_\_\_\_\_ and her daughter, \_\_\_\_\_ :

1. DES pamphlets provided to the alleged victim and her legal representative.
2. Any and all agreements, contracts or documents of any kind wherein CPS or any other state agency pre-conditions

continued custody of a child upon compliance with the terms of the agreement. This would include, but is not limited to, agreements related to the custody of \_\_\_\_\_ and \_\_\_\_\_ or any other child. (For example see Exhibit G attached hereto.)

3. The case notes prepared by any individual operating for or on behalf of CPS or DES relating to the instant case and any prior or subsequent CPS contacts, reports or investigations made by any individual relating to the alleged victim and/or the alleged victim's legal representative in the instant case as well as to the defendant's daughter \_\_\_\_\_ and/or the child's mother, \_\_\_\_\_. [See *State v Lujan*, 192 Ariz. 448, 967 P2d. 123 (1998)].
4. Any and all statements obtained by a CPS investigator or any agent operating on behalf of CPS from all individuals having information related to the instant case. This includes recorded statements as well as notes of non-recorded statements.
5. Any and all correspondence between any CPS worker and the alleged victim, the defendant's daughter, the girls' mothers or the alleged victim's legal representatives, psychologists, counselors, or therapists. Referrals by CPS of the alleged victim or any witness to any mental health organization (including but not limited to Las Familias or other putative

therapy facility) should be disclosed along with any treatment records or progress notes obtained by or available to CPS.

6. Any and all CPS documents which purport to substantiate findings of misconduct by the accused and any materials supporting such findings.
7. Any and all case notes and comments which document the contacts or investigative events in which the CPS case worker and/or the police detective and/or any agent operating on their behalf made contact with the alleged victim, the defendant's daughter, their parents, guardians or any other individuals purporting to have information germane to the case.
8. Any and all CPS reports, including purported summaries of the investigation either at its inception or its conclusion.
9. Any all documents reflecting the participation by any representatives of CPS in any legal proceedings concerning legal and/or physical custody of \_\_\_\_\_ and \_\_\_\_\_.  
Specifically requested are any documents prepared and/or filed by any CPS official on behalf of \_\_\_\_\_ or \_\_\_\_\_.

The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. *Brady* at 373 U.S. 87. Impeachment evidence falls within the *Brady* rule. *United States v. Bagley*, 473 U.S. U.S. 667, 676, 105

S.Ct. 3375, 87 L.Ed2d 481 [1985]. In fact, the courts have ruled that impeachment information is especially important exculpatory evidence. “The jury’s estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence and it is upon such subtle factors as to the possible interest of the witness in testifying falsely that a defendant’s life or liberty may depend.” *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 [1959]. In *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 [1974], the court held that the government’s failure to disclose requested impeachment evidence that the defense could use to conduct an effective cross-examination of important prosecution witnesses constitutes “constitutional error of the first magnitude” requiring automatic reversal.

In the instant case, as in most cases involving child sexual abuse allegations, the sole issue will be the credibility of the testimony of children. [There is no medical or scientific evidence and the defendant made no admissions.] Thus, it is on the jury’s perception of the credibility of his accusers that the defendant’s fate rests. Disclosure of any facts or information which relate even tangentially to the motives and biases of the girls’ mothers and/or the pressures or influences placed on the children to fabricate the allegations or to testify falsely in corroboration is essential if the defendant is to defend himself against two women who will benefit from his conviction and a flawed and preordained investigation. Impeachment evidence of any kind, especially that which reveals bias,

motive, influence or pressure, is thus critically important to the defense and should be disclosed without request. Furthermore, evidence which shows the tendentious motives, biases and intimidating behavior of any participant in the investigation of this case should be disclosed.

Having previously requested these materials, but erring on the side of caution, the defendant specifically requests disclosure of the following evidence of critical importance to his defense and as authorized by State v. Robinson, 153 Az.191, 735 P.2d. 801 [1987]:

1. Any information which could reasonably lead to admissible evidence of false allegations against the defendant by any witness. Examples of such information include, but are not limited to, a desire to have the accused removed from the home, a desire to change legal custody in divorce proceedings, and/or an effort to preclude or gain advantage in any civil or criminal legal proceedings.
2. Any prior sexual history of the children which could explain precocious sexual knowledge, physical findings, and any reason for a mistaken interpretation of an innocent touching.
3. The name[s] of the individual or individuals to whom the children first made their “disclosure” and the context in which these disclosures occurred.
4. The names of all individuals who learned of the disclosures and the actions taken by such individuals.

5. The names of all individuals who advised \_\_\_\_\_ and/or not to disclose their “allegations” in this case with a parent or relative whether a state agent or lay witness [See attached Exhibit D, pages 2-3.]
6. Any and all written materials concerning dates, locations, names of participants and purpose of any CPS investigative conference conducted with any potential witnesses in this case. [See attached Exhibit D, page 3.]
7. Any and all information related to the alleged victim’s [and the defendant’s daughter’s], knowledge of sexual matters [i.e. prior sexual abuse, family discussions, school classes, access to magazines and movies, observations of adult sexual activity] prior to the children’s interviews by CPS and the police. Any statements made by the children of a sexual nature to any person prior to the instant allegations should be disclosed and the children’s histories of sexualization as evidenced by masturbation, sexual contact with animals or other children.
8. Information which establishes whether any evidence in the case would be admissible under the medical diagnosis and treatment hearsay exception.
9. The qualifications, or lack thereof, of the individuals who questioned or interviewed the children concerning the allegations. Furthermore, any evidence known to the state

concerning the credibility, motives and/or biases of any state's witness exhibited in prior cases should be disclosed.

10. Any information which suggests the children attempted to, wished to, or did recant the allegations against the defendant.
11. Any and all materials showing names and addresses of all individuals who have stayed at the residence of \_\_\_\_\_ for a period of at least two consecutive nights since 8/30/91.
12. Any information, including specific acts, from any source such as school records, juvenile records, counseling records, opinions of relatives and acquaintances, related to the children's credibility and the children's competency as a witness.
13. Any and all information related to contacts between individuals operating under the aegis of the protocol and the defendant, \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, and \_\_\_\_\_ subsequent to the first report of the allegations against the defendant.
14. Any and all materials which indicate \_\_\_\_\_ may have claimed to have knowledge of the instant allegations at a time inconsistent with that provided by her to the police or to CPS during the investigation of this case. [See Exhibit D.]

In *Kyles v. Whitley*, 514 U.S.419, 115 S.Ct.1555, 131 L.Ed.2d 490 [1995], the court emphasized that prosecutors have a personal duty to become aware of, and disclose, material exculpatory information. The prosecutor has a duty to learn of any favorable evidence known to others

acting on the government's behalf in the case. The prosecutor must employ whatever means are necessary to discharge her obligations. The best practice is for the prosecutor to personally review the materials.

Furthermore, it is not the role of the prosecutor to decide that facially exculpatory evidence need not be turned over because the prosecutor thinks the information is false. It is the criminal trial, as distinct from the prosecutor's private deliberations, that is the chosen forum for ascertaining the truth about criminal accusations. *Kyles*, supra 115 S.Ct. at 1568. To the extent the prosecutor is uncertain about the materiality of a piece of evidence the prudent prosecutor will resolve doubtful questions in favor of disclosure. *Id.* For the prosecutor is the representative of a sovereignty whose interest in a criminal prosecution is not that it shall win a case but that justice shall be done. *Berger v. United States*, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 [1935].

Finally, in the case of *State v. Carpenter*, 176 Ariz. 486, 862 P.2d 246 [CA Div 1 1993] the court ruled the defendant was required to obtain reports from police departments and other investigative agencies directly through requests of the county attorney rather than by subpoena. This case coupled with the terms of the protocol and the law set forth above makes clear the Pima County Attorney's Office should obtain from Child Protective Services its entire file in this criminal case, carefully examine the contents of that file and disclose any and all materials as requested herein and as required by the law set forth above.

RESPECTFULLY SUBMITTED this \_\_\_\_ day of September, 2002.

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Richard L. Lougee

Copies of the foregoing to:

Court Administrator/Calendar Services

Honorable  
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110 W. Congress  
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