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June 13, 2022

VIA EMAIL:

Rachel Mitchell
Edward Paine
Tiffany Brady
Maricopa County Attorney's Office
225 West Madison
Phoenix, AZ 85003

RE: Demand For Dismissal – *State v. Rafael(a) Vasquez*- CR2020-001853-001.

Ms. Mitchell;

We write to you today on behalf of our client Rafaela Vasquez, demanding that your office dismiss her case. You, and your office, have recently gone on record explaining, in detail, certain basic requirements MCAO places on its prosecutor when charging and prosecuting a case.¹ Before discussing how those requirements apply in this case, it is important to point out general statements made by Mr. Ahler when he was explaining certain standards MCAO imposes on its line prosecutors. For example:

¹ See Notice of Intent to Dismiss and Pre-Determination Hearing letter to MCAO prosecutor April Sponsel, dated June 6, 2022.

I find a disturbing pattern of excessive charging and failure to review available evidence.

You wrongfully indicted an innocent person because you presented inaccurate evidence to a grand jury, you failed to review available evidence, and when you were made aware that you may have an innocent person under indictment you did little to ensure that your prosecution was just.

Before presenting this obviously significant testimony to the grand jury I would have expected you to question the officer more – show the officer the video and ask “Where is [redacted] in this video? Show me where he’s doing what you’ve described.” You had reviewed evidence that contradicted what the officer was telling you and what the officer said was not in any report. Any prosecutor would have an obligation at that point to clarify what they were being told before presenting it as fact.

On January 29, 2021, defense counsel filed a motion to remand or dismiss and argued that [redacted] was “merely present” in the area and had nothing to do with this group. Even after receiving this pleading you still did not review the best available evidence – the body worn camera video showing what he did before he was arrested.

You also noted that if, in the course of the prosecution, you discovered that video or other evidence did not corroborate the information in a police report you relied on to charge a person, you could “just change direction” and dismiss a charge or case.

Additionally, it is true, as you noted, that a charge or case can be dismissed if additional evidence comes to light, but only if the prosecutor actually takes the time to review and assess that evidence.

You acknowledged in your interview that your approach to this case was “novel.” This realization should have caused you to be more cautious, more thorough, more circumspect. If you had carefully reviewed the available evidence before presenting the case to the grand jury, you would have been able to prevent or correct testimony that was not accurate.

Having failed to do that, I would have expected you to react with greater diligence and with the higher sense of urgency when defense counsel alerted you to the possibility that you had indicted an innocent person. But you did not do so.

Furthermore, these cases show a concerning neglect of your duties to review all the evidence in your cases and to reassess your initial decision.

Based on the standards Mr. Ahler outlined in his letter, we believe that you need to apply the evidence in this case in a manner consistent with those standards. If you do, we believe you will conclude that this case must be dismissed.

On March 18, 2018, Elaine Herzberg, impaired by methamphetamine and dressed in dark clothing, started across a darkened section of Mill Avenue, mid-block, while pushing a bicycle that lacked proper reflectors and a front headlight, when she was struck by an Uber automated test vehicle. Your office obtained an indictment by presenting testimony that the collision occurred because Ms. Vasquez, the operator of the Uber automated vehicle, was watching a television program on her phone, rather than watching the road. The Grand Jury found probable cause for negligent homicide because the prosecutors presented evidence that Ms. Vasquez was a distracted driver who, during critical moments of her trip, was watching *The Voice* on a cell phone placed in an area between the bottom of the dashboard and the center console near her right knee and not paying attention to the roadway. But, had the case agent, Tempe Police Department Detective Marsland (“Marsland”) bothered to do a thorough review of the evidence, including simply looking at the phones, he would have known that his premise was false. Had the prosecutors thoroughly reviewed the evidence themselves prior to presenting this matter to the Grand Jury, or reviewed it in *toto* on their own, they might have elected not to go forward with this case.² To be clear, this was evidence that had been available to them since 2018 - two years before your office decided to charge our client. Failure to review the evidence and simply relying upon what they were told, made the entire presentation to the grand jury an exercise in concealing clearly exculpatory evidence.³

While there are numerous other disputed issues in this case that the parties disagree about, this cannot be one of them. Here, the evidence is clear. Ms. Vasquez was not watching *The Voice*, or any other program, on a cell phone during any part of the SUV’s route that night. In fact, she was merely listening to the show on the vehicle’s Bluetooth through her personal phone - an activity Uber had authorized its drivers to do. This was easily verifiable had Marsland or the prosecutors taken the time to properly review the evidence.

Tempe Police Department (“TPD”) conducted Cellebrite cell phone extractions from the two cell phones seized from Ms. Vasquez pursuant to a search warrant. Ms. Vasquez had those phones with her in the vehicle on the night of the collision. The two phones were identified as:

² We obviously do not know how much of the video Mr. Paine or Ms. Brady watched. Perhaps they watched all of it and believe that we misrepresented or misunderstood the evidence. If so, then they should have presented, in their Response to Ms. Vasquez’ Rule 12.9 motion, their interpretation of the what the video shows. They failed to do so. Instead, they seemed to be relying on the relatively low burden of proof necessary to obtain an indictment and the limited nature of the challenge available to a defendant in a 12.9 motion.

³ It also fundamentally tainted the NTSB report because that report relied on many of his findings regarding Ms. Vasquez’ alleged distracted driving.

- LG MS550 Stylo 2 Plus (602-332-7958) (**Black Case**) (“**Stylo 2**”)
- LG MP450 Stylo 3 Plus (510-363-8080) (**Gold Case**) (“**Stylo 3**”)

The exterior cases for those two phones are distinctively different, in that the **Stylo 2** phone – the one Ms. Vasquez used to communicate with headquarters while she was out on her route - had a black outer case. This distinction in the video is obvious to anyone willing, or interested in, taking the time to understand what is depicted. The **Stylo 3** phone, which was her personal-use phone, had a bright metallic gold outer case and was easily distinguishable from the **Stylo 2**. This distinction is critical when reviewing the rear-facing cockpit camera video showing Ms. Vasquez inside the vehicle during her route. We encourage you to review the video and Ms. Vasquez’ Rule 12.9 Motion. A more detailed analysis than what is addressed in this letter is contained in Section II(A), pages 31-35 of that Motion. Further, you will note that your prosecutors ignored the substance of Ms. Vasquez’ argument, instead simply labeling it as an “alternate account of the events.”

The claim that our client, a Trans woman and an alleged felon, was watching television instead of the road was salacious and incendiary enough to ignite a firestorm of publicity. The story received an inordinate amount of coverage. Everyone was talking about the Uber driver who killed a woman because she was watching television. For example:

<https://www.businessinsider.com/uber-driver-rafaela-vasquez-watching-hulu-before-fatal-collision-2018-6>

<https://www.caranddriver.com/news/a21776739/police-autonomous-uber-driver-was-watching-the-voice-at-time-of-fatal-crash/>

<https://www.newsmax.com/thewire/rafaela-vasquez-uber-driver-fatal-crash/2018/06/22/id/867712/>

<https://www.bloomberg.com/news/articles/2018-06-22/uber-operator-was-watching-the-voice-before-self-driving-crash#xj4y7vzkg>

<https://www.cnn.com/2018/06/22/uber-driver-streamed-the-voice-before-self-driving-car-crash.html>

<https://www.abc.net.au/news/2018-06-23/woman-was-watching-the-voice-before-fatal-uber-crash/9902208>

https://news.yahoo.com/police-driver-self-driving-uber-watching-voice-fatal-154500711.html?fr=sycsrp_catchall

<https://www.foxnews.com/auto/driver-in-fatal-self-driving-uber-crash-was-reportedly-watching-the-voice>

https://www.motorauthority.com/news/1117378_driver-in-self-driving-uber-was-watching-the-voice-before-fatal-crash

<https://www.wfaa.com/article/news/nation-now/report-driver-in-autonomous-uber-was-watching-the-voice-moments->

[before-fatal-tempe-crash/465-13f51297-a28c-4f53-95c5-44ff9852224e](https://www.thecarconnection.com/news/1117368_uber-self-driving-car-driver-was-watching-the-voice-on-her-phone-before-fatal-crash)

https://www.thecarconnection.com/news/1117368_uber-self-driving-car-driver-was-watching-the-voice-on-her-phone-before-fatal-crash

<https://thewest.com.au/news/world/uber-driver-was-watching-the-voice-moments-before-fatal-crash-ng-a53998d74d2a8a196e1d0a27a3e6caa7>

https://news.yahoo.com/police-backup-driver-fatal-autonomous-204426148.html?fr=sycsrp_catchall

<https://lawandcrime.com/caught-on-video/records-show-uber-operator-was-watching-the-voice-at-time-self-driving-car-fatally-hit-woman/>

The problem with that claim, however, was that Ms. Vasquez was not watching *The Voice* program, or any other program, on her phone. Your assigned prosecutors have refused to address the central fallacy of their case. They failed to do so in their Response to Ms. Vasquez' Rule 12.9 motion and they refused to do so when specifically challenged by Judge Garbarino during the in-chambers discussion at the Settlement Conference.

The transcript of the Grand Jury presentation is 50 pages long, 25 pages of which are questions from the jurors. During that presentation Marsland made numerous false claims which the prosecution failed to correct, and about which the jury asked numerous questions. The most egregious of those falsehoods was that Ms. Vasquez was not being attentive to the road because she was watching *The Voice*. During his testimony, Marsland claimed that he had watched the rear-facing footage from inside of the car and observed our client looking in the area of her right knee at least 166 times, the location where he believed her cellphone was located. He embellished his claim by also testifying that she spent an inordinate amount of time looking in the area of her right knee where he believed her cell phone was located, and at times, he observed her smiling or laughing while looking in that area. When asked by the prosecutor whether the accident would have happened had Ms. Vasquez not been watching television, Marsland claimed that the collision would have been easily avoided. That is untrue.

The problem with Marsland's testimony is that the phone that had the Hulu application was Ms. Vasquez's personal phone, which was located on the front passenger's seat throughout the ride. In contrast, her work phone was in the area of her right knee. This is the phone that Uber required her to constantly monitor in order to follow, and potentially respond to, a constant stream of messages sent from HQ through the Slack application to its vehicle operators.

Uber encouraged operators to listen to podcasts, audiobooks or shows in order to keep them from being lulled into complacency. All the prosecutors needed to do was to look at the evidence, but they either didn't, or did but have chosen to ignore it. Rather than attempt to rebut our analysis of

the evidence and present an alternate interpretation of this critical evidence, your prosecutors wrote:

“The defendant retains every right to present this alternative account of the events as evidence as part of the defendant’s complete defense at trial. For the purposes of the grand jury, however, the State is not required to disclose every alternative theory of events that might potentially be exculpatory.”⁴

The prosecutors maintained a similar stance during an in-chambers conference with Judge Garbarino during a recent Settlement Conference. Mr. Paine told Judge Garbarino that it was the “defense’s position” that Ms. Vasquez was not watching Hulu.

Compare the prosecutors’ conduct in this case to the similar-type conduct described by Mr. Ahler:

I find a disturbing pattern of excessive charging and failure to review available evidence.

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On January 29, 2021, defense counsel filed a motion to remand or dismiss and argued that [redacted] was “merely present” in the area and had nothing to do with this group. Even after receiving this pleading you still did not review the best available evidence – the body worn camera video showing what he did before he was arrested.

⁴ State’s Response To Defendant’s Motion To Remand For A New Determination Of Probable Cause Pursuant To Rule 12.9 Arizona Rules Of Criminal Procedure, Pg. 6 ¶2

We believe that the prosecutors in this case have failed to exercise the required diligence and discretion in the same ways that Ms. Sponsel failed to do so. In summary:

1. They failed to review the evidence prior to seeking an indictment;
2. That failure to review led them to present false evidence to a grand jury which resulted in an indictment against an innocent person;
3. Before presenting this significant evidence (Ms. Vasquez watching Hulu on her phone) they had an obligation to sit down with Marsland and ask him to “show them (me) where it is she is doing what you described” and confront him with how she could be watching Hulu on a phone that was not equipped with the application, prior to presenting that false information to the grand jury. As Mr. Ahler aptly said, any prosecutor presented with conflicting evidence is obligated to clarify what they are being told before presenting it as a fact.
4. After we advised the prosecutors that Marsland was wrong about the phones, they still did not review the available evidence nor make any effort to correct the record.

We believe that it is incumbent upon you to dismiss this case. Should you seek to dismiss and reindict our client, please provide us with notice so that we can provide you with a *Trebus* request.

Based on the forgoing, we demand that your office dismiss the Indictment with prejudice.

Sincerely,

Marci Kratter
Attorney for Rafaela Vasquez
/s/ Marci Kratter

Al Morrison
Attorney for Rafaela Vasquez
/s/ Al Morrison