

ATTACHMENT A

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2013-002730-003 DT

10/23/2014

HONORABLE BRUCE R. COHEN

CLERK OF THE COURT
B. McDonald
Deputy

STATE OF ARIZONA

KRISTIN SHERMAN

v.

ANTHONY ARTEZ WHITMORE (003)

JULIE ELLEN ROSE

JUDGE KREAMER

**ORDERS RE: MOTIONS TO DISMISS OR
PRECLUDE CORRECTION OF PRIOR FINDINGS
TRIAL AFFIRMED**

Testimony of Cedatria Kimble

The Court heard oral argument on the defense-filed motions relating to the testimony of Cedatria Kimble. Ms. Kimble has been a named co-defendant and in September, 2014, she entered into a plea and testimonial agreement with the State. Immediately thereafter, the State made full disclosure of the March, 2014 statements from Ms. Kimble.

There are some additional facts that are undisputed or established. Ms. Kimble engaged in a “free talk” with the State in March, 2014. Her statements were recorded and spanned approximately 2+ hours. Ms. Kimble was advised at that time that her statements would not be revealed unless and until she and the State entered into a testimonial agreement. Ms. Sherman did advise Ms. Kimble, however, that there was at least one judge in Maricopa County who had found that a statement made by a co-defendant during a free talk was required to be disclosed in a timely fashion, even if a testimonial agreement were not achieved. This act by Ms. Sherman of so informing Ms. Kimble did not formulate an admission by the State that disclosure was mandated nor does it have any probative value in deciding the issues now presented.

The defense makes a variety of assertions regarding the nature of the March, 2014 statement from Ms. Kimble relative to prior statements made by her. Mr. Whitmore alleges that

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she shifted from talking about information told to her by Co-Defendant Collins to claiming personal knowledge of the events at issue herein. The State disputes this assertion and notes that both her prior statement and her March 24 free talk included substantive personal knowledge information. As for Mr. Moore, he claims that Ms. Kimble provided exculpatory evidence in his favor at the March, 2014 free talk. This, too, is contested by the State. From the limited perspective of the Court, there does not appear to have been new exculpatory information that arose from the free talk.

The Court believes that the law on this issue is not nearly as decided as it should be. There is no doubt that there has been a long-established policy that free talks are conducted and disclosures are not made until an agreement is finalized. Any procedure that would require immediate disclosure, regardless of whether a testimonial agreement is reached, would have a “chilling effect” on this important option for law enforcement. Far less individuals would agree to participate in a free talk if they knew that disclosure would be immediate and not tied to a testimonial agreement.

On the other hand, this Court must consider what appears to be the plain language of Rule 15.1(d)(2) of the *Rules of Criminal Procedure*. It provides that the State must make timely disclosure of “All statements of the defendant and of any persons who will be tried with the defendant.” There does not appear to be a “free talk” exception to this rule when the free talk involves a co-defendant.

There are interpretations that could arguably serve to circumvent the rule. For example, if a testimonial agreement is entered into, the person who enters that agreement will no longer “be tried with the defendant.” Technically, the rule would not then apply. While this is a plausible interpretation, it is far too convoluted to allow for the rule to be interpreted in this manner. Frankly, based in no small part upon the intuitive impression of the Court that the defense interpretation of the Rule 15.1(d)(2) could not exist in harmony with the long-standing policies of and approaches taken with free talks, there must be a way to reconcile those policies and procedures of free talks against disclosure requirements.

The Court is therefore finding guidance in the case law. The *Armstrong* decision, argued by the State, appears to have the most relevance to this case. Conversely, the Court believes that *Jimenez* (cited by defendants) is distinguishable. For those reasons, the Court believes that the disclosure made herein was adequate. The support for this conclusion includes, but is not limited to, the availability of prior statements from Ms. Kimble, the number of consistencies between her prior statement and the March, 2014 statement, the fact that disclosure was made well over one month before what will be the start of the trial in this matter, the fact that all defendants knew there was the potential for Ms. Kimble to enter into a testimonial agreement and the overall

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lesser prejudice that would be suffered by the defendants by allowing her testimony than would the harm be to the interests of justice if Ms. Kimble's testimony were precluded.

This Court makes the clear statement that this issue of the potential conflict between Rule 15.1(d)(2) and the established procedures for free talks should be addressed by the appellate courts. Even if the determination herein is discretionary in nature and would be reviewed on an "abuse of discretion" standard, any reviewing court is asked to provide clarity as to how these conflicting interests and rights should be addressed.

As a cautionary note, it is recognized that interpreting the disclosure rules in this manner could be abused by an unscrupulous prosecutor. Such an individual could secure information against one co-defendant from another and then delay finalization of a testimonial agreement, thereby delaying disclosure to the Defendant. Abuses of this nature must be guarded against generally but have no application herein. There is a complete void of information that would suggest any improper actions or intentions on the part of the State herein relative to this disclosure.

IT IS THEREFORE ORDERED denying the Defense Motion To Dismiss or Preclude as it relates to Cedatria Kimble. If, however, the trial court finds that the testimony of Ms. Kimble during the trial actually includes exculpatory evidence relating to Mr. Moore that was known at the time of the free talk but not then disclosed, that judge should allow for Mr. Moore to seek appropriate sanctions for non-disclosure.