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L. KIRK NURMI #020900
LAW OFFICES OF L. KIRK NURMI
2314 East Osborn
Phoenix, Arizona 85016
602-285-6947
nurmilaw@gmail.com

JENNIFER L. WILLMOTT, #016826
WILLMOTT & ASSOCIATES, PLC
845 N. 6th Avenue
Phoenix, Arizona 85003
Tel (602) 344-0034
Email: jwillmott@willmottlaw.com

Attorneys for Defendant **ARIAS**

SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

THE STATE OF ARIZONA Plaintiff, vs. JODI ANN ARIAS, Defendant.	No. CR 2008-031021-001DT **DEFENDANT'S; MOTION TO COMPEL JUROR TWITTER ACCOUNTS** (Hon. Sherry Stephens)

COMES NOW, Ms. Arias, by and through counsel to ask that this Court compel all jurors seated in her case to disclose any Twitter accounts, if any, that they may have and/or any Twitter handles, if any, that they may use to the court prior to the commencement of the upcoming retrial as disclosure of this information is essential in that said information is a crucial tool with which Ms. Arias can work with to ensure that her jury are either not communicating about the case via Twitter or considering information that was sent to the them via Twitter as opposed to what is

presented to them in court. Ms. Arias' basis this motion in the rights due her pursuant to the 5, 6th and 14th Amendments to the United States Constitution as well as the authorities mentioned in the attached Memorandum of Points and Authorities which is incorporated herein by reference.

MEMORANDUM OF POINTS AND AUTHORITIES

I. RELEVANT FACTS

Twitter is a social networking application that allows account holders to send out "tweets." Tweets are messages of no more than 140 characters. Each account holder can have followers who instantly receive these messages or "tweets". Of note is the fact that "tweets" can be made and received from most smart phones. Of most prominence to this motion is that once a person's Twitter handle is known, they can be sent messages directly by anyone with a Twitter account. Thus, any juror who "tweets" during trial or who has a Twitter account that is known to others can be contacted via Twitter and presented with information that the State, Ms. Arias and the Court would not have any knowledge about.

Certainly, this court will likely advise the jury of what is generally referred to as "the Admonition" which will dictate something very similar to that found in the original juror questionnaire;

> You may not use any electronic device or media, such as a telephone, cell phone, smart phone, iPhone, Blackberry or computer; the internet, any internet service, or any text or instant messaging service; or any internet chat room, blog, or website such as Facebook, My Space LinkedIn, You Tube or Twitter to communicate to anyone any information about this case or to conduct any research about this case until you have been excused as a potential juror.

If every juror were to understand and follow this warning throughout the entire trial there would be no issue with a juror choosing to "tweet" information about the case, however, even a juror that follows this admonition could still receive a tweet containing extraneous information.

Ms. Arias also, in consideration of this motion, asks this court to consider that admonition alone does not leave any of the parties with the means to ensure that the admonition was understood or followed. The admonition alone, without any means of monitoring the Twitter activity of any jury members does not protect the rights due Ms. Arias pursuant to the 6th Amendment to the United Sates Constitution.

While there is certainly an element of speculation in asserting concerns that a juror in Ms. Arias' retrial will "tweet" or receive a "tweet" but said speculation is not without a basis in fact. After Ms. Arias' first trial she learned that Tara Kelley, Juror #17, who was eventually chosen as an alternate, had been using Twitter and even had contact via Twitter with a member of the media. (*Exhibit A*). Furthermore, there was a conversation on Ms. Kelley's Facebook account that discussed Ms. Arias' temper (*Exhibit B*). The Facebook conversation occurred prior to the penalty phase hanging. Finally, Ms. Kelley announced on Twitter that she believed she was allowed to view social media as long as she did not discuss the trial (*Exhibit C*). It is unclear whether the contact with the media contained any extraneous information or a suggestion of how Ms. Kelley should decide the case but it is certainly conceivable that next contact may not be so innocuous. More importantly, based on the attached statements Ms. Kelley obviously misunderstood the Admonition and did not follow it. However, counsel was unaware of the violations during trial.

II. LAW AND ARGUMENT

A. THE SIXTH AMDMENT GUARANTEES MS. ARIAS' THE RIGHT TO BE TRIED BY A JURY FREE OF EXTRANEOUS INFLUENCES

The Sixth Amendment includes an impartial jury clause thus, private communications between jurors and third parties are forbidden and can invalidate a verdict. *Mattox v. United*

States 146 U.S. 140, 13 S.Ct 50 (1892).

In 1892 when the Supreme Court decided *Mattox*, or even in 1954, when the United States Supreme Court rendered its decision in *Remmer v. United States* 347 U.S. 227, 74 S.Ct. 450 (1954), Twitter was nothing that could have been contemplated. Yet, regardless of the means of the communication both cases still serve as the backbone from which cases that deal with jurors being contacted by outside sources begin their analysis. The *Remmer* decision stands for the proposition that any private communication or contact with a juror during a trial is presumptively prejudicial to the defendant in a criminal trial. The *Remmer* Court went on to discern that communication of this nature was presumptively prejudicial because they are not made with consideration for court rules or with the knowledge of the parties. Thus what is at issue in this motion, as it relates to Twitter is both the potential for ex-parte contact as well as the potential for extraneous information being provided to the jury.

An example of how the *Remmer* precedent remains relevant in modern times is the analogous case of *U.S. v. Rosenthal* 454 F.3d 943 (9th Cir. 2006). At issue in *Rosenthal* was whether or not the defendant was entitled to a new trial based on the fact that a juror, during the pendency of the proceedings, made a telephone call to an attorney friend and asked that attorney about the need to follow the judge's instruction and about whether or not juries could be hung. The *Rosenthal* Court concluded that this was extraneous information warranting a new trial.

In *U.S. v. Vasquesz-Ruiz*, 502 F.3d 700 (7th Cir. 2007), at issue was whether or not the defendant was entitled to a new trial due to the fact that during the trial a juror found the word "Guilty" written in her notebook. In holding that the defendant was entitled to a new trial the court noted that "[n]othing could be more central to the jury's function than an opinion on ultimate guilt or innocence." *Id* at 704. Thus, should any juror receive even a one word

"tweet" such a "life" or "death" a mistrial would be a presumptive remedy due Ms. Arias. During the first trial, counsel was without the ability to discern if such a contact was made.

Now certainly, the ultimate disposition of both *Rosenthal* and *Vasquez-Ruiz* also involved consideration of whether or not the communication at issue was "ex-parte" or "extraneous information" but such a distinction only deals with the standard of scrutiny that is applied to the communication and not the fact that the intrusion itself could stand in violation of the rights due Ms. Arias pursuant to the 6th Amendment to the United States Constitution. Should this motion be denied, Ms. Arias' sentencing proceedings could be intruded upon without any of the parties being aware of the intrusion.

B. HIGHTENED DUE PROCESS STANDARDS MUST BE EMPLOYED IN CAPITAL SENTECING PROCEEDINGS

As it is often said "death is different" in that a sentence of death, unlike a sentence of imprisonment, however long, as a sentence of death is irrevocable once imposed. *Woodson v. North Carolina* 428 U.S. 280 (1976). Due to this fact the United States Supreme Court has stated that "the balance of conflicting interests must be weighed most heavily favored in the protections afforded a defendant in the Bill of Rights. *Ried v. Covert* 354 U.S. 1 (1957).

In her retrial, Ms. Arias must endeavor to paint a complete picture of whom she is and why she deserves a sentence of life. In this regard she must be able to do so free from external influences of which she is not aware. In considering this motion Ms. Arias reminds this court that painting such a picture, without concern of external influence is not a matter of aspiration, but instead it is the duty of defense counsel to paint such a

picture. *Wiggins*, 539 U.S. 510 (2003) at 524, *citing* ABA GUIDELINES.

Furthermore, Ms. Arias asks this court to be cognizant of the fact the she has an absolute right to present mitigation and that every effort must be made to guarantee a defendant the right to present all relevant mitigation evidence to the jury that will decide whether she lives or dies. Any external influence on the jury is in direct contrast to these rights as said influence could preclude or impair Ms. Arias' jury from considering any relevant mitigating evidence. (*See Generally*) *Smith v. Texas*, 543 U.S. 37, 43-45 (2004); *Tennard v. Dretke*, 542 U.S. 274, 285-86 (2004); *see also* U.S. Const., Amends VIII & XIV; Ariz. Const., Art. 2, § 15.

C. RELEVANT LAW MANDATES THAT THIS COURT INVESTIGATE ANY INSTANCES OF EXTRANEOUS INFLUENCES. THIS MOTION MERELY PROVIDES THE COURT AND BOTH PARTIES WITH THE MEANS TO CONDUCT A PROPER INVESTIGATION

Remmer (supra) dictated that any private communication made directly or indirectly to a juror was presumptively prejudicial. Time however has diminished that presumption and has brought forth an inconsistency between the circuit courts about how the *Remmer* presumption is applied. (*See Generally U.S. v. Tejeda* 481 F.3d 44, 1st Cir. 2007). In this regard, as mentioned above, both *Rosenthal* and *Vasquez-Ruiz* involved consideration of whether or not the communication at issue was "ex-parte" or "extraneous information" to determine which standard should apply regarding the presumptive prejudice of the communication. This distinction is not of import to this motion. Rather it is the ability to have the information to draw this distinction is of primary import as it seems well settled that "[w]hen there is a credible allegation of extraneous influences, the court must investigate sufficiently to assure itself that constitutional rights of the criminal defendant have not been violated" *United States v. Rigsby* 45 F. 3d 120,

124-125 (6th Circuit, 1995). *See Also, U.S. v. Corrado* 227 F.3d 528 (6th Cir. 2000), where credible claims of jury tampering required further investigation.

This court has a duty to investigate any claims of extraneous influences regardless of how they are classified. However, without the means to fully monitor the jurors this court cannot fulfill its duty to Ms. Arias, nor can Ms. Arias assert any concerns of this nature unless she has the means to monitor the Twitter activity of her jury.

III. CONLUSION

Twitter provides those who would like to influence Ms. Arias' jury with the means to do so in a way that could go undetected should this motion be denied. For the reasons mentioned above it is clear that such an intrusion would violate the rights due Ms. Arias in these capital proceedings. Thus, pursuant to the rights due her via the 5, 6th and 14th Amendments to the United States Constitution as well as the authorities mentioned above Ms. Arias requests that this court compel all jurors seated in her retrial to disclose their Twitter accounts and/or twitter handles so that she can monitor any possible intrusions.

ATTACHMENT A

Tracy @mrsksomeday 2h
@MarkEiglarsh from Tara's twitter: @tarakelley320 @USACamps did u post results from Fridays group stunt??
4:50 PM - 17 Mar 2013
Details

Tara Kelley Follow
@tarakelley320

@mrsksomeday @MarkEiglarsh @USACamps u can use social media but can not talk about trial!

Reply Retweet Favorite More

2
Retweets

8:51 PM - 03 May 13

Tracy @mrsksomeday 4m
@tarakelley320 I completely understand that. I was showing it was an innocent tweet. Thank you for your service on the jury.
Details

Don't miss any updates from Tara Kelley

Join Twitter today and follow what interests you!

Full name Email Password

Text follow tarakelley320 to 40404 in the United States

Sign up

ATTACHMENT B

- **Tara Harris Kelley** Lmao!! I'm the whitest Mexican u know!!

May 14 at 11:17pm · Like · 1

-

lol! Too Funny... But it's latina! Hey.. u know I am not mexican right?

May 14 at 11:17pm · Like

-

Tara Harris Kelley See i don't even know the right names haha!!!

May 14 at 11:19pm · Like

-

I thought I had the "I"m not mexican convo with you" I would bet Jodi is not Mexican... Okay.. Now you have to find out if she speaks spanish AND if she is Mexican or something puerto rican, or cuban, etc

May 14 at 11:20pm · Like

-

Thta's it... case solved right there. Your welcome, i just saved you and your people time

May 14 at 11:21pm · Like

-

I have the "I'm not Mexican" conversation with people multiple times... they still don't get it. And if she does have Latina blood, it may explain a temper lol.

May 14 at 11:37pm · Like · 1

-

You are so right Danie! They don't get it. lol

May 14 at 11:38pm via mobile · Like

-

  I'm Puerto Rican and from Jersey... with a hint of German blood... If I can control myself so can others lol. But we do get pretty heated! My bf always says, "I'd hate to see you really mad. I don't ever wanna be the reason!" lol

  May 14 at 11:59pm · Like

-

  Love ur hair!

  May 15 at 1:48am via mobile · Like

-

  The guy to the left photo bombed you! LOL he's pretty sneaky there.

  May 15 at 3:36am · Like

ATTACHMENT C

Have an account? Sign in

Tara Kelley @tarakelley320

Follow

FYI!!!! U can use social media during trial!! Man some people need to get a life!!!

Reply Retweet Favorite More

2 RETWEETS 16 FAVORITES

8:34 PM - 28 May 15

Chris @chrisbr40 59m
@tarakelley320 yes, just like jurors can talk to each other during trial, just not about trial? I was quickly corrected abt this on twitter
Details

Andrea @AndreaApisa 58m
@tarakelley320 he tried 2say u were tweeting during trial told him he was an idiot who didn't have his facts straight &reported him as spam
Details

Tara Kelley @tarakelley320 58m
@chrisbr40 so correct Chris!!!
Details

Tara Kelley @tarakelley320 57m
@AndreaApisa u can still use social media just not about the case!!
Details

Chris @chrisbr40 48m
@tarakelley320 ok cool, I "tweeted" during trial when juror was heard laughing & I was quickly corrected by other former jurors abt that
Details

Lori L Adams @loriladams 18m
@tarakelley320 @chrisbr40 Glad you're posting about this Tara- I've had many arguments over it so I went and pulled AZ Jury Instructions lol
Details

Chris @chrisbr40 16m
@loriladams do u have instructions? just curious. I never saw instructions but heard from former jurors about this
Details

Don't miss any updates from Tara Kelley

Join Twitter today and follow what interests you!

Full name | Email | Password

Text follow tarakelley320 to 40404 in the United States

Sign up

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RESPECTFULLY SUBMITTED, this 21st day of August, 2013

LAW OFFICES OF L. KIRK NURMI

By: */s/ L. Kirk Nurmi*
L. Kirk Nurmi
Attorney at Law
Attorney for the Defendant

Copy of the forgoing E-filed/
Electronically Delivered this 21st day of
August, 2013, to:

Honorable Sherry Stephens
Judge of the Superior Court

Juan Martinez
Deputy County Attorney

By: */s/ L. Kirk Nurmi*
L. Kirk Nurmi
Attorney for the Defendant