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SUPERIOR COURT
COUNTY ARIZONA
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JEANNE HICKS, CLERK
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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA, Plaintiff, vs. **STEVEN CARROLL DEMOCKER,** Defendant.	CAUSE NO. **P1300CR20081339** **STATE'S REPLY TO DEFENDANT'S RESPONSE TO MOTION TO DISMISS** Assigned to Hon. Warren R. Darrow Division PTB

The State of Arizona, by and through Sheila Sullivan Polk, Yavapai County Attorney, and her deputy undersigned replies to defendant's response to motion to dismiss supported by the following memorandum of points and authorities:

MEMORANDUM OF POINTS AND AUTHORITIES

PROCEDURAL SUMMARY

On December 13, 2010 a CMC was held in this CR20081339 (case #1). The court and the defense discussed in length the ex parte hearings and sealed documents issue. The State's single concern was time calculation under Rule 8.2 and made no comments regarding the ex parte hearings and sealed documents. Mr. Moeser, attorney on behalf of Western Newspaper, Inc addressed the sealed document issue.

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The court, upon defendant's suggestion and without objection from the State, ordered the clerk to assign CR201080461, (case #2) and CR201001325, (case #3) to Division PTB. At the end of the hearing, **the defendant asked the State to dismiss** CR20081339 as well as CR201080461, indicating the "new indictment encompasses both". The Court, agreeing cases #1 and #2 "*need to be dismissed*", ordered the State to file a written motion to dismiss within 10 days. Pursuant to the court's order, the State on December 16, 2010 filed a timely motion to dismiss CR20081339. The court signed the Order Dismissing CR20081339 without prejudice on December 17, 2010.

In a notice of change of judge ruling taken under advisement the court, sua sponte concluded it acted improperly by dismissing CR20081339 before the defendant was afforded an opportunity to object to the dismissal. The court vacated its order of dismissal in CR20081339 even though the defendant requested the State to dismiss CR20081339 back in December, 2010. On April 21, 2011 defendant filed a timely response to the State's motion to dismiss CR20081339. The defendant has no objection to the dismissal with the understanding that "it has no effect on previous rulings issued in this case" citing law of the case and Rule 16.1(d), Ariz.R.Crim. P. as authority. Defendant's qualified no objection to a dismissal is contrary to the law.

ARGUMENT

State v Whelan, 208 Ariz. 168, 91 P.3d 1011, (2004) is the applicable authority to the facts and circumstances of this case. In *Whalen* the defendant was arrested for DUI with license suspended (count I) and DUI with a BAC of 0.10 or more within two hours of driving (count II). Defendant filed a motion to suppress the blood results because the medical assistant, a phlebotomist was not a "qualified person" under Arizona law at that time. The trial court granted defendant's motion to suppress and the State filed a motion to dismiss the case without prejudice. The order of dismissal was not appealed. Subsequently, a higher Arizona court held a phlebotomist fit the

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definition of a qualified person. Based on this ruling the State refiled the same two counts against the defendant in the second case. The defendant filed a motion to dismiss count 2 and again moved to suppress the evidence claiming the second trial judge was bound by the previous ruling of the first trial judge. The case went to trial and defendant was convicted on count 1 and acquitted on count 2. Both parties appealed.

On appeal defendant claimed the second trial judge erred by denying his motion to dismiss count 2 and the denial of his motion to suppression the evidence. Defendant claimed that res judicata, law of the case and Rule 16.1(d) precluded the second trial judge from reversing the first trial judge.

Whelan held that "Rule 16.1(d), like the law of the case doctrine, is procedural and applies to setting of the *same* case. As Rule 16.1(d) expressly provides, '[t]his rule shall govern the procedure to be followed in cases between *arraignment and trial*.'" Emphasis added by the *Whelan* court at page 171.

The question before the *Whelan* court,

> "is not whether the law of the case doctrine or Rule 16.1(d) precludes reconsideration but whether the principles of res judicata and more specifically, the subsidiary doctrine of *collateral estoppel* (or "issue preclusion") precludes the trial court from considering afresh, in a subsequent proceeding, the suppression order entered in the earlier proceeding.
>
> *Whelan* at page 171.

Whelan unequivocally stated this issue does not implicate Rule 16.1(d) or the doctrine of the law of the case. "The law of the case concerns the practice of refusing to open questions previously decided in the *same* case by the same court or a higher court. *Davis v Davis*, 195 Ariz. 158, 162, 985 P.2d 950, 952 (App. 1999). The emphasis on "same case" was placed by the *Whelan* court. The W*helan* court concluded the law of collateral estoppel precludes the trial court from considering anew in a subsequent proceeding, an order entered in an earlier proceeding.

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The *Whelan* court, citing from *State v Jimeniz*, 130 Ariz. 138, 140, 634 P.2d 950, 952 (1981) noted, "[t]he traditional elements of collateral estoppel are: [1] the issue sought to be re-litigated must be precisely the same as the issue in the previous litigation; [2] a final decision on the issue must have been necessary for the judgment in the prior litigation; [and][3] there must be mutuality of parties."

Element one's "precisely the same" test cannot be met in this case. The numerous rulings in CR20081339 are not precisely the same in Case #3 as in case #1. The difference in the type and number of charges contained in two separate indictments are precisely not the same. It would be a mistake of law to apply the law of the case and Rule 16.1(d) in this analysis.

Case #1 was a First degree murder and Armed Burglary case. Pretrial rulings in case #1 resulted in the suppression of the State's evidence based upon "alleged" late disclosure. Under element one, the issues at hand are not "precisely the same" as case #1 because of the additional 8 charges in a separate case, the suppressed evidence can no longer be claimed to be "late" and the State, at defendant's recommendation, was ordered by this court to dismiss case #1.

Under element two of the collateral estoppel analysis, the pretrial rulings in case #1were not final decisions necessary for the judgment in that litigation". *Jimenez*, supra at 150. This is because the rulings were interlocutory and not final orders. *State v Rodriguez*, 126 Ariz. 28, 30, 612 P.2d 484, 486 (1980) equated a motion *in limine* with a motion to suppress under Rule 16, Ariz. R. Crim. P. In *Rodriguez*, the motion was meant to preclude the State from introducing the defendant's juvenile record. The orders in case #1precluding the State's evidence based upon a finding they were lately disclosed equates to a motion to suppress. Note: the case of *Rodriguez* cited here is not the same case cited by the defendant. According to Black's 8th edition an interlocutory appeal is an appeal that occurs before the trial court's final ruling on the entire case. In a mistrial, there are no final decisions on the merits entered in for collateral estoppel to apply. *Garcia v. General Motors Corp.*, 195 Ariz. 510, 514, 990 P.2d 1069, 1073 (1999).

If collateral estoppel does not apply to the facts in this case, then the same analysis can be made under the good cause exception in Rule 16.1(d). Good cause exceptions that apply to this analysis include: 1) all rulings in case#1 dealt with the charges of First Degree Murder and Armed Burglary; 2) case #3 contains 7 additional felonies and 1 misdemeanor charged by separate indictment; 3) trial judge #1 suppressed the majority of the State's evidence based primarily on untimely disclosure after the court imposed an arbitrary discovery cut-off date in July, 2009 for a

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trial scheduled to start in June, 2010; 4) the disclosure cut-off date in case #3, by stipulation of the parties and order of trial judge #2 is August 7, 2011; 5) approximately 29 ex parte hearings under Rule 15.9 were held by trial judge #1 and previous defense counsel that arguably prejudiced the State's overall case; 6) defendant is currently re-litigating trial judge #1's 15.9 ex parte hearings and the sealing of court documents, (latter is relevant to the charges of fraud schemes and forgery in case #3); 7) trial judge #1 ruled certain witnesses could not to be called to testify who are now material witnesses in case #3 pertaining to the hiding of the golf club cover, anonymous email, voice in the vent, Hartford Insurance monies and forgery charges; 8) the alleged abuse of discretion by trial judge #1 in precluding the testimony of Jena Johnson; and 9) the defendant requested and the court ordered the State to dismiss cases #1 and #2. The State reserves the right to add to this list of good cause as further motions relating to the admissibility evidence in case #3 becomes apparent.

State v King, 180 Ariz. 268, 883 P.2d 1024, (1984) cited by the defendant actually supports the State's case if this court decides the law of the case and Rule 16.1(d) apply. In *King*, the first trial judge barred the introduction of testimony under Rule 702, Ariz. R. Crim. P. Trial judge #2 overruled this decision pursuant to Rule 16.1(d), Ariz. R. Crim. P. utilizing the "good cause" exception. The singular good cause exception in *King* was a finding by trial judge #2 that the testimony was admissible under Rule 701. In other words the factual testimony was exactly the same except the testimony was admitted under a different rule of criminal procedure. *King* is distinguished from the instant case by the fact that the overruled decision occurred in the *same* case, making the analysis under procedural Rule 16.1(d) applicable. *King* affirmed the good cause exception by stating the court's discretion to reconsider an earlier ruling is reflected in Rule 16.1(d). *King,* quoting *Love v Farmers Ins. Group* 121 Ariz. 71, 73, 588 P.2d 364, 366 (App. 1978) agreed that "a court does not lack the power to change a ruling simply because it ruled on the question at an earlier stage."

Defendant's reliance on *State ex rel. Romley v. Superior Court*, 183 Ariz. 139, 142, 901 P.2d 1169, 1172(App. 1995) is distinguished from the instant case by the fact that the overruled decision occurred in the *same* case. The issue in *Romley* concerned whether trial judge #2 had discretion to overrule trial judge #1 under the good cause exception of Rule 16.1(d). The court overruled trial judge #1 by disagreeing that a defendant must have actual notice of the continued trial date in order to be tried in absentia. *Romley* at page 142 and citing from Hibbs v. Calcot, Ltd., 166 Ariz.210, 214,

801 P.2d 445 (App. 1990) said "If no new circumstances have arisen, a second trial judge should not review the ruling of the first judge."

State v. Rodriguez, 160 Ariz. 381, 773 P.2d 486 (App. 1989), cited by the defendant did not involve the *same* case and it was decided long before *Whelan*, supra. Trial judge #2 overruled trial judge #1's decision under the good cause exception of Rule 16.1(d) and denied the admissibility of the victim's trial #1transcript from use in trial #2. *Rodriguez* upheld trial judge's good cause exception which consisted of a vague discrepancy in the victim's trial transcript. The State is not requesting the court to rely on *Rodriguez. Rodriguez* falls under the same case analysis, but if the court is persuaded by this case, there are more than enough good cause factors in case #3 to re-visit trial judge #1's rulings.

The analysis of the *Whelan* decision would be incomplete without discussing Arizona's adopted exception to the collateral estoppel doctrine under The Restatement (Second) Judgments, section 28(2)(b). *Whelan* at 172, supra.

The Restatement (Second) of Judgments, section 28(2)(b) provides:

> "where an issue is actually litigated and determined by a valid and final judgment and the determination is essential to the judgment , relitigation of the issue in a subsequent action between the parties is not precluded if: *a new determination is warranted in order to take account of an intervening change in the applicable legal context.*"

Emphasis added.

The intervening change in the applicable legal context are additional facts in case #3 that were not present at the beginning of case #1. These intervening facts resulted in 7 additional felonies and 1 misdemeanor offense occurring after the defendant was arrested, indicted and placed in custody on the first degree murder charge in case#1. The intervening change in the applicable legal context are the facts that are inextricably intertwined with the murder of Carol Kennedy but arose during the pendency of the first case. The intervening change in the legal context in case #3 allows for a re-determination of the rulings in case #1on its own grounds. The section 28(2)(b) exception to the collateral estoppel doctrine has been expressly followed in Arizona in *Irby Construction Co. v. Arizona Dept. of Revenue*, 184 Ariz. 105, 109, 907 P.2d 74, 78 (App. 1995). *Irby* stated that "a new determination" is warranted.

The dissent in *Whelan* relied upon *State v Nahee*, 155 Ariz. 115, 745 P.2d 173. The majority distinguished *Nahee* noting the order at issue in that case was a dismissal and not an interlocutory

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order; secondly there was **no intervening change in facts** or law; and thirdly, the dissent acknowledges that the brief reference to law of the case in *Nahee* appears to be dicta. *Whelan* at 174, supra.

CONCLUSION

As a matter of law and for the factual reason stated above this court is moved to dismiss CR20081339 with prejudice with a specific statement that none of rulings in case #1 survive or carry over into case CR201001339, with the exception of the ex parte hearings and documents under seal.

RESPECTFULLY SUBMITTED this 28 day of April, 2011.

Sheila Sullivan Polk
YAVAPAI COUNTY ATTORNEY

By: Steven A. Young
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COPY of the foregoing **Delivered** this 28th day of April, 2011, to:

Honorable Warren R. Darrow
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Yavapai County Superior Court

Clerk of the Court
Yavapai County Superior Court

COPY of the foregoing **Emailed** this 28th day of April, 2011, to:

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