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SUPERIOR COURT  
COUNTY OF ARIZONA  
2011 APR 28 PM 4:24  
JEANNE HIGGS, CLERK  
BY: BOBBI JO BALL ✓

6 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
7 **IN AND FOR THE COUNTY OF YAVAPAI**

8 **STATE OF ARIZONA,**

9 Plaintiff,

10 vs.

11 **STEVEN CARROLL DEMOCKER,**

12 Defendant.

CAUSE NO. **P1300CR20081339**

**STATE'S REPLY TO DEFENDANT'S  
RESPONSE TO MOTION TO  
DISMISS**

Assigned to Hon. Warren R. Darrow  
Division PTB

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14  
15 The State of Arizona, by and through Sheila Sullivan Polk, Yavapai County Attorney, and  
16 her deputy undersigned replies to defendant's response to motion to dismiss supported by the  
17 following memorandum of points and authorities:

18 **MEMORANDUM OF POINTS AND AUTHORITIES**

19 **PROCEDURAL SUMMARY**

20 On December 13, 2010 a CMC was held in this CR20081339 (case #1). The court and the  
21 defense discussed in length the ex parte hearings and sealed documents issue. The State's single  
22 concern was time calculation under Rule 8.2 and made no comments regarding the ex parte hearings  
23 and sealed documents. Mr. Moeser, attorney on behalf of Western Newspaper, Inc addressed the  
24 sealed document issue.  
25  
26

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

8  
9 In a notice of change of judge ruling taken under advisement the court, sua sponte concluded  
10 it acted improperly by dismissing CR20081339 before the defendant was afforded an opportunity to  
11 object to the dismissal. The court vacated its order of dismissal in CR20081339 even though the  
12 defendant requested the State to dismiss CR20081339 back in December, 2010. On April 21, 2011  
13 defendant filed a timely response to the State's motion to dismiss CR20081339. The defendant has  
14 no objection to the dismissal with the understanding that "it has no effect on previous rulings issued  
15 in this case" citing law of the case and Rule 16.1(d), Ariz.R.Crim. P. as authority. Defendant's  
16 qualified no objection to a dismissal is contrary to the law.

### 17 ARGUMENT

18  
19 *State v Whelan*, 208 Ariz. 168, 91 P.3d 1011, (2004) is the applicable authority to the facts  
20 and circumstances of this case. In *Whalen* the defendant was arrested for DUI with license  
21 suspended (count I) and DUI with a BAC of 0.10 or more within two hours of driving (count II).  
22 Defendant filed a motion to suppress the blood results because the medical assistant, a phlebotomist  
23 was not a "qualified person" under Arizona law at that time. The trial court granted defendant's  
24 motion to suppress and the State filed a motion to dismiss the case without prejudice. The order of  
25 dismissal was not appealed. Subsequently, a higher Arizona court held a phlebotomist fit the  
26

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

6  
7 On appeal defendant claimed the second trial judge erred by denying his motion to dismiss  
8 count 2 and the denial of his motion to suppression the evidence. Defendant claimed that res  
9 judicata, law of the case and Rule 16.1(d) precluded the second trial judge from reversing the first  
10 trial judge.

11 Whelan held that “Rule 16.1(d), like the law of the case doctrine, is procedural and applies to  
12 setting of the *same* case. As Rule 16.1(d) expressly provides, “[t]his rule shall govern the procedure  
13 to be followed in cases between *arraignment and trial*.”” Emphasis added by the *Whelan* court at  
14 page 171.

15  
16 The question before the *Whelan* court,

17 “is not whether the law of the case doctrine or Rule 16.1(d) precludes reconsideration but  
18 whether the principles of res judicata and more specifically, the subsidiary doctrine of  
19 *collateral estoppel* (or “issue preclusion”) precludes the trial court from considering afresh,  
20 in a subsequent proceeding, the suppression order entered in the earlier proceeding.

21 *Whelan* at page 171.

22 *Whelan* unequivocally stated this issue does not implicate Rule 16.1(d) or the doctrine of the  
23 law of the case. “The law of the case concerns the practice of refusing to open questions previously  
24 decided in the *same* case by the same court or a higher court. *Davis v Davis*, 195 Ariz. 158, 162, 985  
25 P.2d 950, 952 (App. 1999). The emphasis on “same case” was placed by the *Whelan* court. The  
26 *Whelan* 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.

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

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

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

15 Under element two of the collateral estoppel analysis, the pretrial rulings in case #1 were not  
16 final decisions necessary for the judgment in that litigation”. *Jimenez*, supra at 150. This is because  
17 the rulings were interlocutory and not final orders. *State v Rodriguez*, 126 Ariz. 28, 30, 612 P.2d  
18 484, 486 (1980) equated a motion *in limine* with a motion to suppress under Rule 16, Ariz. R. Crim.  
19 P. In *Rodriguez*, the motion was meant to preclude the State from introducing the defendant’s  
20 juvenile record. The orders in case #1 precluding the State’s evidence based upon a finding they  
21 were lately disclosed equates to a motion to suppress. Note: the case of *Rodriguez* cited here is not  
22 the same case cited by the defendant. According to Black’s 8<sup>th</sup> edition an interlocutory appeal is an  
23 appeal that occurs before the trial court’s final ruling on the entire case. In a mistrial, there are no  
24 final decisions on the merits entered in for collateral estoppel to apply. *Garcia v. General Motors*  
25 *Corp.*, 195 Ariz. 510, 514, 990 P.2d 1069, 1073 (1999).

26 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

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

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

25 Defendant's reliance on *State ex rel. Romley v. Superior Court*, 183 Ariz. 139, 142, 901 P.2d  
26 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,

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1 801 P.2d 445 (App. 1990) said “If no new circumstances have arisen, a second trial judge should not  
2 review the ruling of the first judge.”

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

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

14 The Restatement (Second) of Judgments, section 28(2)(b) provides:  
15 “where an issue is actually litigated and determined by a valid and final judgment and the  
16 determination is essential to the judgment , relitigation of the issue in a subsequent action  
17 between the parties is not precluded if: *a new determination is warranted in order to take*  
18 *account of an intervening change in the applicable legal context.*”

19 Emphasis added.

20 The intervening change in the applicable legal context are additional facts in case #3 that  
21 were not present at the beginning of case #1. These intervening facts resulted in 7 additional felonies  
22 and 1 misdemeanor offense occurring after the defendant was arrested, indicted and placed in  
23 custody on the first degree murder charge in case#1. The intervening change in the applicable legal  
24 context are the facts that are inextricably intertwined with the murder of Carol Kennedy but arose  
25 during the pendency of the first case. The intervening change in the legal context in case #3 allows  
26 for a re-determination of the rulings in case #1 on 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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1 order; secondly there was **no intervening change in facts** or law; and thirdly, the dissent  
2 acknowledges that the brief reference to law of the case in *Nahee* appears to be dicta. *Whelan* at 174,  
3 supra.

4 **CONCLUSION**

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

8  
9 **RESPECTFULLY SUBMITTED** this 28 day of April, 2011.

10 **Sheila Sullivan Polk**  
11 **YAVAPAI COUNTY ATTORNEY**

12 By: Steven A. Paupore  
13 **Jeffrey G. Paupore**  
14 Deputy County Attorney

15 **COPY** of the foregoing **Delivered** this  
16 28<sup>th</sup> day of April, 2011, to:

17 Honorable Warren R. Darrow  
18 Division PTB  
19 Yavapai County Superior Court  
20 Clerk of the Court  
21 Yavapai County Superior Court

22 **COPY** of the foregoing **Emailed** this  
23 28<sup>th</sup> day of April, 2011, to:

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