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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

THE STATE OF ARIZONA,)
)
Plaintiff,)
)
vs.)
)
JODI ANN ARIAS,)
)
Defendant.)

CR 2008-031021-001

**OBJECTION TO DEFENDANT'S MOTION
TO DISMISS ALL CHARGES WITH
PREJUDICE AND/OR IN THE
ALTERNATIVE TO DISMISS THE
STATE'S NOTICE OF INTENT TO
SEEK THE DEATH PENALTY DUE TO
RECENTLY DISCOVERED PURPOSEFUL
AND EGREGIOUS PROSECUTORIAL
MISCONDUCT**

(Assigned to the Honorable
Sherry Stephens)

The State of Arizona, by the undersigned Deputy County Attorney, objects to defendant's request to dismiss the conviction with prejudice or dismiss "the 'State's Notice of

Intent to Seek the Death Penalty' that the State filed against her on October 31, 2008." This response is supported by the attached Memorandum of Points and Authorities.

Submitted on November 20, 2014.

WILLIAM G. MONTGOMERY
MARICOPA COUNTY ATTORNEY

BY: /s/ [Signature]
/s/ Juan M. Martinez
Deputy County Attorney

Court Chatter

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTS

On July 9, 2008, Defendant Jodi Ann Arias was indicted on one count of first degree premeditated murder, and a notice of intent to seek the death penalty was filed. The victim was Travis Alexander, with whom defendant had a relationship.

On May 8, 2013, a jury convicted defendant of first degree murder. On May 15, the jury found that the aggravating factor of especially cruel had been proven. On May 23, the jury returned with "no unanimous agreement" on the sentence to be imposed, and the court declared a mistrial as to the penalty phase. The retrial of the penalty phase is currently underway.

Defendant now seeks dismissal of the charge against her or alternatively the dismissal of the State's notice seeking the imposition of the death penalty. Defendant has accused the State of prosecutorial misconduct based on allegations stemming from an inadequate examination of the browsing history on the victim's computer. There is no forensic evidence proving that any alterations occurred. However, if any alterations were made, they were done while the computer was being reviewed by previous defense counsel.

I. LAW AND ARGUMENT

A. Defendant Fails to Cite an Applicable Rule Under Which this Court Can Overturn her Conviction at this Stage of the Proceedings.

Defendant requests the court to dismiss the charge against her. Defendant has already been convicted by a jury and therefore has no currently pending charges to dismiss. She has incorrectly and prematurely brought her request to this court. Although the defendant cites no rules, if she is seeking to vacate the judgment pursuant to Rule 24.2(a)(2), Ariz. R. Crim. P., that motion must be made within 60 days after the entry of judgment and sentence. Because judgment and sentence have not yet been entered in this case, such a motion would be premature. See *State v. Saenz*, 197 Ariz. 487, 489, ¶6, 4 P.3d 1030, 1032 (App. 2000); *State v. Fitzgerald*, 232 Ariz. 208, 212, ¶20, 303 P.3d 519, 523 (2013). This court ruled by minute entry of August 9, 2013, that defendant's motion to vacate the aggravation phase verdict was not yet ripe.

Defendant's claim of newly discovered material facts would more appropriately be brought under Rule 24.2(a)(2) or in a petition for post-conviction relief under Rule 32.1(e). Her claim of alleged prosecutorial misconduct in the guilt phase, would more appropriately be raised on direct appeal under Rule 31. As defendant acknowledges, case law "deals with a conviction

after it is finalized by sentencing and Ms. Arias' conviction has yet to be finalized ..." (motion at 8).

The penalty phase is not the proper time to challenge the jury's decision in the guilt phase to convict defendant of first degree murder. Defendant cites no authority holding otherwise. Accordingly, the relief defendant is seeking to "dismiss all charges" or vacate the conviction cannot be granted here.

The defendant cites no ground upon which the State's notice of intent to seek the death penalty can be dismissed. The prosecutor has wide discretion in deciding whether to seek the death penalty. *State v. Roque*, 213 Ariz. 193, 226, ¶143, 141 P.3d 368, 401 (2006); *State v. Salazar*, 173 Ariz. 399, 411, 844 P.2d 566, 578 (1992). "This court has rejected defendant's argument that allowing prosecutors the discretion to seek the death penalty is unconstitutional." *State v. Spears*, 184 Ariz. 277, 291, 908 P.2d 1062, 1076 (1996).

Defendant has repeatedly sought dismissal of the death penalty as some type of fallback position, and her previous requests have all been denied. She has failed to cite authority factually on point. *Barrs v. Wilkinson*, 186 Ariz. 514, 924 P.2d 1033 (1996), cited by defendant, addressed potential sanctions when the State has failed to give timely notice of its intent to seek the death penalty. That did not occur here. *Barrs*

acknowledges that the "decision to pursue the death penalty is exclusively the prosecutor's." *Id.* at 516, 924 P.2d at 1035.

No relationship exists between the death notice and the misconduct alleged, i.e., failure to provide disclosure of evidence in the guilt phase. Accordingly, dismissal of the death penalty would not be an appropriate sanction under Rule 15.7 and would infringe upon the State's discretion to pursue that sentence.

B. The State has not Engaged in Any Misconduct Nor has Defendant Raised a Valid Argument that Such Misconduct Occurred.

Defendant is seeking to overturn her conviction or in the alternative to dismiss the State's notice of intent to seek the death penalty based upon alleged prosecutorial misconduct. "To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that (1) misconduct is indeed present; and (2) a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying defendant a fair trial." *State v. Ramos*, 235 Ariz. 230, ___, ¶22, 330 P.3d 987, 994 (App. 2014).

[A] defendant must demonstrate that the prosecutor's misconduct so infected the trial with unfairness as to make the resulting conviction a denial of due process. Reversal on the basis of prosecutorial misconduct requires that the conduct be so pronounced and persistent that it permeates the entire atmosphere of the trial.

Roque, 213 Ariz. at 228, 141 P.3d at 403 (citing *State v. Hughes*, 193 Ariz. 72, 79, 969 P.2d 1184, 1191 (1998)). No prosecutorial misconduct has occurred here.

Defendant wholly fails to demonstrate any evidence of prosecutorial misconduct. Defendant makes mere assertions that evidence will be produced at an evidentiary hearing and her argument is speculative at best. Defendant has yet to establish that this supposed evidence even exists. Her motion is devoid of any actual proof that demonstrates that files were erased from the computer. Nor has defendant proven that the State was responsible for the alleged alterations.

Defendant has been too busy pointing the finger at the State to recognize that the victim's computer was being analyzed by previous defense counsel during the time frame in which defendant believes the files were deleted. Gregory Parzych and Maria Schaffer, defendant's previous counsel, turned on the computer on June 19, 2009, and conducted a review of its contents. Defendant has failed to designate the exact times when the files were allegedly altered.

Without specific allegations of misconduct there is nothing the State can address in response to defendant's motion. The first prong of the test, the presence of misconduct, has not

been satisfied. Defendant prematurely alleges prejudice without proof that there was in fact any prosecutorial misconduct.

III. CONCLUSION

Defendant continues to make unsupported allegations of prosecutorial misconduct without conducting a full or diligent investigation. The State has not engaged in any prosecutorial misconduct that would warrant vacating the conviction or dismissing the notice of intent to seek the death penalty. The court should deny all relief sought.

Submitted on November 20, 2014.

WILLIAM G. MONTGOMERY
MARICOPA COUNTY ATTORNEY

BY: /s/ Juan M. Martinez
/s/ Juan M. Martinez
Deputy County Attorney

Copy mailed\hand-delivered
November 20, 2014, to:

The Honorable Sherry Stephens
Judge of the Superior Court

L. Kirk Nurmi
2314 East Osborn
Phoenix, AZ 85016

BY: /s/ Juan M. Martinez
/s/ Juan M. Martinez
Deputy County Attorney

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