WILLIAM G. MONTGOMERY
MARICOPA COUNTY ATTORNEY

Juan M. Martinez
Deputy County Attorney
Bar Id #: 009510
301 West Jefferson, 4th Floor
Phoenix, AZ 85003
Telephone: (602) 506-5780
Mcaomjc1@mcao.Maricopa.Gov
MCAO Firm #: 00032000
Attorney for Plaintiff

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

| | |
|---|---|
| THE STATE OF ARIZONA,<br><br>Plaintiff,<br><br>vs.<br><br>**JODI ANN ARIAS,**<br><br>Defendant. | CR 2008-031021-001<br><br>**MOTION *IN LIMINE* TO PRECLUDE CERTAIN TESTIMONY FROM DEFENSE EXPERTS AND TO PRECLUDE HEARSAY STATEMENTS OF VICTIM**<br><br>(Assigned to the Honorable Sherry Stephens, Div. U, Crj21) |

The State of Arizona, by the undersigned Deputy County Attorney, moves *in limine* to preclude defense experts from testifying that defendant lacked premeditation, acted in self defense or was fearful when she killed the victim. Defense experts should also be precluded from testifying about the victim's alleged conditions or tendencies. Defendant's self-serving hearsay statements to her experts relaying the victim's alleged statements should also be precluded. This motion is supported by the attached Memorandum of Points and Authorities.

Submitted June _____, 2011.

WILLIAM G. MONTGOMERY
MARICOPA COUNTY ATTORNEY

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

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. FACTS**

On July 9, 2008, defendant Jodi Arias was indicted on one count of first degree premeditated murder, or in the alternative, felony murder. The victim was Travis Alexander, with whom defendant had a relationship. On November 6, 2008, the State filed its amended notice of intent to seek the death penalty and aggravating factors. Trial is set for August 2, 2011. Defendant has disclosed to the State two psychological evaluations – one prepared by Richard M. Samuels, Ph.D. ("Samuels Report") and one prepared by Cheryl L. Karp, Ph.D. ("Karp Report"). A copy of each of these reports has been provided to the court under seal but not filed with the Clerk of the Court. One or both reports contain information that is not the proper subject of expert testimony, is unduly prejudicial to the State, and/or is inadmissible under the hearsay rules. Certain testimony should be precluded so as not to place prejudicial or otherwise inadmissible statements before the jury.

**II. LAW AND ARGUMENT**

**A. Defense experts should be precluded from testifying that defendant acted without premeditation, impulsively, fearfully, or other similarly descriptive terms during this killing.**

Dr. Samuels stated in his report: "It does not appear that Jodi Ann Arias' actions were premeditated in any way"; "There is no evidence of premeditation whatsoever in the case material made available to this examiner"; "[H]er actions were clearly not premeditated. . . . [H]er actions were an impulsive reaction



to a perceived threat of personal harm, carried out under the fog of threat, depersonalization and fear for her own life"; "[I]t is in this examiner's professional opinion that within reasonable psychological probability, Ms. Arias did not act with premeditation. . . ." (Samuels Report at 17-18, 22; P1108-09, P1113).

Testimony by experts is admissible if it will "assist the trier of fact to understand the evidence or to determine a fact in issue." Rule 702, Ariz.R.Evid. "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Rule 704. However, our courts have held that whether a defendant acted with or without premeditation, reflection or fear are not proper subjects of expert testimony, because they are within the common knowledge of jurors. In *State v. Dickey*, 125 Ariz. 163, 608 P.2d 302 (1980), the court found no error when the trial court excised parts of a psychiatrist's deposition, which was used to support the defendant's theory of self-defense.

> In the excluded portions of the deposition, Dr. Gray stated that he believed that appellant acted out of fear when he shot Karl Koester and that fear was his sole conscious motivation. He also stated that appellant would not have fired the shot had he not been in fear of his life and that he did not observe any evidence in his examination of appellant to indicate that appellant's act was the product of reflective thinking.
> . . . .
> The primary concern in the admission of expert testimony is "whether the subject of inquiry is one of such common knowledge that people of ordinary education could reach a conclusion as intelligently as the witness or whether, on the other hand, the matter is sufficiently beyond common experience that the opinion of an expert

would assist the trier of fact." *State v. Owens*, 112 Ariz. at 227, 540 P.2d at 699. This determination is left to the sound discretion of the trial court. See *State v. Means*, 115 Ariz. 502, 566 P.2d 303 (1977).

> In the present case, the jury heard Dr. Gray's opinion of several traits of appellant's personality, such as being overly protective, easily fearful, and not prone to violence. These were matters about which expert opinion may provide assistance to a lay jury. The determination whether appellant was actually fearful at the time of the shooting, however, depends upon which version of the facts the jury chose to believe. Appellant testified that he was in fear for his life when he shot Koester. If the jury believed appellant's testimony, that the victim rushed at his pickup, yelled that he would kill appellant, and yanked open the driver's door of the pickup, the jury would not require psychiatric testimony to decide that appellant was afraid. Such expert opinion would add nothing to the jury's own common knowledge and experience. The statement that Dr. Gray found no evidence in his examination that appellant acted out of reflection is also not helpful in this case. The issue whether appellant was thinking reflectively prior to shooting Koester could be resolved by the jury without expert assistance, once it had determined the facts surrounding the shooting. We find no abuse of discretion of the trial court.

*Id.* 125 Ariz. at 168-169, 608 P.2d at 307-308. "An expert witness may not testify specifically as to whether a defendant was or was not acting reflectively at the time of a killing." *State v. Christensen*, 129 Ariz. 32, 35-36, 628 P.2d 580, 583-584 (1981).

In *State v. Hallman*, 137 Ariz. 31, 35, 668 P.2d 874, 878 (1983), the court found that the trial court did not err in granting the State's motion in limine to "preclude any expert testimony regarding whether the defendant was acting 'reflectively or reflexively,' 'impulsively,' 'without premeditation,' 'fearfully,' 'intoxicated' or in any manner during the alleged criminal offenses."



> Expert witnesses testified on behalf of the defense as to defendant's impulsive personality and that defendant had a tendency to act without reflection. Such evidence assists the trier of fact in recognizing character traits of the particular defendant and is a proper subject of expert testimony. *State v. Christensen*, 129 Ariz. 32, 35, 628 P.2d 580, 583 (1981). Arizona law is clear, however, that "[s]uch testimony may only be used as evidence that the defendant possesses such a trait and it must be left to the jury to determine whether and how the trait affected the defendant's specific intent at the time of the alleged crime." *State v. Hicks*, 133 Ariz. at 71, 649 P.2d at 274; *State v. Christensen*, 129 Ariz. at 35-36, 628 P.2d at 583-84; *State v. Dickey*, 125 Ariz. 163, 169, 608 P.2d 302, 308 (1980).
>
> Nevertheless, the defendant claims the trial court cannot properly limit testimony before the testimony is offered. We disagree. Ariz.R.Evid. 103(c) provides:
>
> In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.
>
> The trial court limited the scope of the experts' testimony in order to comply with the dictates of *State v. Dickey, supra* and *State v. Christensen, supra*, and thus prevent "inadmissible evidence from being suggested to the jury." Accordingly, the trial court did not err in granting the State's motion in limine.

*Id.*

Likewise, in this case, the court should preclude defendant's experts from testifying that defendant killed the victim without premeditation, impulsively, fearfully, or other similarly descriptive terms.

**B. Defense experts should be precluded from testifying that the victim was "hypersexual," had paraphilia, pedophilia or similar conditions or tendencies.**

Dr. Samuels stated in his report: "Jodi Ann Arias appears to have been engaged in an unhealthy relationship with a hyper-

sexed individual who was able to manipulate this insecure woman into becoming his sexual servant in an abusive relationship"; "Relative to Mr. Alexander's pedophilia. . . ."; "[S]he later sent him a pamphlet describing treatment for his paraphilia. . . ."; "[I]t is apparent that Mr. Alexander was a hypersexual male who tended to manipulate women, as indicated in his emails and texts" (Samuels Report at 15, 20-21; P1106, P1111-12). Dr. Karp stated in her report: The relationship "also involved Travis' pedophilic tendencies. . . ."; "Sometimes there is shame in giving into unnatural sexual acts. . . ."; ". . . as well as [Jodi] discovering his pedophilic behavior. . . ."; "She knew she was the only one that actually knew his 'awful dark secret' – that he was a pedophile" (Karp Report at 5-6, 13; P1012-13, P1020; Addendum at 7, P1090).

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

Rule 703, Ariz.R.Evid.

The defense experts here had no direct knowledge as to whether the victim had conditions or tendencies related to hypersexuality, paraphilia or pedophilia. Such conclusions were derived almost entirely from self-serving statements made by defendant. The only "corroborative" evidence available to and



relied upon by defense experts in support of these allegations are 10 forged letters purportedly written by the victim. There is no evidence that the victim was previously diagnosed with a sexually-related disorder, and defendant's experts may not diagnose him now. Although the experts may diagnose defendant based on her beliefs, they may not relay those beliefs to the jury as fact.

In *State v. Montijo*, 160 Ariz. 576, 774 P.2d 1366 (App. 1989), the defendant was charged with first-degree murder and argued self-defense. The trial court precluded a "psychiatric autopsy" performed by the defendant's expert. The expert concluded that the victim had "anti-social personality disorder" and was sexually aggressive and promiscuous. The court held that "preclusion was appropriate because the proposed testimony was not a proper subject of expert testimony." *Id.* at 580, 774 P.2d at 1370.

> In a series of cases our supreme court has distinguished between general information about a character or behavioral trait and a particularized opinion about how that trait was manifested in the case at trial. *State v. Moran*, 151 Ariz. 378, 728 P.2d 248 (1986) (how conduct should be judged in determining whether a child molestation victim is credible as opposed to whether this victim is telling the truth); *State v. Hicks*, 133 Ariz. 64, 649 P.2d 267 (1982) (alcoholic character trait as opposed to how that trait influenced the defendant during the crime); *State v. Christensen*, 129 Ariz. 32, 628 P.2d 580 (1981) (trait of impulsivity as opposed to whether defendant was acting impulsively and without reflection at the time of the crime). The psychiatric autopsy in this case far transgressed this line. It sought to inform the trier not only about decedent's character but what decedent did and why he did it on the night of his death. It was properly rejected. As put in *State v. Moran*, 151 Ariz. at 383, 728 P.2d at 253:
>
> When the only evidence consists of the victim's accusation and the defendant's denial, expert

> testimony on the question of who to believe is nothing more than advice to jurors on how to decide the case. Such testimony was not legitimized by Rule 704 [Ariz.R.Evid., 17A A.R.S.], and is not admissible under Rule 702 [Ariz.R.Evid., 17A A.R.S.]. The same principle applies to expert opinion testimony on whether the crime occurred, whether the defendant is the perpetrator, and like questions.
>
> To this we would add that much of the psychiatric autopsy should have been excluded on the ground that it was unduly prejudicial as being designed primarily to show that the decedent was a bad man richly deserving of death and that whatever defendant's motivation in killing him, he performed a public service.

*Id.* Similarly, in this case, the only reason to describe the victim as "hypersexual" and "pedophile" is to prejudice the jury against him when there is no objective evidence that he had those conditions or tendencies.

**C. Statements allegedly made by Travis Alexander and communicated to defense experts by defendant are inadmissible hearsay.**

The reports of the defense experts contain several hearsay statements that defendant attributes to the victim. Dr. Samuels stated in his report: The victim "admitted having an interest and experience" in sex with "young boys"; "You f-king bitch, I'll kill you" (Samuels Report at 5, 8; P1096, P1099). Dr. Karp stated in her report: "He yelled at her, 'fucking kill you, bitch'"; "He told her that he had a couple of experiences with boys and did confess to a Bishop, but not his Bishop"; "Travis had admitted to her that he had fondled little boys before" (Karp Report at 12, P1019; Addendum at 3, 6, P1086, P1089). The only "corroborative" evidence are 10 forged letters purportedly written by the victim.



"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), Ariz.R.Evid. Hearsay is generally not admissible. Rule 802. The alleged statements regarding the victim and "boys" are being offered for their "truth" – *i.e.*, that the victim actually engaged in such conduct. If defendant seeks to use those types of statements, defendant should explain why they are relevant and under which hearsay exception they are admissible. Alleged statements regarding "boys" do not go to the state of mind of either defendant or the victim at the time of the murder. There is no evidence that any boys were in danger when defendant murdered the victim, nor does any evidence exist that the victim ever abused or endangered any boys. Defendant's purported beliefs about the victim possibly may be a basis for the experts' opinions on her mental state, but it does not follow that the experts should be free to introduce alleged statements of the victim as if they were fact.

Defendant's allegation that the victim said "I'll kill you" before she killed him also is hearsay. Defendant originally told the police she was not in Arizona when the victim was killed. She later changed her story and explained that the crime was committed by intruders. She has now changed her story yet again to one where the victim was going to kill her for dropping his camera. Her response was to stab and shoot him, allegedly in self-defense. Part of defendant's current rendition, which she relayed to the experts, is that the victim actually said he would kill her. Defendant should not be

allowed to use the experts to vouch for her self-serving hearsay.

In *State v. Barger*, 167 Ariz. 563, 810 P.2d 191 (App. 1990), the defendant had told police after the crime that he had felt threatened by the victim. He elected not to testify and instead tried to introduce his statements through the testifying officer. The court ruled that such statements were self-serving hearsay and inadmissible. In *State v. Lindeken*, 165 Ariz. 403, 799 P.2d 23 (App. 1990), the defendant admitted that she killed the victim but did so either in self-defense or because she was insane. She did not testify, but two mental health experts recounted her story as she had relayed it to them. In response to the State's pretrial motion to preclude, the court ruled that the defendant's statements could not be used as substantive evidence of self-defense, although the statements could be used as the basis for the doctors' opinions on insanity. In *State v. Salazar*, 182 Ariz. 604, 898 P.2d 982 (App. 1995), the court stated that the reasonableness of a defendant's actions was generally not a proper subject for expert testimony. "Because jurors are capable of determining whether the use of force in self-defense is reasonable, expert testimony bearing on that issue is generally inadmissible." *Id.* at 610, 898 P.2d at 988.

Defendant's experts may not testify as to whether or not defendant acted with premeditation or in self-defense or whether her actions were reasonable or justified. Because they may not opine on those issues, the victim's alleged statements just before he was murdered are not relevant to their opinions. In addition, admitting statements such as "I'll kill you" would be



unduly prejudicial to the State, since they vouch for defendant and do not require her to testify avoiding cross-examination.

**III. CONCLUSION**

Whether defendant acted with premeditation or in self-defense or was fearful when the crime occurred are not proper subjects of expert testimony and should be precluded. Defense experts also should be precluded from describing the victim or his conduct with unsubstantiated terms such as "hypersexual" and "pedophile." In addition, defendant's self-serving hearsay statements relaying the victim's alleged statements should be precluded since these experts are being used to introduce her story in lieu of her testimony. Therefore, the State requests that this court grant the State's motion *in limine*.

Submitted June _____, 2011.

WILLIAM G. MONTGOMERY
MARICOPA COUNTY ATTORNEY

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

Copy mailed\delivered
June _____, 2011,
to:

The Honorable Sherry Stephens, Div. U, Crj21
Judge of the Superior Court

Laurence Kirk Nurmi
2314 East Osborn
Phoenix, Arizona 85016

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