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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 **RESPONSE TO MOTION TO DISMISS STATE'S NOTICE OF INTENT TO SEEK THE DEATH PENALTY; SPEEDY TRIAL AND EFFECTIVE ASSISTANCE OF COUNSEL** (Assigned to the Honorable Sherry Stephens)

The State of Arizona, by the undersigned Deputy County Attorney, objects to dismissal of its notice seeking the death penalty. There is no law under which this court would have the authority to dismiss the death penalty allegation under the circumstances of this case. This response is supported by the attached Memorandum of Points and Authorities.

Submitted January _____, 2012.

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. Defendant was represented by Laurence Kirk Nurmi and Maricopa County Deputy Public Defender Victoria Washington. Trial was set for February 21, 2012.

On December 16, 2011, Ms. Washington filed a motion on behalf of defendant seeking to allow the Public Defender's Office to withdraw. The motion stated that further representation of Ms. Arias would run the serious risk of disclosing confidential information about a former client. "[A]ny representation of Ms. Arias would be directly adverse to our former client and neither Ms. Arias nor the other client have granted consent to any such representation or disclosure of information." The motion stated that the conflict did not impact Mr. Nurmi.

On December 22, 2011, the court granted the motion to withdraw after discussion during a sealed proceeding. The Office of Public Defense Services was ordered to appoint second counsel, an investigator, mitigation specialist and paralegal. Jennifer Willmott was subsequently appointed as second counsel. At a status conference on January 3, 2012, the defense orally moved for a continuance, which the State opposed. The court

granted the motion, stating in its Minute Entry that "delay is indispensable to the interests of justice and that the following extraordinary circumstance(s) exist warranting the continuance: New counsel has been appointed and needs sufficient time to prepare for trial." Defendant waived applicable time limits. Trial was reset to October 17, 2012.

On December 29, 2011, Mr. Nurmi filed a motion to dismiss the notice to seek the death penalty, arguing that defendant had to choose between her right to competent counsel and her right to a speedy trial. Defendant's motion is without merit and should be denied.

II. LAW AND ARGUMENT

Since the filing of defendant's motion, a second qualified lawyer has been appointed to the defense team, negating any argument that a violation of Rule 6.8, Ariz.R.Crim.P., exists. Presumably that lawyer will follow the ABA Guidelines set forth in defendant's motion. In addition, on January 3, 2012, defendant requested a continuance and waived applicable time limits.

Rule 8.4, Ariz.R.Crim.P., provides for exclusion of certain periods from the computation of time limits. Those include delays "occasioned by or on behalf of the defendant" (8.4(a)), and delays "resulting from continuances in accordance with Rule 8.5" (8.4(e)). A continuance may be granted "upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice" (8.5(b)). The court complied with those rules when granting defendant's motion to

continue. Although Rule 8 protects an important right, the court could not ignore defendant's right to competent counsel.

> While our rule-based time limits are important in insuring prompt trials, they should not be slavishly adhered to when to do so would damage other equally significant values. Prime among these is that any trial at its inception must appear proper to resolve finally the issues dividing the parties. When defense counsel states that he is not adequately or fully prepared on the eve of trial, where the lack of preparation is not due to an absence of diligence on his part, a trial judge does not err in continuing the matter. Nor is this result changed because defendant insists on going to trial. The judge's obligation is to see that justice is done. It is not to require a trial, a conviction in which may be immediately overturned for ineffective assistance of counsel.

State v. Smith, 146 Ariz. 325, 326-327, 705 P.2d 1376, 1377-78 (App. 1985) (holding that the continuance ordered by the judge to allow adequate defense preparation was excluded time either as a delay occasioned on behalf of defendant or a delay resulting from a continuance granted as indispensable to the interests of justice).

Ms. Washington approached the court with information relating to a conflict of interest, and the court granted her motion to withdraw. "The decision whether to grant counsel's motion to withdraw from representation is left to the sound discretion of the trial court." *Coconino County Public Defender v. Adams*, 184 Ariz. 273, 275, 908 P.2d 489, 491 (App. 1995). It was for defendant's benefit that conflicted counsel withdrew and new counsel was appointed. "The ethical rule prohibiting an attorney from representing a client when there is a conflict of interest is for the benefit of the client. A continuance to allow newly appointed counsel adequate time to prepare for trial

is also for the benefit of the defendant." *State v. Timley*, 255 Kan. 286, 296, 875 P.2d 242, 250 (1994). Mr. Nurmi should not now be allowed to argue that the withdrawal initiated by his co-counsel adversely impacts defendant.

Delay in this case was caused by defense counsel's ethical dilemma and not by any action of the State. Nevertheless, the premise of defendant's motion appears to be that if the death penalty notice were dismissed, defendant would need only one lawyer and could proceed to trial more quickly. However, lawyers who withdraw are routinely replaced in capital cases, and defendant's request to strike the death penalty has no relationship to withdrawal of counsel. The prosecutor has wide discretion in deciding whether to seek the death penalty. *State v. Roque*, 213 Ariz. 193, 227, 141 P.3d 368, 402 (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 cites no law under which this court would have authority to dismiss the death penalty under the circumstances here.

III. CONCLUSION

The court properly excluded time under Rule 8.4, because defendant requested a continuance and because the delay allowing newly appointed counsel to prepare was occasioned by or on behalf of defendant. Dismissing the notice of intent to seek the death penalty is not a remedy when a member of the defense

team withdraws. Therefore, the State requests that this court deny defendant's motion.

Submitted January _____, 2012.

WILLIAM G. MONTGOMERY
MARICOPA COUNTY ATTORNEY

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

Copy mailed\delivered
January _____, 2012,
to:

The Honorable Sherry Stephens
Judge of the Superior Court

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