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| |) | In the Circuit Court of the |
| |) | Ninth Judicial Circuit, in and for |
| |) | Orange County, Florida |
| STATE OF FLORIDA |) | |
| |) | Case No.: 482008-CF-0015606-O |
| v. |) | Division 16 |
| |) | |
| CASEY MARIE ANTHONY, |) | Hon. Stan Strickland |
| |) | |
| Defendant. |) | |
| |) | |

Defendant’s Reply To State’s Response to Motion To Preclude Death Procedures

COMES NOW the Defendant, CASEY MARIE ANTHONY, by and through her attorneys ANDREA D. LYON and JOSE A. BAEZ, and presents the following Reply to the State’s Response to her Motion to Preclude Death Procedures.

In its response, the State does not confront the arguments Miss Anthony makes in her Motion to Preclude Death Procedures. Instead, the State suggests that Miss Anthony has filed the motion to “grandstand.....before the media.” *See* State’s Response to Motion to Preclude Death Procedures, herein State’s Response, at 1. Miss Anthony reaffirms that her Motion to Preclude Death Procedures is well founded and petitions this court to preclude the prosecution from seeking the death penalty on the basis of the arguments made in the aforementioned motion. Miss Anthony further replies to the State’s Response as follows:

I. The Judiciary Has the Authority and Duty to Curb Prosecutorial Discretion Where the Prosecution Has Impermissible Motives

The judiciary has the authority to restrict a prosecutor’s discretion in seeking the death penalty when the prosecutor has impermissible motives such as bad faith or the desire to prevent the exercise of a defendant’s constitutional rights. *State v. Donner*, 500

So.2d 532, 533 (Fla. 1987). *See* Def.'s Memorandum of Law in Support of Motion to Preclude Death Procedures, herein Memorandum of Law, at 4-5. The State contends that Miss Anthony is relying on bad law in *Donner* in making such an argument. According to the State, the actual holding in *Donner* provides that the judiciary is prohibited from interfering with the prosecutor's decision to seek the death penalty in a first-degree murder case. *See* State's Response, at 1; *see also Donner*, 500 S0.2d at 533.

The State is correct, but incomplete, in their narrow analysis of the *Donner* holding so far as it relates to the specific fact of the case. It is true that *Donner* held that the judge did not have the authority to preclude the prosecution from seeking the death penalty. In *Donner*, the trial court judge decided to preclude the death penalty for three reasons: (1) because the State induced the defendant to forego trial by a jury which could not recommend the death penalty; (2) after consideration of the potential aggravating and mitigating circumstances, that a jury could not validly recommend the death penalty in that case; and (3) if the state were permitted to acquire a death qualified jury, the defendant could seek relief, if convicted under Florida Rule of Criminal Procedure 3.850, by alleging ineffective assistance of counsel. *Id. at 533-34*. On appeal, the *Donner* court held that none of these three reasons established an impermissible motive on behalf of the prosecution, such as bad faith, race, religion, or a desire to prevent the exercise of the defendant's constitutional rights, which, if established, would give a court the authority to preclude the prosecution from seeking the death penalty. *Id.* Accordingly, ***Donner* supports the proposition that the judiciary does in fact have the authority to preclude the prosecution from seeking the death penalty when impermissible motives on behalf of the prosecution do in fact exist.** *Id.* (emphasis added). The

State's argument asks for a rigid application of the fact-bound *Donner* decision while ignoring the broader principle of law on which it is based.

Furthermore, the State suggests that Miss Anthony's reliance on *Donner* is misplaced in light of the *State v. Bloom*, 497 So.2d 2 (Fla. 1986). See State's Response, at 2. As discussed in Miss Anthony's Motion, *Donner* stands for the aforementioned principle that prosecutorial discretion may be curbed by the judiciary when impermissible motives, such as bad faith, race, religion, or a desire to prevent the exercise of the defendant's constitutional rights, can be attributed to the prosecution,. *Id.* at 3; see also Memorandum of Law at 5. The State is correct in contending that *Donner* is based on *Bloom*. See State's Response at 1. The State's claim, however, that Miss Anthony's Motion failed to cite to *Bloom* is puzzling in light of the following language that appeared in the *Summary of Argument* section on the first page of Miss Anthony's motion:

The judiciary has the authority to curb prosecutorial discretion where the Prosecution harbors bad faith motives that infringe the defendant's constitutional rights. See *State v. Donner*, 500 So.2d 532, 533 (Fla. 1987) ("As noted in *Bloom*, the judiciary has authority to curb pretrial prosecutorial discretion only in those instances where impermissible motives may be attributed to the prosecution, such as bad faith, race, religion, or a desire to prevent the exercise of the defendant's constitutional rights.") See Memorandum of Law at 1.

Miss Anthony cited to *Bloom* a second time on page 24 of her Motion. Miss Anthony reiterates that the *Bloom* holding simply states what later became the *Donner* principle regarding judicial authority to curb prosecutorial discretion. In its Response, the State again refers to the narrow holding of *Bloom* while ignoring the broader principles of law it stands for. See State's Response, at 1. Just as in *Donner*, the *Bloom* court found that specific facts of the case failed to establish the judge's authority to curb the prosecutor's discretion. *Bloom*, 497 So.2d at 3. **Contrary to the State's assertion, *Bloom* does not**

establish that the judiciary never has the authority to curb prosecutorial discretion. *Bloom* clearly states that the judiciary does have such authority when it is established that prosecutors have sought a prosecution for impermissible motives. *Id.* (emphasis added). Therefore, Miss Anthony stands behind her argument that the judiciary has the authority to curb the prosecutor's discretion where the prosecution's discretionary choice evinces bad faith motives that infringe the defendant's constitutional rights.

The State also argues that, procedurally, there is nothing that requires the prosecution to "decide" to seek the death penalty. *See* State's Response, at 2. Miss Anthony agrees that there are no procedures that would require the State to seek the death penalty because such a decision falls under the expansive umbrella of prosecutorial discretion. It is well established that the decision to charge and prosecute is an executive responsibility, and that the state attorney thus has complete discretion in deciding whether to prosecute and how to conduct the prosecution. *State v. Gibson*, 935 So.2d 611 (Fla. Dist. Ct. App. 2006). The judiciary cannot inhibit the State's decision to prosecute for reasons of judicial economy, public interest, or the victim's desire to prosecute. *See State v. Franklin*, 901 So.2d 394 (Fla. Dist. Ct. App. 2005) (a trial court cannot inhibit the State's decision to prosecute for reasons of judicial economy alone); *see also State v. Wheeler*, 745 So.2d 1094, 1096 (Fla. Dist. Ct. App. 1999) (decision to prosecute cannot be infringed upon by a trial court's belief that the best interests of the public and the parties would be served by dismissal); *State v. Greaux*, 977 So.2d 614 (Fla. Dist. Ct. App. 2008) (a prosecutor's sole discretion to charge and prosecute criminal acts is not affected by a victim's change in desire to prosecute). Therefore, Miss Anthony is confused by the

State's contention that they are not required to make a decision to seek the death penalty, as they are never forced to make decision to prosecute by the judiciary. Miss Anthony has petitioned this Court to exercise its constitutional power to function as a check on executive abuse of discretion in seeking the ultimate penalty, and her position does not implicate the broader prerogative of the prosecution to decide whom to prosecute and how.

II. Given the Requirement of Heightened Reliability in Capital Cases, This Court Must Ensure that the Prosecution's Decision to Seek the Death Penalty is Not Driven by Impermissible Motives.

The State has chosen not to dispute Miss Anthony's argument. Accordingly, Miss Anthony stands by her original briefing on this issue.

III. By Seeking the Death Penalty Where It Is Not Justified by a Legitimate State Interest, the Prosecution is Impermissibly Attempting to Prevent the Exercise of Miss Anthony's Constitutional Right to a Fair Trial and Due Process.

The State does not have sufficient evidence as a matter of law to establish first-degree murder in this case, let alone to establish sufficient aggravating circumstances to recommend the death penalty. *See* Memorandum of Law, at 6. In her Motion, Miss Anthony contends that because the State does not have a legitimate interest in seeking the death penalty, the State must be seeking the imposition of death penalty procedures for a bad faith, strategic purpose that would prejudice Miss Anthony and violate her constitutional rights to due process and a fair trial as protected by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16, 21, and 22 of the Florida Constitution. *Id.* at 2, 7.

In its response, the State claims that Miss Anthony misunderstands the concept of bad faith. *See* State's Response, at 1. To make such an argument, the State creatively

summarizes Miss Anthony's argument as "We don't agree that the facts of the case justify the ultimate application of the death penalty, so there must be a nefarious reason behind the decision, so it must be bad faith." *Id.* at 3. The State later contends that Miss Anthony "likes to throw around [the term "bad faith] rather recklessly". *Id.* at 5. Though unsupported by any legal argument whatsoever, these statements by the prosecution apparently require that Miss Anthony to clarify the legal basis of her motion.

The State seems to believe that bad faith on behalf of the prosecution can only be shown either when a prosecutor has discriminated against the defendant on behalf their race or religion, or when prosecution has been sought to limit the defendant's constitutional rights. *Id.* at 4. The state is incorrect, as evidenced in Miss Anthony's original Motion and Memorandum of law, and below:

A. The Prosecution Cannot Be Seeking the Death Penalty in Good Faith Because There Is Insufficient Evidence as a Matter of Law to Establish First Degree Murder.

The State has chosen not to dispute Miss Anthony's argument. Accordingly, Miss Anthony stands by her original briefing on this issue.

B. The Prosecution Cannot Be Seeking the Death Penalty in Good Faith Because There Is Insufficient Evidence as a Matter of Law to Establish Aggravating Circumstances Required to Recommend the Death Penalty.

The State has chosen not to dispute Miss Anthony's argument. Accordingly, Miss Anthony stands by her original briefing on this issue.

i. As a Matter of Law, There Is Insufficient Evidence to Establish Any Aggravating Circumstances Other Than That the Victim Was Under Twelve Years of Age.

The State has chosen not to dispute Miss Anthony's argument. Accordingly, Miss Anthony stands by her original briefing on this issue.

- 1. As a Matter of Law, the Prosecution Cannot Establish that Miss Anthony Committed a Capital Felony That Was Especially Heinous, Atrocious, or Cruel.**

The State has chosen not to dispute Miss Anthony's argument. Accordingly, Miss Anthony stands by her original briefing on this issue.

- 2. As a Matter of Law, the Prosecution Cannot Establish that Miss Anthony Committed a Capital Felony of Homicide that Was Committed in a Cold, Calculated, and Premeditated Manner.**

The State has chosen not to dispute Miss Anthony's argument. Accordingly, Miss Anthony stands by her original briefing on this issue.

- 3. As a Matter of Law, the Prosecution Cannot Establish that Miss Anthony Committed a Capital Felony after Committing or Attempting to Commit Aggravated Child Abuse.**

The State has chosen not to dispute Miss Anthony's argument. Accordingly, Miss Anthony stands by her original briefing on this issue.

- 4. As a Matter of Law, the Prosecution Cannot Establish that Miss Anthony Committed a Capital Felony in Which the Victim Was Particularly Vulnerable Because the Defendant Stood in a Position of Familial or Custodial Authority over the Victim.**

The State has chosen not to dispute Miss Anthony's argument. Accordingly, Miss Anthony stands by her original briefing on this issue.

- ii. The Under 12 Aggravator Is Not a Permissible Basis for Sentencing Miss Anthony to Death in This Case.**

The State has chosen not to dispute Miss Anthony's argument. Accordingly, Miss Anthony stands by her original briefing on this issue.

C. The Death Penalty Would Be a Grossly Disproportionate Punishment in This Case.

The State has chosen not to dispute Miss Anthony's argument. Accordingly, Miss Anthony stands by her original briefing on this issue.

D. Seeking the Death Penalty to Obtain a Death-Qualified, and Thus Conviction-Prone, Jury in this Case Would Violate Miss Anthony's Rights to a Fair Trial and Due Process.

As argued in Miss Anthony's original motion, the State's decision to seek the death penalty where there is insufficient evidence to support such a sentence indicates that the State is not legitimately seeking to implement Florida's capital punishment scheme, but rather to gain a bad-faith strategic advantage in an effort to secure a conviction at any cost. *See* Memorandum of Law, at 23. The State contends in its response that courts have only entertained claims bad faith prosecution when a defendant had claimed that they were being singled out for prosecution as the result of the exercise of a constitutional right unrelated to any crime or criminal prosecutions, such as the exercise of first amendment rights, the right to run for political office, or the right of free assembly. *See* State's Response, at 4. The State continues that Miss Anthony has not stated which constitutional right she is prohibited from exercising as a result of the prosecution's bad faith intention to seek the death penalty. *Id.* The State further claims that Miss Anthony does not present which constitutional rights have been violated by the prosecutions bad faith motives for seeking the death penalty. *Id.*

As she argued clearly in her original motion, Miss Anthony's constitutional rights to due process and a fair trial would be violated by the prosecution's decision to seek the death penalty against her in this case. *See* State's Response, at 2, 5, 6-7, 23-34, 30, and

33. It is true that Florida courts have not decided a case in which a prosecutor was found to have violated a defendant's due process and rights to a fair trial by seeking the death penalty to gain tactical advantage. The United States Supreme Court has, however, spoken on the issue. In *Furman v. Georgia*, 408 U.S. 238, 354 (1972), Justice Marshall concurring opinion stated that "if the death penalty is used to encourage guilty pleas and thus to deter suspects from exercising their rights under the Sixth Amendment to jury trials, it is unconstitutional." The Supreme Court has also entertained the argument that a tactical delay on behalf of the prosecution could violate a defendant's Sixth Amendment rights. See *United State v. Marion et. al.*, 404 U.S. 307, 325 (1971) (a "tactical" delay would violate the Due Process Clause); see also *United States v. Lovasco*, 431 U.S. 783, 795 (1971) (delay undertaken by the Government solely "to gain tactical advantage over the accused could be a violation of the defendant's constitutional rights). Accordingly, Miss Anthony re-iterates her argument that the State's intention to seek the death penalty in order to gain a tactical advantage over the defense is in bad faith and a violation of Miss Anthony's due process and fair trial rights.

E. Death Qualifying a Jury Infringes a Defendant's Constitutional Rights Where Not Justified by a Legitimate State Interest.

The State has chosen not to dispute Miss Anthony's argument. Accordingly, Miss Anthony stands by her original briefing on this issue.

i. Death Qualification Creates a Conviction-Prone Jury.

The State has chosen not to dispute Miss Anthony's argument. Accordingly, Miss Anthony stands by her original briefing on this issue.

ii. Death Qualification Increases the Likelihood of Sentencing That Does Not Adhere to Constitutional and Statutory Requirements.

The State has chosen not to dispute Miss Anthony's argument. Accordingly, Miss Anthony stands by her original briefing on this issue.

iii. The Supreme Court Has Not Approved of Death Qualification Where It Is Not Justified by a Legitimate State Interest.

The State has chosen not to dispute Miss Anthony's argument. Accordingly, Miss Anthony stands by her original briefing on this issue.

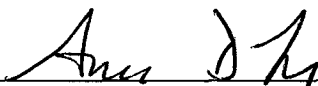
F. There Is No Legitimate State Interest in Death Qualifying the Jury in This Case.

The State has chosen not to dispute Miss Anthony's argument. Accordingly, Miss Anthony stands by her briefing on this issue.

Miss Anthony also petitions this court for a hearing on this matter. Contrary to the State's contention, Miss Anthony fully believes that she has presented a "colorable claim of discriminatory prosecution." *See* State's Response, at 5. Miss Anthony points to her memorandum of law and this reply to support her position.

WHEREFORE, the Defendant CASEY MARIE ANTHONY respectfully asks this Court to grant her Motion to Preclude Death Procedures.

Respectfully submitted,



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for CASEY MARIE ANTHONY.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been furnished to the Office of the State Attorney, 415 North Orange Avenue, Orlando, Florida 32801; via facsimile and /or U.S. Mail on this _____ day of October, 2009.

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