

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2008-031021-001 DT

03/25/2013

HONORABLE JOSEPH C. WELTY

CLERK OF THE COURT
T. Henninger
Deputy

STATE OF ARIZONA

JUAN M MARTINEZ

v.

JODI ANN ARIAS (001)

KIRK NURMI
JENNIFER L WILLMOTT

CAPITAL CASE MANAGER

MINUTE ENTRY

The Court has received and reviewed Defendant's Motion for Protective Order.

IT IS ORDERED setting oral argument on Defendant's motion for March 27, 2013 at 9:00 a.m. before the Honorable Joseph C. Welty.

cc: Shana Druckerman via email
Beth Karas via email
Paul Matadeen via email

This case is eFiling eligible: <http://www.clerkofcourt.maricopa.gov/efiling/default.asp>. Attorneys are encouraged to review Supreme Court Administrative Order 2011-140 to determine their mandatory participation in eFiling through AZTurboCourt.

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THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,

Plaintiff,

JODI ARIAS

Defendant.

No. CR2008-031021-001

**DEFENDANT'S MOTION FOR
PROTECTIVE ORDER**

Assigned to Honorable Sherry Stephens

To be Heard by Honorable Joseph Welty)

Pursuant to Rule 15.4 Arizona Rules of Criminal Procedure, A.R.S. 13-4062(2) the 5th, 6th, 8th, and 14th Amendments to the United States Constitution, and Art. 2, §§ 4, 15, 23, and 24 of the Arizona Constitution, Ms. Arias, hereby requests that this court enter a protective order precluding any and all public information requests from being granted that relate to the detailed costs of Ms. Arias' defense. In this motion Ms. Arias takes the position that allowing the a third party, to access these documents would inhibit Ms. Arias' ability to receive a fair trial as she is due Ms. Arias pursuant to the authorities

mentioned above. Ms. Arias will expand on this assertion in the attached Memorandum of Points and Authorities that is incorporated herein.

MEMORANDUM OF POINTS AND AUTHORITIES

I. RELEVANT FACTS AND PROCEDURAL HISTORY

On March 21, 2013, the Office of Public Defense Services filed a “Notice of Public Records Request.” Attached to this pleading are the various informal requests that were made by various media organizations. In sum, these requests seek detailed billing information including the amount of hours billed by the attorney’s and experts.

Relevant to this motion is the fact that all members of Ms. Arias’ defense team are paid an hourly wage either by or through the Office of Public Defense Services (henceforth OPDS). In order to obtain payment from OPDS all members of the defense team submit statements to OPDS that detail the work they have done over a certain period of time. The same is true for any experts hired on Ms. Arias’ behalf should they be witnesses at trial or not.

II. LAW AND ARGUMENT

Two issues are of import as it relates to the motion at hand, attorney client privilege and Ms. Arias right to a fair trial.

Ultimately, as it relates to attorney client privilege, since public disclosure of said items will allow the State to view these items, a prominent issue raised in this motion is whether or not the State has a right to view or access the billing logs generated by members of Ms. Arias' defense team as they prepare for her defense in this capital case. If the State is allowed to view or access these records the State may be able to determine what witnesses, both expert and civilian, the defense has interviewed and not listed as witnesses in any phase of the trial as they attempt to develop a viable defense. Thus, the State, or a third party may be able to discern with whom the defense has consulted with in order to develop their theory of the case.

In essence, should the State, or a third party, be able to access this information the State, either directly or via a third party, would have a window into the thoughts and process of the defense team. However, "[a] defendant need not provide the prosecutor or the court with a preview of his case or his arguments, nor need he provide the prosecutor advance notice of the weaknesses in the State's case or identify evidence that the State should present to sustain its burden of proof. *State v. Marshall*, 4 P.3d 1039, 1044, 197 Ariz. 496, 501 (Div. 1, 2000).

Certainly, *Marshall* is not a death penalty case, however, the fact that the State is seeking the death penalty against Ms. Arias makes the principles quoted above all that much more poignant because the insight that would be given to the State in this capital

case if they had access to these records would provide insight into the thoughts and/or actions of defense counsel as it relates not only to the determination of Ms. Arias' guilt to the charged offense, but, should the case proceed to a penalty phase, this insight would carry over to the issue of whether or not the State can prove its aggravating factor which makes Ms. Arias eligible for the death penalty, and potentially whether or not Ms. Arias is sentenced to death or life in prison.

In considering the legality of this potential intrusion into Ms. Arias' defense, she would ask the court to consider not only the holding in *Marshall* but also Rule 15.4 of The Arizona Rules of Criminal Procedure which dictates in relevant part that;

b. (1) Work Product. Disclosure shall not be required of legal research or of records, correspondence, reports or memoranda to the extent that they contain opinions, theories or conclusions of the prosecutor, members of the prosecutor's legal or investigative staff or law enforcement officers, or of defense counsel or defense counsel's legal or investigative staff.

Furthermore, Ms. Arias would point out to the court that the dictates of 13-4062(2) are also applicable to the issue at hand as the records at issue may make note of those discussions and in turn the actions of counsel and/or other members of the defense team may be a direct result of those discussions.

Finally, Ms. Arias would point to Rule 6.8 Arizona rules of Criminal Procedure which dictate that counsel in a capital case must be "familiar with and guided by" the ABA Guidelines" which is a direct reference to the ABA Guidelines For The Appointment And Performance Of Defense Counsel In Death Penalty Cases (2003). As these guidelines represent the standards for capital defense work, *Wiggins v. Smith* 539 U.S. 510 (2003), this court must then be mindful of any actions by the State or a third

party that would intrude upon Ms. Arias' defense team's ability to follow these guidelines as these guidelines "are not aspirational [but rather] embody the current consensus about what is required to provide effective defense representation in capital cases." *History of Guideline 1.1.*

Thus, the duty Ms. Arias defense team owes her is "definably different from those of counsel in ordinary cases." *Commentary to ABA Guideline 10.1.* In this regard, in order to provide Ms. Arias with high quality representation her defense team must conduct "a thorough and independent" investigation relating to all phases of a capital trial." *ABA Guideline 10.7.* Thus, as it relates to the issue at hand Ms. Arias would submit that the independence of her investigation would be compromised should the State, or a third party, be able to access the records that document the work of her defense team.

Compromising Ms. Arias' ability to conduct an independent investigation must not be taken lightly in that the right to effective assistance of counsel applies not just to the first degree murder phase of a capital trial, but also with equal force at the sentencing phase of a capital trial. See *Silva v. Woodford* 279 F.3d 825, 836 (9th Cir. 2002).

Thus, what is potentially being compromised is the penalty phase preparation that requires extensive and unparalleled investigation into the personal and family history of the accused. *Commentary to ABA Guideline 10.7.* This would include reviewing Ms. Arias'; school records, medical records, juvenile and adult incarceration records and other relevant records. *Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456 (2005). From

these records counsel is required to “construct a persuasive narrative rather than to simply present a catalog of seemingly unrelated mitigating factors, thus a shotgun approach should be avoided. *Wiggins*. It is Ms. Arias’ position that should the State, or a third party, be allowed access the documents at issue they could gain insight into the thoughts and actions of defense counsel in this regard and thus compromise counsel’s ability to construct this narrative.

As it directly relates to fair trial considerations that relate directly to the media in considering this motion Ms. Arias would remind this court that allowing the requesting media outlets from having this information might very well diminish Ms. Arias’ right to a fair trial as described in Estes v. Texas, 381 U.S. 532, 85 S.Ct. 1628 (1965) that “[T]he life or liberty of any individual in this land should not be put in jeopardy because of actions of the news media; and that due process requirements in both the Fifth and Fourteenth Amendments and the provisions of the Sixth Amendment require a procedure that will assure a fair trial.” In re Oliver, 333 U.S. 257, 68 S.Ct. 499 (1948) as cited in Estes v. Texas, 381 U.S. 532, 85 S.Ct. 1628 (1965).

III. CONCLUSION

Pursuant to the authorities mentioned above as well as the 5th, 6th, 8th, and 14th Amendments to the United States Constitution, and Art. 2, §§ 4, 15, 23, and 24 of the Arizona Constitution, Ms. Arias, hereby requests that this court seal any and all billing records submitted by any member of Ms. Arias’ defense team as allowing the State

