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SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

THE STATE OF ARIZONA Plaintiff, vs. JODI ANN ARIAS, Defendant.	No. CR 2008-031021-001DT **DEFENDANT'S MOTION FOR RECONSIDERATION: MOTION TO DISMISS STATE'S NOTICE OF INTENT TO SEEK THE DEATH PENALTY DUE TO DEFENDANT'S INABILITY TO PRESENT A COMPLETE CASE FOR LIFE** **(Oral Argument Requested)** (Hon. Sherry Stephens)

Ms. Arias, through undersigned counsel, pursuant to the rights due her via the Fifth, Eighth and Fourteenth Amendments of the United States Constitution, as well as Art. II, § 4 and Art. III of the Arizona Constitution, hereby requests that this Court reconsider its previous denial of her request that the "State's Notice of Intent to Seek the

Death Penalty" filed against her by the State on October 31, 2008, be dismissed. This request for reconsideration is being made based on the decision made by the Court of Appeals on November 26, 2014, in which they held that mitigation witnesses could not testify in sealed proceedings, due to this decision, additional mitigation witnesses will not testify on Ms. Arias' behalf. Thus, in addition to the witnesses listed in her original motion, as will be described below, this ruling has further inhibited Ms. Arias' ability to present a complete defense of her life to the point that should a sentence of death be imposed by this jury, said sentence would be unconstitutional. *Skipper v. South Carolina* 476 U.S. 1 (1986) *Smith v. Texas*, 543 U.S. 37, 43-45 (2004); *Tennard v. Dretke*, 542 U.S. 274, 285-86 (2004).

MEMORANDUM OF POINTS AND AUTHORITIES

I. RELEVANT FACTS

On or about October 30, 2014, Ms. Arias requested that the court room be sealed so that neither the public and/or the media could be present while an important mitigation witness testified. On October 31, 2014, in a sealed minute entry this court issued a ruling granting that request. In support of its ruling the court alluded to the importance of Ms. Arias' testimony to her own case for life, the refusal of other mitigation witnesses to testify and found that Ms. Arias' overriding interest would likely be prejudice if the courtroom is not closed during her testimony.

In this regard, this court has already concluded that any continuation of this sentencing phase trial held in open court would be done in a setting that is prejudicial to

Ms. Arias, thus it would seem that further evidence would not be needed because the court has already concluded that a full case for life cannot be made under the conditions that the Court of Appeals has now imposed. However, should any doubt remain, Ms. Arias would point out that due to this ruling three other mitigation witnesses will not testify, thus her case for life will not include the testimony of a longtime boyfriend, a former co-worker and an individual who knew Mr. Alexander before he met Ms. Arias and who would have provided the jury with testimony that Mr. Alexander confessed his interest in child pornography to him.

II. LAW AND ARGUMENT

As Ms. Arias pointed out in her original motion, the sentencer in a capital case must consider in mitigation anything in the life of the defendant that might mitigate against a sentence of death. *Smith v. Texas*, 543 U.S. 37, 43-45 (2004); *Tennard v. Dretke*, 542 U.S. 274, 285-86 (2004); *see also* U.S. Const., Amends VIII & XIV; Ariz. Const., Art. 2, § 15. Mitigating circumstances are, "circumstances which do not justify or excuse the offense, but which, in fairness or mercy, may be considered as extenuating or reducing the degree of moral culpability." *Coker v. Georgia*, 433 U.S. 584, 590-91 (1977).

Of further note is that preclusion of mitigation evidence constitutes a violation of the Due Process Clause of the United States Constitution. *Green v. Georgia*, 442 U.S. 95, 97 (1979); U.S. Const., Amend. XIV; *see also* Ariz. Const., Art. 2, § 4.

Given this court's findings of October 30, 2014, it would seem hard to conceive how forcing Ms. Arias and her other mitigation witnesses to testify in open court would

not amount to a preclusion of mitigation in violation of the aforementioned, well settled case law, particularly given the fact that the three other mitigation witnesses will not testify at all. The auxiliary question being if this neutered case does not satisfy the above constitutional requirements is it in the interests of justice to continue this sentencing phase retrial in light of the fact that, per *Skipper,* an actual execution can never take place. *Skipper* provides further insight in that in that case a sentence of death was overturned because the defendant was denied the opportunity to place all relevant mitigating evidence before the jury. In her previous motion Ms. Arias detailed how several mitigation witnesses were unwilling to participate, now more have been added to this list, likewise consistent with Ms. Arias' arguments are this Court's own findings, which illustrate how a fatal blow has been dealt to Ms. Arias' ability to make a complete case for life.

Further illustration of this reality can be found in *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954 (1978) where a death sentence was vacated when the sentencer did not have a full opportunity to consider all of the mitigating circumstances before imposing a sentence of death. Given the current state of affairs it is clear that Ms. Arias' current jury will also be denied a full opportunity to consider all of the mitigating factors. Likewise, in *Eddings v. Oklahoma* 455 U.S. 104, 102 S.Ct. 869 (1982), the sentencer refused to consider mitigating circumstances of the defendant's unhappy upbringing and emotional disturbance leading the court to conclude that the sentence of death imposed upon the defendant had to be vacated because said sentence was not constitutional. The *Eddings* Court went on to hold that in order for a sentence of death to be constitutional it

must be supported by the sort of individualized consideration of mitigating factors that the Eighth and Fourteenth Amendments to the United States Constitution demand. Ms. Arias' in not waiving mitigation has attempted to meet this standard and cannot do so because the intense media scrutiny that surrounds this case has caused those who would otherwise testify on her behalf to fear for their safety and the safety of their families, thus this fear prevents Ms. Arias' witness from giving her case for life its full effect.

III. CONCLUSION

This court has already determined that if Ms. Aras had to testify in proceedings that were not sealed from the public and/or the media she would be prejudiced. The court of appeals has said such a procedure is improper. Thus, by prevailing in the Court of Appeals, the media interests have dealt a fatal blow not to Ms. Arias, but instead, to the State's ability to lawfully obtain a sentence of death against her. Thus, for the reasons mentioned above and in her original motion, any such sentence would stand in direct contrast to the Fifth, Eighth and Fourteenth Amendments of the United States Constitution, as well as Art. II, §4 and Art. III of the Arizona Constitution, Thus, Ms. Arias comes before this Court to request that in the interests of justice this Court dismiss the State's Notice of Intent to Seek the Death Penalty filed against Ms. Arias.

RESPECTFULLY SUBMITTED this 26th day of November, 2014.

By: */s/ L. Kirk Nurmi*
L. KIRK NURMI
Counsel for Ms. Arias

Copy of the foregoing
E-Filed/delivered this 26th
day of November, 2014, to:

THE HONORABLE SHERRY STEPHENS
Judge of the Superior Court

JUAN MARTINEZ
Deputy County Attorney

By */s/ L. Kirk Nurmi*
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Counsel for Ms. Arias