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**IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE**

STATE OF ARIZONA,

Appellee,

v.

JODI ANN ARIAS,

Appellant.

No. 1 CA-CR 15-0302

Maricopa County Superior Court
No. CR-2008-031021-001 DT

**MOTION TO DISQUALIFY THE
COURT OF APPEALS**

Comes now Ms. Arias, by and through her undersigned attorneys, and respectfully requests that the Court of Appeals recuse itself from considering the appeal of her conviction for First Degree Murder. The reason for this request is that Judge Cattani, who currently sits as an associate judge for Division One of the Court of Appeals, cannot fairly and impartially consider her appeal. Judge Cattani recently authored and published an article in a publication for The National Judicial College

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entitled "Jody Arias and the Cost of Seeking the Death Penalty." (Ex. 1). In that article, Judge Cattani makes statements that call into question his ability, and consequently this Court's ability, to consider Ms. Arias' appeal in a fair and impartial way. *See*, A.R.S. Sup.Ct.Rules, Rule 81, Code of Jud.Conduct. This motion is set forth more fully in the attached memorandum.

RESPECTFULLY SUBMITTED this 4th day of September, 2015.

MARICOPA COUNTY PUBLIC DEFENDER

By _____ /s/
PEG GREEN
Deputy Public Defender

By /s/
CORY ENGLE
Deputy Public Defender

¹ The article repeatedly misspelled Ms. Arias' first name. Her name is spelled "Jodi," not "Jody."

MEMORANDUM OF POINTS AND AUTHORITIES

FACTS:

A jury found Ms. Arias guilty in Maricopa County Superior Court for First Degree Murder. (ME 5-8-13). The jury hung during the penalty phase of this death penalty case. (ME 5-23-13). The jury hung again after a retrial of the penalty phase. (ME 3-5-15). The court sentenced Ms. Arias to natural life in prison. (ME 4-13-15). Ms. Arias filed a notice of appeal. (I. 2083).

Judge Cattani authored an article that was published in The Judicial Edge, the monthly newsletter published by The National Judicial College. (Ex. 1). Judge Cattani entitled the article, "Jody (sic) Arias and the Cost of Seeking the Death Penalty." (*Id.*). The National Judicial College published the article on or about August 20, 2015. (*Id.*). In that article, Judge Cattani made several comments about the Arias case:

- "Arias' guilt was never in doubt. The only question in the case was whether she should spend the rest of her life in prison or be executed for her horrific crime." (*Id.*).
- "The Maricopa County Legal Defender has reported expenditures exceeding \$3 million to retain counsel on Arias' behalf for the first trial alone. The overall cost of prosecuting and defending this case will obviously far exceed that amount." (*Id.*).

- “If Arias lives to the age of 70 it will cost the State of Arizona \$840,000. The first trial alone cost considerably more than that.” (*Id.*).
- “...most of the costs associated with the approximately 20-year appeals process are borne by the State.” (*Id.*).
- “As to Jody (sic) Arias, there are some who believe that her crime evidenced a degree of brutality that warranted the death penalty. Others believe that Arias is not the type of person who posed a threat to anyone other than her victim, and that resources would have been better spent on other, more dangerous criminals.” (*Id.*).

Judge Cattani was appointed to the Arizona Court of Appeals on February 9, 2013. (*Id.*). Prior to his appointment, he worked for the Attorney General’s Office where he oversaw capital litigation. (*Id.*). Arias’ trial was litigated in Superior Court from July 9, 2008 to April 13, 2015. (ME 7-9-08; ME 4-13-15).

LEGAL ARGUMENT:

Judges should “...aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity and competence. (A.R.S. Sup.Ct.Rules, Rule 81, Preamble).

The Code of Judicial Conduct emphasizes the premise that an “...independent, fair and impartial judiciary is indispensable to our system of justice.” (*Id.*). The Preamble to the Code states that “Judges should maintain the dignity of judicial office at all times, and avoid both impropriety and the appearance of impropriety in their

professional and personal lives. They should aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity and competence.” (*Id.*).

As used in the Code, “impartiality” means the absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge. (A.R.S. Sup.Ct.Rules, Rule 81, Terminology). A “pending matter” is defined as a matter that has commenced. (*Id.*). A matter continues to be pending through any appellate process until final disposition. (*Id.*).

Judge Cattani’s article constitutes a comment in a pending matter that calls his ability to be impartial into question, thus violating the code of judicial conduct. His article does not reflect an “open mind” when it comes to Ms. Arias’ appeal. A reader could infer that he believed she was guilty before her trial even commenced. His comments about Ms. Arias and her case, made while her appeal is pending in Division One of this Court, are improper.

A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety. (A.R.S. Sup.Ct.Rules, Rule 81, Code of Jud.Conduct, Rule 1.2). Judge Cattani’s article reflects comments that erode public confidence in his ability to view this case impartially. He states that Ms. Arias’ guilt

was "never in doubt." He measures her involvement in the criminal justice system in dollars and cents, not as an individual who has a right to due process throughout post-conviction proceedings. His reference to her longevity is an insensitive comparison of her life with the costs of the criminal justice system.

The comment to Rule 1.2 notes that public confidence in the judiciary is eroded by improper conduct that creates the appearance of impropriety. (A.R.S. Sup.Ct.Rules, Rule 81, Code of Jud.Conduct, Comment to Rule 1.2). The comment goes on to explain: "The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this code or engaged in other conduct that reflects adversely on the judge's...impartiality..." (*Id.*). When an appellate judge writes a derogatory article about a woman whose criminal conviction is pending appeal in his division, it creates a perception that the judge has abandoned his duty to view her appeal impartially.

The Code of Judicial Conduct states that a judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially. (A.R.S. Sup.Ct.Rules, Rule 81, Code of Jud.Conduct, Rule 2.2). Further, a judge shall perform the duties of judicial office without bias or prejudice. (A.R.S. Sup.Ct.Rules, Rule 81, Code of Jud.Conduct, Rule 2.3). The comment to Rule 2.3 notes that a judge who manifests bias or prejudice in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. (A.R.S. Sup.Ct.Rules, Rule 81, Code of

Jud.Conduct, Comment to Rule 2.3). Judge Cattani's article reflects an attitude toward Ms. Arias that is not fair and impartial. He gathered research about the costs of Ms. Arias' case, research that goes outside of the record on appeal. That information should not be considered when reviewing Ms. Arias' trial on appeal. Anyone reading the article could easily conclude that Judge Cattani would not be inclined to grant a new trial for Ms. Arias, given the costs of her first trial. His article impairs the fairness of Ms. Arias' appeal and brings the rest of the court of appeals into disrepute because he is an active, sitting judge on that court. The article appeared in a judicial publication, for the consideration of other judges. The comment goes on to note that a judge must avoid conduct that may reasonably be perceived as prejudiced or biased. (*Id.*).

Perhaps Rule 2.10 speaks most directly to Judge Cattani's article about the Arias case. Rule 2.10 states that a judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending in any court. (A.R.S. Sup.Ct.Rules, Rule 81, Code of Jud.Conduct, Rule 2.10). Judge Cattani wrote an article for a legal publication. The article centered around an appeal pending before him in the Arizona Court of Appeals. Judge Cattani made statements in that article that impaired the fairness of Arias' pending appeal. He is responsible for reviewing her conviction for First Degree Murder. He wrote that

her guilt was never in question. In so doing, he implies that he does not believe in the presumption of innocence.

Ms. Arias was not guilty until her jury heard every bit of testimony from the stand, considered every bit of evidence, deliberated and voted. A reader could easily infer that Judge Cattani believed she was guilty before the trial began, and the trial was just a waste of time and taxpayer money.

The tone of his article treats Ms. Arias not as a human who was convicted of a very serious crime and is serving a term of natural life in prison, but as a statistic—a burden on the system, measured in dollars and cents. He speculates about her life expectancy as if she were some mythical character, not a real person appearing in his court. The tone and flavor of the article, written about a case pending appeal in his own court, violates the code of judicial ethics rule mandating fairness and impartiality.

Finally, Rule 2.11 of the Code speaks to disqualification of a judge. (A.R.S. Sup.Ct.Rules, Rule 81, Code of Jud.Conduct, Rule 2.11). A judge shall disqualify himself in any proceeding in which the judge's impartiality might reasonably be questioned, when the judge makes a public statement that commits the judge to reach a particular result or rule in a particular way in the proceeding. (A.R.S. Sup.Ct.Rules, Rule 81, Code of Jud.Conduct, Rule 2.11(A)(5)). The comment to the rule explains that a judge is disqualified whenever his impartiality might reasonably be questioned,

regardless of whether any of the specific provisions of paragraphs (A)(1) through (5) apply. (A.R.S. Sup.Ct.Rules, Rule 81, Code of Jud.Conduct, Comment to Rule 2.11).

Judge Cattani and the entire Court of Appeals must disqualify themselves from considering Arias' appeal, due to Judge Cattani's disregard of the appearance of fairness and impartiality shown on behalf of Ms. Arias' pending appeal. Judge Cattani could have chosen *any* other topic to write about; instead, he chose to write about an appeal currently pending in his own court. Judge Cattani does not view Ms. Arias as a living, breathing human being whose criminal conviction is in his court, purportedly for the purpose of a fair and impartial review of her trial. While Ms. Arias has been convicted of a very serious crime, she, like any other criminal defendant whose case is on appeal, deserves to be treated respectfully and with dignity. Her case deserves to be reviewed thoughtfully and objectively. Judge Cattani's article demonstrates that he cannot be fair and impartial in this case.

The Code of Judicial Conduct emphasizes that judges must conduct themselves in a way to inspire confidence in their ability to do their job in a fair and impartial way. The theme of fairness and impartiality resonates throughout this set of rules. Judge Cattani chose to write and publish this article about Ms. Arias' trial and pending appeal. He cavalierly proclaimed that her guilt was never an issue. He analyzed her trial in terms of dollars and cents, not in whether justice was served or whether her conviction was the result of due process and a fair trial.

Because Judge Cattani failed in his duty to be fair and impartial regarding Ms. Arias, he must be disqualified, pursuant to Rule 2.11. Not only that, but because his behavior reflects on the rest of Division One, Division One must be disqualified as well. Finally, because the Court of Appeals exists as one court, both divisions must be disqualified. *See*, ARIZ. CONST., art. 6 § 9; A.R.S. § 12-120(A).

CONCLUSION:

Ms. Arias asks that the Court of Appeals be disqualified from further consideration of her appeal and that her appeal be transferred to the Arizona Supreme Court.

RESPECTFULLY SUBMITTED this 4th day of September, 2015.

MARICOPA COUNTY PUBLIC DEFENDER

By _____ /s/
PEG GREEN
Deputy Public Defender

By _____ /s/
CORY ENGLE
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