

**IN THE ARIZONA SUPREME COURT**

JIMMY LASHAWN McGILL,	)	Arizona Supreme Court
	)	No. CR-19-0124-PR
Petitioner,	)	
	)	Arizona Court of Appeals No.
v.	)	2 CA-SA 2019-0011 &
	)	2 CA-SA 2019-0019
HONS. KEVIN WHITE and LAWRENCE	)	
WHARTON, Judges of the Superior Court	)	Pinal County Superior Court
of Arizona in and for Pinal County,	)	No. CR-16174
	)	
Respondent Judges,	)	
	)	
STATE OF ARIZONA,	)	
	)	
Real Party In Interest.	)	

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**BRIEF OF *AMICUS CURIAE* ARIZONA ATTORNEYS FOR  
CRIMINAL JUSTICE (AACJ) IN SUPPORT OF PETITIONER**

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## INTRODUCTION

Arizona has chosen to structure its funding of indigent defense by placing most of the funding, and all of the decision making, at the county level. *See* A.R.S. § 11-581 (“In any county the board of supervisors may establish the office of public defender and appoint a suitable person to hold that office.”); §§ 11-588 & 41-2409 (method of state funding for county indigent defense); § 12-117 (Supreme Court manages public defender training fund). As a result, Arizona has fifteen separate procedures. Arizona Attorneys for Criminal Justice (AACJ) has served an important role in the statewide defense community by communicating with attorneys in every jurisdiction and ensuring the courts understand the extent of the resources needed to provide the level of defense required by the Sixth Amendment’s right to competent counsel.

In 2011, this Court addressed then-existing Rule 15.9 to explain that defendants are entitled to *ex parte* hearings for purposes of obtaining resources for their mitigation investigations. *Morehart v. Barton*, 226 Ariz. 510 (2011). The prosecution has no role in such requests by indigent defendants—a point that is usually taken for granted but was overlooked by the prosecution and the judges in this case. Because the law is so well settled that prosecutors have no role in determining who represents a defendant and what resources they receive to help

defend the case,<sup>1</sup> AACJ concentrates its arguments on the role of the judiciary in protecting the constitutional right of the defendant to effective assistance of counsel. As will be developed in this brief, the dearth of Arizona law explaining the role of the court in hearing funding requests *ex parte* is particularly problematic given the decentralized—and sometimes irregular—mechanisms in the state for funding indigent defense. The result of the actions of the Pinal County Superior Court in this case is to disparage fundamental rights to criminal defendants to investigate their cases, with no reasoned basis for doing so. Action by this Court is required so that trial courts throughout Arizona will understand how to protect these rights.

### **INTERESTS OF *AMICUS CURIAE***

AACJ, the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 in order to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law

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<sup>1</sup> See, e.g., *Hurles v. Superior Court*, 174 Ariz. 331 (App. 1993) (citing *Knapp v. Hardy*, 111 Ariz. 107 (1974)). AACJ is aware of at least two cases where the Pinal County Attorney's Office has attempted to interfere in the composition of the defense team. One of those involved conduct that led to that office being forcibly removed from the case. *State ex rel. Voyles v. Cahill (Wilson)*, 2 CA-SA 2014-0050 (order declining jurisdiction Sept. 17, 2014). For this reason, granting review will remind prosecuting agencies of their proper role in this part of the process.

students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

AACJ offers this brief because the issue presented concerns the constitutional right of defendants to obtain the resources they need and to which they are entitled. AACJ members are attorneys representing indigent defendants in all fifteen Arizona counties, and AACJ is familiar with the myriad bureaucratic structures for funding indigent defense, some less secure than others. Especially in those counties where resources must be requested from the same judges who will be expected to decide disputes between the parties, it is critical that those defendants be on a level playing field with the prosecuting agencies who do not need to request resources in this manner. This case presents an excellent vehicle for explaining to the trial courts of this state their responsibilities for maintaining the integrity of *ex parte* communications from indigent defense attorneys seeking to satisfy the constitutional requirements for obtaining the resources necessary to defend the case.

## ARGUMENTS

### I. Criminal defendants have a fundamental right to investigate their post-conviction claims.

McGill was a 16-year-old child when he committed the crimes for which he was sentenced to a *de facto* life sentence. He has raised a post-conviction claim challenging this *de facto* life sentence pursuant to the Supreme Court’s cases holding that children are “constitutionally different from adults for purposes of sentencing.” *Miller v. Alabama*, 567 U.S. 460, 471 (2012). “Because juveniles have diminished culpability and greater prospects for reform,” they “are less deserving of the most severe punishments.” *Id.* (quoting *Graham v. Florida*, 560 U.S. 48, 68 (2010)). To support his claim, a complete independent investigation of all relevant legal and factual issues that could arise in the sentencing phase of his case is required by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article 2, sections 4, 15, and 24 of the Arizona Constitution.

The Eighth Amendment requires an individualized assessment of the offender’s “age and the wealth of characteristics and circumstances attendant to it.” *Miller*, 567 U.S. at 476. Those characteristics include “immaturity, impetuosity, and failure to appreciate risks and consequences.” *Id.* at 477. They also include “the family and home environment that surrounds” the juvenile offender, and “from which he cannot usually extricate himself—no matter how brutal or dysfunctional.” *Id.* And they also include “the circumstances of the homicide offense, including the

extent of his participation in the conduct and the way familial and peer pressures may have affected” the offender. *Id.* A life-without-parole sentence is constitutionally available only for “the rare juvenile offender whose crime reflects irreparable corruption.” *Id.* at 479-80 (citing *Graham*, 560 U.S. at 68; *Roper v. Simmons*, 543 U.S. 551, 573 (2005)). This is because, for juveniles, a life-without-parole sentence is tantamount to the death penalty. *Id.* at 475 (citing *Woodson v. North Carolina*, 428 U.S. 280 (1976)).

To raise a successful post-conviction claim, McGill must show that his Eighth Amendment claim is “colorable.” Ariz. R. Crim. P. 32.6(d)(1); *State v. Valencia*, 241 Ariz. 206, 210 ¶ 18 (2016) (citing *State v. Amaral*, 239 Ariz. 217, 220 ¶¶ 11-12 (2016)). To meet this burden McGill must “attach to the petition any affidavits, records, or other evidence currently available to the defendant supporting the petition’s allegations.” Rule 32.5(d). The failure to meet this burden could result in summary dismissal of his claim; thus, a petitioner seeking to demonstrate a lack of permanent incorrigibility at the time of the offense must conduct an exhaustive investigation into the background of the child who committed the offense—usually twenty or more years in the past. This complete investigation must include an exhaustive social history and consultation with a mitigation specialist with particularized experience to place these events into context:

At least one member of the team must have specialized training in identifying symptoms of mental illness, developmental disability, post-

traumatic stress disorder, and neurological deficits; long-term consequences of deprivation, neglect, and maltreatment during developmental years; social, cultural, historical, political, religious, racial, environmental, and ethnic influences on behavior; effects of substance abuse; and the presence, severity, and consequences of exposure to trauma.

The Campaign for the Fair Sentencing of Youth (CFSY), *Trial Defense Guidelines: Representing a Child Client Facing a Possible Life Sentence* (2015),<sup>2</sup> p.9.

It should go without saying that law school hardly prepares an attorney for the kind of investigative work into a person’s social and psychological background that is needed to substantiate a *Miller* claim. And, although the mitigation specialist conducts an “investigation,” it is an entirely different kind of investigation from that which involves evaluation of issues related to guilt or innocence—which is why the guidelines both for capital defense and for defending children facing a life sentence require the mitigation specialist to be distinct from the investigator. *See* CFSY Guidelines at 15-19 (distinguishing roles of investigator and mitigation specialist).

**II. An indigent defendant has a right to necessary funding at government expense for post-conviction investigation.**

The unreasonable denial of expert witness assistance at government expense

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<sup>2</sup> Available at <https://www.fairsentencingofyouth.org/wp-content/uploads/Trial-Defense-Guidelines-Representing-a-Child-Client-Facing-a-Possible-Life-Sentence.pdf> (last accessed June 3, 2019).

to an indigent criminal defendant violates the Due Process Clause of the Fourteenth Amendment. *Ake v. Oklahoma*, 470 U.S. 68, 76-77 (1985); *Hinton v. Alabama*, 571 U.S. 263 (2014). The due process rationale of *Ake* applies to all criminal defendants and expert witnesses, not just capital cases. *Little v. Armontrout*, 835 F.2d 1240, 1243-44 (8th Cir. 1987). Due process requires the appointment of an expert when such testimony is “reasonably necessary” for an indigent defendant to present a defense. *State v. Gonzales*, 181 Ariz. 502, 511 (1995).

Rule 15.9 previously provided for the appointment of additional defense team members (like investigators and mitigation specialists) in capital cases. In 2016-2017, the Task Force for Restyling the Arizona Rules of Criminal Procedure not only moved Rule 15.9 to its current location in Rule 6.7, but it also proposed substantial changes to that rule that expanded its reach into all criminal cases—changes this Court adopted that went into effect on January 1, 2018. The Rule 32 Task Force that this Court has created by Administrative Order 2018-07 has now proposed changes to Rule 32.5(c) that would codify a trial court’s inherent power to appoint investigators, expert witnesses, and mitigation specialists when such is “reasonably necessary.” See Petition to Amend Rule 32, Ariz. R. Crim. P., No. R-19-0012, <https://www.azcourts.gov/Rules-Forum/aft/949> (last accessed June 3, 2019).<sup>3</sup>

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<sup>3</sup> The Rule 32 Task Force has proposed creating a duplicate rule (Rule 33) for

Here McGill has raised an Eighth Amendment claim that requires a showing that he is not irreparably corrupt. He must not only allege this claim in his post-conviction petition but he must also support it with evidence. The assistance of an expert is “reasonably necessary” to meet this burden because, as discussed above, an attorney skilled in the law is often unskilled in the investigative techniques for developing mitigation. Failure to conduct an adequate mitigation investigation and to present a case for imposing less than the ultimate sentence is considered ineffective assistance of counsel. *Wiggins v. Smith*, 539 U.S. 510 (2003); *Rompilla v. Beard*, 545 U.S. 374 (2005). After *Miller*, the ultimate sentence for juveniles is that which provides no “hope for some years of life outside prison walls.” *Montgomery v. Louisiana*, 136 S. Ct. 718, 737 (2016).

Arizona death sentences often get overturned on post-conviction review due to ineffective mitigation investigations. Sometimes this occurs at the trial court level. *See, e.g., State v. Cody Martinez*, Pima County Superior Court No. CR-2003-1993; *State v. Joshua Villalobos*, Maricopa County Superior Court No. CR-2004-005523; *State v. Ryan Kuhs*, Maricopa County Superior Court No. CR-2005-138481; *State v. Kyle Sharp*, Cochise County Superior Court No. CR-1995-000271. In other cases, relief is not obtained until the case reaches the federal courts. *E.g., White v. Ryan*,

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pleading defendants in noncapital cases, and it similarly provided for such resources to be available to pleading defendants in Proposed Rule 33.5(b).

895 F.3d 641 (9th Cir. 2018); *Kayer v. Ryan*, 923 F.3d 692 (9th Cir. 2019). When trial courts deny resources to defendants that plainly fall within the definition of “reasonably necessary,” such rulings necessarily violate the clear mandates of *Ake* and *Wiggins*, and this Court’s immediate intervention is required so that judges understand the scope of the investigation that is required in order to raise a claim under *Valencia*.

**III. A criminal defendant has the right to file an *ex parte* motion under seal to request necessary funds.**

McGill filed an *ex parte* under seal motion to request the necessary funds to conduct a complete and independent investigation, because he has the right to conduct his investigation outside of the presence and knowledge of the prosecution. Disclosure is not appropriate until it is determined that the materials will be used and/or disclosure is required by the applicable rules of criminal procedure and/or rules of evidence.

The right for a criminal defendant use an *ex parte* motion to a conduct a complete independent investigation has already been decided under Arizona law by this court in *Morehart*. This right is also set forth in Rule 6.7(b) (formerly Rule 15.9), which allows the filing of an *ex parte* motion when a “proper showing is made concerning the need for confidentiality.”

At issue in *Morehart* was the right of a capital defendant to conduct a complete

and confidential pre-trial investigation without disclosing the ongoing investigation to the State. The defendant filed a motion requesting an *ex parte* hearing to allow use of out-of-state subpoenas to obtain mitigation information. The State did not object, but the victims objected to an *ex parte* hearing that they could not attend. In allowing the *ex parte* request, this Court held that

Consistent with this constitutional framework, Rule 15.9 addresses the appointment of investigators and expert witnesses for indigent defendants in capital cases. As initially adopted in 2002, this Rule did not provide for *ex parte* proceedings, which prompted concerns that defense counsel might improperly be required to disclose privileged or work product material in seeking to obtain mitigation evidence. Accordingly, the Rule was amended to expressly allow *ex parte* proceedings upon a “proper showing ... [of a] need for confidentiality,” and directing that “any such proceeding, communication, or request shall be recorded verbatim and made a part of the record available for appellate review.” Ariz. R. Crim. P. 15.9(b); *cf.* Ariz. Sup. Ct. R. 81, Code of Judicial Conduct, Rule 2.9(A)(5) (providing “[a] judge may initiate, permit, or consider any *ex parte* communication when expressly authorized by law to do so”).

*Morehart*, 226 Ariz. at 513 ¶ 11. The purpose of allowing *ex parte* communications is to prevent premature disclosure of trial strategy or work product when making requests to the court. *State v. VanWinkle*, 230 Ariz. 387, 391 ¶ 11 (2012).

Federal law also provides a criminal defendant with the right to use an *ex parte* motion to conduct a complete independent investigation necessary to present a complete defense. Discussed in *Ake*, 470 U.S. at 82-83, this right has been codified in 18 U.S.C. § 3006A(e)(1), which allows an *ex parte* application for funds “where they are necessary to protect the attorney-client relationship or confidential and

privileged attorney-client communications.”

An *ex parte* motion also allows counsel to protect relevant information that is protected by the attorney-client privilege. Defense counsel is ethically bound to protect client confidentiality by making applications for resources *ex parte*. See ABA Criminal Justice Standards, Defense Function (4th ed.), Standard 4-4.1 (“Application to the court [for resources] should be made *ex parte* if appropriate to protect the client’s confidentiality.”). The attorney-client privilege is the ““oldest of the privileges for confidential communications”” and is “rigorously guarded ‘to encourage full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.’” *State v. Towery*, 186 Ariz. 168, 177, n.6 (1996) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)). Use of an *ex parte* funding request allows the consideration of this protected information in making a ruling on the request.

#### **IV. Refusal to allow *ex parte* under seal requests for funding prejudice indigent defendants and violate equal protection.**

If McGill was able to fund his own defense, he would not be required to disclose confidential materials to or litigate with the prosecution to secure funds. If McGill was an indigent defendant in most other counties, he would have been able to seek funding without going to the court. For example, many counties, including

Maricopa and Pima Counties, have a county department called Public Defense Services or something similar that serves the purpose of ensuring that all defendants have a competent defense. Other counties, such as Yavapai and Coconino, leave the role of coordinating indigent defense in the hands of one of the public defense agencies.

Although Pinal is the third largest county by population in the state, it has only one public defense agency with no conflict office. The Pinal County Public Defender has no appellate or post-conviction department, leaving all such matters to be managed by private appointed lawyers. Until very recently, the Public Defender employed no investigators (it now has one), and all requests for additional resources must be made to the judge on a case-by-case basis. Most concerning, however, is the fact that Pinal County has no indigent defense coordinator; the Pinal County Superior Court judges are responsible for appointing attorneys as well as hearing all requests for resources for indigent defendants. While no particular bureaucratic structure for funding indigent defense is constitutionally mandated, and there is no *per se* conflict in having judges decide on such funding questions, Pinal County's mechanism does little to reduce the risk that the prosecution will discover how the indigent defendant's counsel plans to investigate the case.

The equal protection guarantees of the Fourteenth Amendment to the U.S. Constitution and article 2, section 13 of the Arizona Constitution prevent the unequal

application of the law. Here some defendants are required to disclose confidential information to the government and to litigate to obtain funding, while other defendants are not required to disclose confidential information to the State or litigate with the State over funding.

The effects of the federal and state equal protection guarantees “are essentially the same,” *State v. Lowery*, 230 Ariz. 536, 541 ¶ 13 (App. 2012) (quoting *State v. Bonnewell*, 196 Ariz. 592, 596 ¶ 15 (App. 1999)), each generally requiring the law treat all similarly situated persons alike, *Vong v. Aune*, 235 Ariz. 116, 123 ¶ 32 (App. 2014) (quoting *Wigglesworth v. Mauldin*, 195 Ariz. 432, 438, ¶ 19 (App. 1999)).

If a statute or rule does not apply to a suspect class or impinge on a fundamental right, the rational basis test will be applied. This test “upholds legislative regulation which imposes burdens on one class but not another so long as (1) the court can find some legitimate state interest to be served by the legislation and (2) the facts permit the court to conclude that the legislative classification rationally furthers the state’s legitimate interest.” *Kenyon v. Hammer*, 142 Ariz. 69, 78-79 (1984). The actions by the Pinal County Superior Court fail both prongs of this test. No legitimate state interest is served by requiring indigent criminal defendants to disclose confidential information to the prosecution and to litigate with opposing counsel in order to obtain funding for constitutionally required investigation; nor does the difference in treatment of indigent defendants in Pinal

County further any legitimate interest. This Court should ensure that an indigent criminal defendant is provided an effective mechanism to protect the constitutional right of defendants to obtain the resources they need and to which they are entitled. This Court should also protect the rights of all indigent criminal defendants to conduct a complete and privileged investigation regardless of the county in which the case is pending.

### **CONCLUSION**

For these reasons, AACJ asks this Court to grant review of the petition and hold that issues regarding resources must be decided *ex parte* and that a trial court abuses its discretion when it discloses any information regarding the requests to the prosecution.

RESPECTFULLY SUBMITTED this 3d day of June, 2019.

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