ARIZONA SUPREME COURT

STATE OF ARIZONA *ex rel*. ALLISTER ADEL, MARICOPA COUNTY ATTORNEY, Petitioner, v. HON. JAY ADLEMAN, JUDGE OF THE MARICOPA COUNTY SUPERIOR COURT, Respondent Judge, SHAVONTE DESHAWN BEASLEY, Real Party in Interest	Arizona Supreme Court Case No. CR-21-0157-PR Arizona Court of Appeals No. 1 CA-SA 21-0028 Maricopa County Superior Court No. CR2012-008302-001 **BRIEF OF *AMICI CURIAE* ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE (AACJ) AND ARIZONA CAPITAL REPRESENTATION PROJECT (ACRP) IN SUPPORT OF REAL PARTY IN INTEREST**

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INTRODUCTION

The Maricopa County Attorney's Office (MCAO) committed gross and egregious misconduct in Shavonte Beasley's case. First, it issued a criminal subpoena duces tecum for Beasley's communications, even though A.R.S. § 13-4071(D) plainly states, "Blank subpoenas shall not be used to procure discovery in a criminal case…" Second, MCAO's request was so overbroad that it had to know that it would encompass privileged communications among Beasley, his counsel, and the defense team. Third, MCAO violated A.R.S. § 13-3016(B)(2)-(3) by failing to give notice to Beasley of the subpoena so that Beasley could object. All of these might be forgiven if not for the fact that MCAO, upon recognizing that it received communications between Beasley and his defense team, did not ask for guidance from the trial court or ask for a special master to be appointed, but instead charged ahead and read all of the communications. Rather than show any remorse for its attorneys' misconduct, MCAO continues its unabated pursuit of admitting these communications in Beasley's case. If MCAO were to obtain relief in this case, prosecutors would only become emboldened in their acquisition of inmates' communications.

MCAO further misapprehends the purpose of the attorney-client privilege by creating a classic "cart before the horse" situation. According to MCAO's test, i.e., looking at each individual communication in isolation to see what information is

conveyed, the MCAO is allowed to violate the privilege with impunity. Only last year this Court held that once the defendant shows an expectation of privileged communication, the attorney-client privilege attaches and it is up to defense counsel—not the court and certainly not the prosecutor—to determine which communications may not be discovered. *Clements v. Bernini*, 249 Ariz. 434 (2020).

Finally, MCAO's approach ignores the challenges that all defense counsel face when it comes to building trust with incarcerated clients. This is especially true for capital defense counsel, who must investigate not only guilt-innocence issues but also mitigation issues that frequently involve the most personal, traumatic, and humiliating imaginable. This requires the defense team to attach a mitigation specialist who often takes a front-and-center role in the case. Rarely if ever does a capital defendant understand the mitigation specialist's role until they have spent countless hours building rapport and trust. For this reason, communications between defense team members and their client must be afforded a higher degree of protection—the opposite of what occurred in this case.

INTERESTS OF *AMICI CURIAE*

Arizona Attorneys for Criminal Justice (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 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.

Arizona Capital Representation Project (ACRP) is a statewide non-profit legal services organization that assists indigent persons facing the death penalty in Arizona through direct representation, pro bono consulting services, training, and education. ACRP tracks and monitors all of the capital prosecutions in Arizona.

Amici offer this brief because the issue of maintaining the attorney-client privilege is at the heart of their shared mission to ensure that all defendants—especially capital defendants—have the benefit of frank and open communication with their lawyers and their defense teams. When prosecutors abuse their position by obtaining recordings or electronic messages of privileged communications and then reviewing them, the privilege is in grave danger of disappearing for incarcerated defendants. Particularly during the COVID-19 pandemic when jail visits are impossible, jailers and prosecutors must be vigilant to protect the privilege and avoid violating it at all costs. When prosecutors demonstrate a lack of concern for their duty as ministers of justice, the courts must protect the defendant, as the lower courts did in this case.

ARGUMENTS

I. Jailers and prosecutors violate the attorney-client privilege when jailers intentionally record all of inmates' communications with their attorneys and defense teams and turn those communications over to prosecutors.

A lawyer's duty to maintain client confidentiality includes the lawyer-client privilege, but is also substantially broader and extends to all information a lawyer or other members of the defense team learn during the course of representation. Ariz. R. Sup. Ct. 42, ER 1.6(a) ("A lawyer shall not reveal confidential information relating to the representation of a client unless the client gives informed consent [or] the disclosure is impliedly authorized in order to carry out the representation..."). The ethical rules anticipate that, at times, confidentiality may be broken and advises that a lawyer "shall make *reasonable* efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." ER 1.6(c) (emphasis added). Beasley's lawyers took such reasonable steps by relying on the "assurances of confidentiality by Beasley's jailers." *Decision* ¶ 17.

A lawyer's duty of confidentiality applies with no less force when a client is incarcerated. Indeed, the Supreme Court has declared that "[e]ven in a jail, or perhaps especially there, the relationships which the law has endowed with particularized confidentiality must continue to receive unceasing protection." *Lanza v. New York*, 370 U.S. 139, 143-44 (1962). The Eighth Circuit applied this principle

in response to prisoners' claims that their right to counsel and to due process were violated by the requirement that they meet with their lawyers in areas of the jail where their conversations might be overheard by guards. *Johnson-El v. Schoemehl*, 878 F.2d 1043 (8th Cir. 1989). The court held that "'such conditions impede the detainees' ability to prepare for trial, jeopardize the confidentiality of their lawyer-client communications and invade their right to privacy.'" *Id*. at 1053 (quoting *Moore v. Janing*, 427 F. Supp. 567, 576 (D. Neb. 1976), *abrogated by Gonzales v. Moreno*, 1989 WL 230918 (D. Neb. 1989)).

The State's interference with the confidentiality of attorney-client communications has a chilling effect on such communications.

> It takes no stretch of imagination to see how an inmate would be reluctant to confide in his lawyer about the facts of the crime, perhaps other crimes, possible plea bargains, and the intimate details of his own life and his family members' lives, if he knows that a guard is going to be privy to them too.

Nordstrom v. Ryan, 762 F.3d 903, 910 (9th Cir. 2014). Not only will defendants feel unsafe to disclose sensitive facts that are necessary for building a life-saving mitigation narrative, but, as MCAO has demonstrated in this case, the State will use the defendant's privileged statements against him. The D.C. Circuit recognized this problem long ago, cautioning that

> Once the investigatory arm of the government has obtained information, that information may reasonably be assumed to have been passed on to other government organs responsible for the prosecution. Such a presumption merely reflects the normal high level of formal and

> informal cooperation that exists between the two arms of the government.

Briggs v. Goodwin, 698 F.2d 486, 495 (D.C. Cir. 1983), *vacated on other grounds*, 712 F.2d 144 (D.C. Cir. 1983).

In *Clements*, this Court recognized the importance of maintaining the confidentiality of lawyer-client communications to fulfilling a defendant's right to counsel. 249 Ariz. at 439 ¶ 7. This Court restated in *Clements* the test for determining whether a communication is privileged:

> The proponent must show that 1) there is an attorney-client relationship, 2) the communication was made to secure or provide legal advice, 3) the communication was made in confidence, and 4) the communication was treated as confidential.

Id. at 440 ¶ 8 (citing *Samaritan Found. v. Goodfarb*, 176 Ariz. 497, 501 (1993)). MCAO, validating the concerns expressed in *Briggs*, has attempted to capitalize on this by searching all of Beasley's communications and determining which ones do not pertain to legal advice. MCAO's argument demonstrates its unwillingness to recognize the privileged nature of attorney-client communications with criminal defendants.

Clements involved a jail inmate who called his attorney on a recorded line. This Court recognized that other courts found a waiver of the privilege if the line was recorded, but it

> decline[d] to adopt a bright-line approach here. Instead, when assessing the confidentiality of communications made on a recorded line, a trial

> court should consider the content of any recording warning, the reasonableness of any expectation of confidentiality, and whether the jail's recording policy presents an unreasonable or arbitrary restriction on a defendant's ability to communicate with his counsel.

Id. at 440-41 ¶ 13. This Court then noted:

> Knowingly monitoring attorney-client communications to prevent the privilege from attaching to those conversations simply because the phone number used by a defendant to contact his or her attorney is not listed with the State Bar appears to constitute an unreasonable burden on a defendant's ability to confer with counsel. If an inmate has no practical way to communicate with counsel without interception, he can hardly be said to have waived the privilege by choice or inadvertence.

Id. at 441 ¶ 14. Beasley has correctly pointed out that the peculiar circumstances related to the COVID-19 pandemic essentially pushed Beasley into communicating with his defense team via tablet.

Amici do not propose that this special action should morph into an *ad hoc* disciplinary proceeding against the prosecutors involved,[1] but the ethical violations are relevant to showing why the attorney-client privilege is sacrosanct. As this Court stated only last year, "the court may not invade the privilege to determine its existence, even in camera using a special master." *Clements*, 249 Ariz. at 438 ¶ 1.

In *Clements*, the communications were accidentally recorded. There was nothing accidental about MCAO's conduct in this case. Judge Adleman recognized, "Without a doubt, the State's conduct in this case was far more intrusive than the

[1] Judge Adleman similarly "emphasize[d] … that any references to ER 4.4 are merely instructive and not controlling in this matter." *12/18/2020 Ruling* at 3 n.4.

prosecution in *Clements*. In the present case, the State reviewed all of the disputed communications and – only after completing that review – sought the permission of this Court to deem the communications as non-privileged and admissible at trial." *12/18/2020 Ruling* at 3 n.2. This is why Judge Adleman correctly noted that *Clements* "only serves to validate [his] original ruling" denying the State's motion to use Beasley's communications. *Id*. at 2.

Although the issue presented in *State v. Marner (Goldin)*, 251 Ariz. 198 (2021), was different due to the procedural posture of that case, the precipitating action in both cases is strikingly similar. In both cases, prosecutors willfully obtained communications protected by the privilege. In *Goldin*, this Court reviewed a ruling removing the Tucson section of the Attorney General's Office from a case in which prosecutor Richard Wintory had committed serious misconduct many years earlier. The most notable difference between the two cases is that in Goldin's case, when Wintory's superiors learned of his misconduct, they quickly fired him. Yet the taint of Wintory's action continued to infect the case a decade later, to the point that the trial court ordered the Tucson office disqualified from the case just because he might possibly have communicated his knowledge to others. *Goldin*, 251 Ariz. at 201 ¶ 16. Here, on the other hand, MCAO has endorsed their prosecutors' actions by continuing to pursue this issue, and they have publicized their ill-gotten gains through a public filing in the superior court. What makes Beasley's case so similar

to *Goldin* is that this Court must confront the necessary consequences of prosecutors learning privileged defense team communications—in *Goldin* to decide whether to disqualify a prosecuting agency, and here to decide whether MCAO may benefit from its misconduct.

MCAO suggests this Court adopt a process whereby it may obtain all of a defendant's communications, review them, and then move *in limine* to admit those messages that are relevant to issues at trial. MCAO inexplicably ignores the fact that privileged communications are not discoverable in the first place. As this Court stated in *Twin City Fire Ins. Co. v. Burke*, 204 Ariz. 251, 256 ¶ 22 (2003), "neither this type of relevance nor pragmatic importance alone will support a finding that the attorney-client privilege has been waived… If so, the privilege will have little meaning."

It is true that the stakes are high for both sides in a death penalty case; but MCAO must remember its primary duty as "a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice…" ER 3.8 cmt. MCAO must avoid the temptation to win "at any cost." *In re Peasley*, 208 Ariz. 27, 37 ¶ 44 (2004). Allowing MCAO to reap the benefits of its conduct in this case would set a dangerous precedent that would lead incarcerated defendants to harbor mistrust toward the security of any communications with their defense team.

II. Capital defense teams have a heightened obligation to communicate with their clients.

A. Counsel have a duty to keep clients informed.

The Arizona Rules of Professional Conduct require counsel to maintain contact with their client, including "keep[ing] the client reasonably informed about the status of the matter" and "promptly comply[ing] with reasonable requests for information." ER 1.4. Capital defense counsel's duties include informing the client as to matters about which the client must give informed consent, consulting with the client about the means used to accomplish the client's objective, keeping the client informed about the status of the case, complying with the client's request for information, and providing the client sufficient information to allow the client to make informed decisions. Lawrence J. Fox, *Capital Guidelines and Ethical Duties: Mutually Reinforcing Responsibilities*, 36 Hofstra L. Rev. 775, 796-97 (2008). The ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases ("ABA Guidelines") impose an additional requirement on defense teams to "engage in continuing interactive dialogue with the client concerning all matters that might reasonably be expected to have a material impact on the case…" ABA Guideline 10.5.

The ABA Guidelines emphasize the importance of maintaining regular lines of communication between lawyer and client because of the high stakes in such cases. "Even if counsel manages to ask the right questions, a client will not—with

good reason—trust a lawyer who visits only a few times before trial, does not send or reply to correspondence in a timely manner, or refuses to take telephone calls." ABA Guideline 10.5, Commentary. The ABA Guidelines further note that a capital lawyer must humanize the client and that such work "cannot be done unless the lawyer knows the inmate well enough to be able to convey a sense of truly caring what happens to him." *Id*.

B. Criminal restitution does not adequately protect defendants' due process rights.

For decades the capital defense community has recognized that "[d]eveloping an effective relationship may be counsel's most difficult task in a capital case…." Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. Rev. 299, 322 (May 1983). The client's impairments are one factor that make the task such a challenge. Clients "may have mental illnesses or personality disorders that make them highly distrustful or impair their reasoning and perception of reality; they may be [intellectually disabled] or have other cognitive impairments that effect their reasoning and perception of reality; they may be depressed and even suicidal; or they may be in complete denial in the face of overwhelming evidence." ABA Guideline 10.5, Commentary. The Spencer Report, a study of capital defense representation commissioned by the U.S. Courts, found that, compared with other criminal matters, client communication is "vastly more time consuming and demanding in a death penalty case" than in other criminal

matters.[2] The 2010 update to the Spencer Report notes that capital defense counsel

> must have the counseling skills to advise a client deciding between pleading guilty in return for a life sentence and proceeding to trial where the sentencing options are death or life imprisonment without the possibility of release. They must have communication skills to establish trust with clients, family members, witnesses, and others whose backgrounds may be culturally, racially, ethnically, linguistically, socioeconomically, and otherwise different from counsel's.[3]

Building and maintaining rapport serves capital defense counsel's most primary functions—the development of lifesaving mitigation. ABA Guideline 10.11 and Commentary. Rapport between a client and his lawyer is a precursor to the client's ability to make social history disclosures. Mental health experts have concluded that "[r]apport between interviewer and subject is a necessary, though by no means a sufficient, condition for disclosure [of a history of trauma] to occur." Kathy Wayland, *The Importance of Recognizing Trauma Throughout Capital Mitigation Investigations and Presentations*, 36 Hofstra L. Rev. 923, 960 (Spring 2008). Legal scholars recognize that a client's Sixth Amendment right to counsel suffers where a lawyer has not developed a rapport with her client. *See, e.g.* Bradley

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[2] Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation, ep 18, available at https://www.uscourts.gov/sites/default/files/original_spencer_report.pdf (last visited September 20, 2021).

[3] Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases, p.92, available at https://www.uscourts.gov/sites/default/files/fdpc2010.pdf (last visited September 20, 2021).

A. MacLean, *Effective Capital Defense Representation and the Difficult Client*, 76 Tenn. L. Rev. 661, 661 (2009) ("[E]ffective defense representation in a capital case … depends on the nature and quality of the relationship between the lawyer and the client."). More specifically, rapport between the lawyer and client that "reflects warmth, genuine concern, and mutual trust" allows the client to feel at ease, thus facilitating the exchange of information necessary to the development of the case. Sean O'Brien, *When Life Depends on it: Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 Hofstra L. Rev. 693, 742-43 (Spring 2008) (quotation omitted).

One experienced capital mitigation specialist provided the following testimony about the process of developing trust with a client:

> [Mary] Durand testified in the PCR court that spending a substantial amount of time with a capital defendant, beginning very early in the case, is essential in order to build trust. Most capital defendants "believe, at least initially, that the pursuit of a mitigation case is necessarily a concession of guilt." Durand testified that the "time required to develop rapport and trust with a capital client typically takes a hundred hours." She testified, "When you spend time talking to them, if you have the proper amount of time, every occasion but one, in capital cases that I have done, I have gotten the client's permission to do what I need to do."

Kayer v. Ryan, 923 F.3d 692, 705 (9th Cir. 2019), *vacated sub nom. Shinn v. Kayer*, 141 S. Ct. 517 (2020).

The State relies on messages about setting up an iHeartradio account as a prime example of non-privileged communication. *Petition for Review* at 12; *State's*

Supplemental Brief at 6. Capital defense attorneys would call this building trust with a client. A close and trusting relationship between a client and his team "can be the key to persuading a client to accept a plea to a sentence less than death." Scharlette Holdman & Christopher Seeds, *Cultural Competency in Capital Mitigation*, 36 Hofstra L. Rev. 883, 902 (2008). The State simply fails to appreciate the challenges that defense teams face when communicating with any incarcerated clients. These challenges have been enhanced by orders of magnitude during the COVID-19 pandemic, when attorneys not only were disallowed from visiting clients in jail but also had difficulty receiving telephone calls because most attorneys teleworked and avoided the office. Inmates were further isolated because they had less family contact and were rarely (if ever) transported to court hearings. Thus, an isolated message about using the tablet for entertainment may seem unrelated to confidential attorney-client communication, but in context it may be vital to the relationship.

Moreover, the consequences of permitting MCAO to access—much less use—these messages will be devastating to the attorney-client privilege. If jailers may record attorney-client communications and turn them over to prosecutors, defendants will inevitably refuse to communicate with their defense teams. Such a result must be rejected.

III. Intellectually disabled defendants are uniquely vulnerable to interference from the State.

This case presents unique challenges beyond those faced by most pretrial detainees, because Beasley is considering a challenge to the death penalty based on intellectual disability. *Decision* ¶ 2. Although the State disputes that Beasley is intellectually disabled, it does not appear that defense counsel is without basis for making the assertion or that defense counsel's assertion is in bad faith. The fact that Beasley may be intellectually disabled creates an additional challenge to building a trusting relationship with his defense team and makes him even more vulnerable than other criminal defendants to the State's interference in his privileged communications with his team.

Intellectual disability experts have noted that individuals with even the mildest form of intellectual disability have difficulty understanding their rights and the seriousness of their charges. Karen L. Salekin, *et al.*, *Offenders with Intellectual Disability: Characteristics, Prevalence, and Issues in Forensic Assessment*, 3 J. Mental Health Research in Intellectual Disabilities 97, 103-04 (2010). The Supreme Court recognized in *Atkins v. Virginia*, 536 U.S. 304, 321 (2002), that intellectually disabled defendants "may be less able to give meaningful assistance to their counsel" and "in the aggregate face a special risk of wrongful execution."

Individuals with intellectual disability are characterized by, *inter alia*, "slow information processing," and difficulty with "changing demands, making good

decisions, and engaging in meaningful planning for the future." Salekin, *supra* at 99. These individuals also tend to comply with authority, demonstrate gullibility, and are poor at gauging risk. Sheri Lynn Johnson et al., *Convictions of Innocent People with Intellectual Disability*, 82 Alb. L. Rev. 1031, 1051 (2019); Stephen Greenspan, *Homicide Defendants with Intellectual Disabilities: Issues in Diagnosis in Capital Cases* 19 Exceptionality 21 (Fall 2011). Beasley's potential intellectual disability makes him more prone to accept his jailer's assurances that his emails with his defense team would be treated as confidential, and thus making it less likely that he would appreciate the risk of engaging in such communications with his defense team. The State seeks to take advantage of an unsophisticated and uneducated defendant who believed in good faith that he was engaging in private conversations with his defense team.

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CONCLUSION

This Court should hold that prosecutors may not use *ex parte* subpoenas to obtain stored communications of criminal defendants. This Court should further hold that any such violation of this rule requires that the prosecutors may not use that information in any manner at all—including as impeachment—in any proceeding, because no lesser remedy could restore defendants to their rightful position in the litigation.

RESPECTFULLY SUBMITTED this 20th day of September, 2021.

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