ARIZONA SUPREME COURT

ISRAEL JOSEPH NARANJO,

Petitioner,
v.

HON. HOWARD SUKENIC, JUDGE OF THE MARICOPA COUNTY SUPERIOR COURT,

Respondent Judge,

STATE OF ARIZONA,

Real Party in Interest

Arizona Supreme Court Case
No. CR-22-0076-PR

Arizona Court of Appeals
No. 1 CA-SA 22-0017

Maricopa County Superior Court
No. CR2007-119504-001

BRIEF OF *AMICI CURIAE* ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE (AACJ) AND ARIZONA CAPITAL REPRESENTATION PROJECT (ACRP) IN SUPPORT OF PETITIONER

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INTRODUCTION

Claims of ineffective assistance of counsel (IAC) in criminal post-conviction cases necessarily present a tension between two competing interests: producing all relevant information in the quest for truth, and protecting the sanctity of the attorney-client privilege. By definition, invoking a privilege prevents not only admission into evidence of certain information but also its discovery by another party in litigation. "[T]he attorney-client privilege, dating back to the 1600s, is the most ancient of the confidential communication privileges." *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991) (citing 8 J. Wigmore, Evidence § 2290, at 542-44 (McNaughton rev. 1961)). The client cannot rely on the Sixth Amendment's guarantee of "Assistance of Counsel," a "bedrock principle in our criminal justice system," *Martinez v. Ryan*, 566 U.S. 1, 12 (2012), if the defendant cannot trust counsel to maintain the privilege. On the other hand, criminal defendants cannot use this privilege as both a shield and a sword by attacking a prior attorney while preventing that attorney from rebutting spurious allegations.

The Rule 32 Task Force reviewed case law and other authorities in this and other jurisdictions and concluded that the standard for a prior attorney revealing privileged information where the client raised an IAC claim should be identical to the standard when the client files a charge with the State Bar of Arizona. This standard permits prior defense counsel to disclose to the prosecution only that

information that is necessary to rebut the IAC claim. Arizona Rule of Criminal Procedure 32.6(f) (Rev. 2020) does not merely track Ethical Rule 1.6(D)(4); it cross-references it for the standard.

In Israel Naranjo's case, the trial court failed to apply that standard in any meaningful manner. Inexplicably, it ignored *Waitkus v. Mauet*, 157 Ariz. 339 (App. 1988), solely because it was decided by Division Two of the Court of Appeals. Petition for Review, Exhibit 13, at 2. Although the trial court's order is unsustainable under any appropriate standard, new rules require new explorations for the contours of that rule. This Court should interpret new Rule 32.6(f) in a manner that requires post-conviction counsel to make only those disclosures from trial counsel's confidential file that are narrowly tailored to the allegations raised in the post-conviction petition. The trial court should narrowly construe the IAC claim at issue and ensure that anything ordered disclosed is relevant specifically as to that claim.

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 whose mission is to improve the quality of representation afforded to indigent persons facing the death penalty in Arizona. ACRP effectuates its mission through direct representation, pro bono training and consulting services, and education. ACRP tracks and monitors all 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 competent counsel who investigate and make tactical decisions whether evidence will be helpful to the defense. Filing an IAC claim for post-conviction relief does not license the State to have full access to defense counsel's confidential files. Although a criminal defendant cannot use the privilege as both a shield and a sword when presenting an IAC claim, neither does the mere raising of a claim give the State and the court license to examine defense counsel's files in a quest for additional information to use against the defendant. Ethical rules prevent IAC claims from turning into a fishing expedition for the State. It is vital that trial judges enforce narrow limits on what the State may discover from a trial attorney's file.

ARGUMENTS

I. Arizona Rule of Criminal Procedure 32.6(f) requires disclosure only of information necessary to effectively rebut an IAC claim.

The guiding principles for members of the Arizona bar make clear a lawyer's obligation to maintain "inviolate" the confidences and secrets of the client. Ariz. R. Sup. Ct. 41(f). The ethical rules extend 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..."). This Court recognized that "ER 1.6 is much broader than the attorney-client privilege." *Samaritan Foundation v. Goodfarb*, 176 Ariz. 497, 507 (1993). *See also* ABA Formal Opinion 10-456 (warning defense counsel against disclosing information protected by ER 1.6 to prosecution absent a court order even when responding to IAC allegations). Similarly, trial counsel's professional obligations impose "a continuing duty on the part of defense counsel to safeguard the interest of former clients by facilitating the work of successor counsel…" David M. Siegel, *The Continuing Duty Then and Now*, 42 Hofstra L. Rev. 447 (Winter 2013). This means, among other things, protecting privileged information, including work product, where the privilege has not been waived.

There are specific exceptions for when an attorney may reveal information

related to client representation, one of which is "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client." ER 1.6(d)(4).

This Court created the Rule 32 Task Force (R32TF) because members of the preceding Criminal Rules Task Force recognized that post-conviction rules needed substantial overhaul. *See* R-17-0002, Appendix B to Petition, ep 55. One area identified at the beginning of the R32TF's work was clarifying what constitutes a waiver of attorney-client privilege. Members recognized that the only cases in Arizona on this topic were a generation removed and thus unknown to most practitioners, and those cases did not assist in answering many other questions that may arise. Such cases provided little guidance beyond the common-sense maxim that "[t]he defendant may not hide unfavorable information behind a curtain of privilege." *State v. Moreno*, 128 Ariz. 257, 260 (1981). *See also State v. Lawonn*, 113 Ariz. 113, 114 (1976) ("[T]he adversary system is not a poker game. We are still involved in a search for truth.") (citing *Williams v. Florida*, 399 U.S. 78 (1970)). In *State v. Cuffle*, 171 Ariz. 49, 52 (1992), this Court explained that the waiver of the privilege is implicit in a claim that the defendant did not knowingly enter into a plea agreement, because such a claim necessarily requires inquiry into the advice

provided by counsel. None of this authority explains the limits of the waiver.

In *Waitkus*, the court of appeals accepted special action jurisdiction and reversed an overbroad trial court order that required disclosure of trial counsel's entire file to the prosecutor. The court held that the waiver of privilege related to an IAC claim went only as far as trial counsel's testimony and did not extend to counsel's file. 157 Ariz. at 340. In dictum, the court discussed the possibility of producing some documents, *id*. at 340-41, but it did not elaborate since the case did not call for a more focused answer on that point.

The R32TF workgroup assigned to this particular question circulated a memorandum on July 6, 2018, that proposed requiring the defendant to make an express waiver on the record before privileged information could be released to rebut an IAC claim.[1] The R32TF rejected the requirement of an express personal waiver because it "would present logistical issues and might impede the petition's progress."[2] At the next meeting, the workgroup presented a much shorter proposal:

> **Attorney-Client Privilege**. By raising any claim of ineffective assistance of counsel, the defendant waives the attorney-client privilege as to any information necessary to allow the State to rebut the claim, as

[1] Meeting packet of August 3, 2018 (memorandum dated July 6, 2018), ep 65-68, https://www.azcourts.gov/Portals/74/Rule%2032%20TF/MtgPkt080318R32.pdf?ver=2019-03-07-154154-953.

[2] Meeting minutes of August 3, 2018, ep 7, https://www.azcourts.gov/Portals/74/Rule%2032%20TF/Minutes080318R32.pdf?ver=2019-03-07-162111-493.

provided by Ariz. R. Sup. Ct. 42, ER 1.6(d)(4).[3]

The R32TF agreed with this proposal, and after renumbering the rules, it was ultimately placed in a new Rule 32.6(f).[4] The meeting packets and minutes reveal no intent by this Court or the R32TF to overrule any prior Arizona cases on this issue.[5] However, now that the current rule is now pegged to ER 1.6(d)(4), this Court must also look to the ethical rules for guidance in interpreting the new criminal rule.

In *Robert W. Baird & Co. Inc. v. Whitten*, 244 Ariz. 121 (App. 2017), the court of appeals addressed what constitutes putting privileged and confidential information "at issue." It held not only that "the mere filing of an action" was insufficient to find waiver of the attorney-client privilege, but also insufficient is "the mere fact that the privileged information would be relevant or of pragmatic importance to the issues before the court—otherwise, the privilege would have little meaning." *Id*. at 127 ¶ 17. "[T]o waive the attorney-client privilege, a party must make an affirmative claim that its conduct was based on its understanding of the advice of counsel—it is not sufficient that the party consult with counsel and receive

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[3] Meeting minutes of August 31, 2018, ep 5, https://www.azcourts.gov/Portals/74/Rule%2032%20TF/Minutes083118R32.pdf?ver=2019-03-07-122556-017.

[4] The R32TF later created a new Rule 33 that is nearly identical to Rule 32, and the text of Rules 32.6(f) and 33.6(f) is identical.

[5] The R32TF stated such intent in other rules. *See* R-19-0012, Petition, ep 12, https://www.azcourts.gov/Rules-Forum/aft/949 (expressing intent to overrule in part *Canion v. Cole*, 210 Ariz. 598 (2005), by rule change).

advice." *Id*. at 128 ¶ 20 (quoting *Everest Indem. Ins. Co. v. Rea*, 236 Ariz. 503, 505 ¶ 9 (App. 2015)). Although this was a malpractice case involving a civil bondholder, it is particularly instructive because it shows that waiver must be strictly limited.

Additionally, the R32TF workgroup memorandum specifically relied on *Bittaker v. Woodford*, 331 F.3d 715 (9th Cir. 2003), when it crafted the current rule. With implied waivers of privilege, "[e]ssentially, the court is striking a bargain with the holder of the privilege by letting him know how much of the privilege he must waive in order to proceed with his claim." *Id*. at 720. The court recognized three "important implications." *Id*. "The first is that the court must impose a waiver no broader than needed to ensure the fairness of the proceedings before it." *Id*. "Second, the holder of the privilege may preserve the confidentiality of the privileged communications by choosing to abandon the claim that gives rise to the waiver condition." *Id*. at 721. "Finally, if a party complies with the court's conditions and turns over privileged materials, it is entitled to rely on the contours of the waiver the court imposes, so that it will not be unfairly surprised in the future by learning that it actually waived more than it bargained for in pressing its claims." *Id*. It explained that a narrow waiver rule protects the post-conviction defendant's rights against the prosecution unfairly obtaining information that could be used against the defendant in a subsequent proceeding. *Id*. at 722-23. Although it was the attorney-client privilege at issue, the *Bittaker* court noted that its reasoning applied equally to

attorney work product. *Id*. at 722 n.6 (citing *Upjohn Co. v. United States*, 449 U.S. 383, 400 (1981)).

The R32TF also relied on the American Bar Association's Formal Opinion 10-456. This opinion noted that there have been occasions where a defendant's trial attorney has not only cooperated with the prosecution but even volunteered privileged and confidential information for the court. The ABA opined that attorneys will be permitted to make disclosures, but those disclosures must be limited and must be objectively necessary. It concluded, "it is highly unlikely that a disclosure in response to a prosecution request, prior to a court-supervised response by way of testimony or otherwise, will be justifiable." It also observed, "[i]n the generation since *Strickland*, the normal practice has been that trial lawyers do not disclose client confidences to the prosecution outside of court-supervised proceedings."

In post-conviction cases, a defendant does not need to prove that the attorney was incompetent in every aspect of the case. On the contrary, trial counsel may have been competent or even exceptional in many respects but ineffective as to one aspect of the case. In capital cases, effectively conducting a mitigation investigation is not an all-or-nothing finding. A defense team may have located and interviewed many social history witnesses but failed as to others, which may render counsel ineffective. The mere filing of an IAC claim based on one facet of the mitigation investigation and presentation does not open the door to revealing confidential information about

the mitigation investigation into unrelated witnesses.

Other states have similarly required disclosures from trial counsel's files to be narrowly tailored to the specific IAC claim. *See Commonwealth v. Flor*, 136 A.3d 150, 160 (Pa. 2016) ("[T]he mere potential that the PCRA court's order will force the disclosure of privileged materials requires reversal of the PCRA court's discovery order."); *Salt Lake Legal Defender Ass'n v. Uno*, 932 P.2d 589, 591 (Utah 1997) (documents must be reviewed *in camera* and edited to remove unrelated content before turning them over to State to rebut IAC claim); *State v. Buckner*, 527 S.E.2d 307 (N.C. 2000) (describing state statute that limits the waiver of privilege to that information "necessary to defend against the allegations of ineffectiveness").

Against this backdrop, there are substantial concerns that prosecutors will abuse the opportunity and misuse the information they receive. In *State ex rel. Adel v. Adleman*, 252 Ariz. 356 (2022), this Court recently addressed the prosecutors' obtaining and accessing stored communications between the in-custody defendant and members of his defense team. It noted that the conduct of the Maricopa County Attorney's Office "complicated" the privilege analysis because the prosecutors did not comply with their ethical duty to cease reviewing the materials, notify defense counsel, and seek court guidance. *Id.* at 362 ¶ 20 (citing *Lund v. Myers*, 232 Ariz. 309, 311-12 ¶¶ 12-13 (2013)).

II. A protective order is insufficient to protect the confidentiality of the defense investigation.

Respondent ordered Mr. Naranjo to disclose materials relating to the interviews of witnesses who he did not call to testify at trial. Petition for Review, Exhibit 14, at 10, 12-13. Respondent also issued a protective order "prohibiting the State from using, in any retrial or resentencing proceeding, any confidential or privileged information disclosed by Defendant to the State pursuant to any Court Order in post-conviction proceedings." ME 9/21/21 (Appendix to Response to Petition for Review). Although appearing narrow on the surface, this discovery order is actually overbroad and will have a chilling effect on capital defense investigations. Also, the protective order is insufficient to protect confidential work product.

The ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases ("ABA Guidelines") require capital defense teams conduct an exceptionally broad investigation into their client's life history, including interviewing "the client's family members…and virtually everyone else who knew the client and his family, including neighbors, teachers, clergy, case workers, doctors, correctional, probation, or parole officers, and others." 31 Hofstra L. Rev. 913, 1024 (2003); *see also* Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases ("Supplementary Guidelines"), 36 Hofstra L. Rev. 677, 689 (Spring 2008) (defense team must interview "the client, the client's family, and other witnesses who are familiar with the client's life history, or family

history or who would support a sentence less than death."); Ariz. R. Crim. P. 6.8(a)(5) (requiring capital defense counsel "be familiar with and guided by the performance standards in" the ABA Guidelines and Supplementary Guidelines). The United States Supreme Court has, on numerous occasions, recognized that a capital defendant's constitutional right to effective assistance requires counsel to conduct an exhaustive investigation into the client's life history, family history, culture, exposure to trauma, and other influences or events that may help to explain the commission of a terrible crime. *E.g.*, *Rompilla v. Beard,* 545 U.S. 374, 387 & n.7 (2005); *Wiggins v. Smith*, 539 U.S. 510, 522-23 (2003); *Williams v. Taylor*, 529 U.S. 362, 395-96 (2000). This evidence often comes from events that are shameful and humiliating, such as abandonment, poverty, intellectual disability, or sexual or physical abuse. *Wiggins*, 539 U.S. at 516-17.

When conducting such an extensive investigation, it is not surprising that the defense team may uncover evidence that is unsympathetic or otherwise potentially harmful to the client. Making such evidence discoverable in post-conviction proceedings serves as a strong incentive for defense counsel to curtail their investigations and creates a Catch-22—defense counsel must conduct a thorough investigation of their client's life history to support a case for life, but such an investigation may be used against the client in later proceedings. Indeed, counsel has an obligation to pursue a line of investigation, even upon the discovery of harmful

evidence, until they have "learned the nature and strength of that evidence and could weigh it against the mitigating evidence counsel had discovered." *In re Lucas*, 94 P.3d 477, 505-06 (Cal. 2004).

The inadequacy of a protective order was demonstrated in the capital case of *Lambright v. Ryan*, 698 F.3d 808 (9th Cir. 2012). In that case, in the context of an evidentiary hearing in federal habeas proceedings on trial counsel's failure to investigate and present social history and mental health evidence, the State was permitted over defense objection to depose Lambright about the crime. *Id*. at 812. The defense argued that the State's request was beyond the scope of the IAC allegation, an attempt to fish for aggravating evidence, and a violation of Mr. Lambright's Fifth Amendment right against self-incrimination. The district court permitted the deposition, but issued a protective order, declaring the discovery at issue to be "confidential" and ordering that "[a]ny information, documents and materials obtained vis-à-vis the discovery process may be used only by representatives from the Office of the Arizona Attorney General and only for purposes of any proceedings incident to litigating the claims presented in the petition for writ of habeas corpus…pending before this Court." *Id*. at 813. The order further prohibited the disclosure of the materials to "any other persons or agencies, including any other law enforcement or prosecutorial personnel or agencies…" *Id.*

Despite the language of the protective order, the State provided protected

materials to the Pima County Attorney's Office. *Id*. at 814. The district court then modified its protective order to apply only to "privileged" materials. *Id*. After additional litigation by the parties over the scope of the protective order, the district court made additional post-hoc modifications to the order to allow the Pima County Attorney's Office to use evidence developed during the district court evidentiary hearing. Although the Ninth Circuit later found that district court had abused its discretion in modifying the order, *id*. at 826, the damage had already been done. With a comprehensive protective order in place, the Arizona Attorney General's office nevertheless turned over protected materials, including Mr. Lambright's deposition, to the Pima County Attorney's Office for use against Mr. Lambright.

Thus, even with a protective order, the respondent judge's discovery order will have a chilling effect on post-conviction counsel. The *Lambright* case demonstrates that protective orders are insufficient to protect privileged information. The Attorney General's office may not adhere to the protective order, may litigate to modify the protective order, and the respondent judge may revise the order *after* the disclosure has been made. Furthermore, privileged information that is beyond the scope of an IAC allegation should not be shared at all, even with assurances on the limitations of its use.

III. The defense does not have the same discovery obligations as the State.

In ordering the disclosure at issue here, the respondent judge appears to reason

that the defense's position in post-conviction proceedings is akin to the prosecutor's position in trial proceedings. Petition for Review, Exhibit 13, at 2 (Respondent finding "the tables are turned" with regard to disclosure obligations and noting "the parties are uncomfortable assuming the role of the other in this circumstance"). Although the petitioner bears the burden of persuasion in a post-conviction matter, he nevertheless does not "assume the role of" the prosecutor, nor does he take on the same special responsibilities of a prosecutor, nor does the State obtain the protections of defendants that are guaranteed by the Bill of Rights.

ER 3.8 lays out ethical responsibilities that are born solely by the prosecution and never by defense counsel, including the duty to "promptly disclose" "new, credible, and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted…" ER 3.8(g). The ethical rules for prosecutors have long recognized that the prosecutor's duty, in contrast to that of defense counsel or other advocates, "is to seek justice, not merely to convict." Model Code of Professional Responsibility EC 7-13 (1981); *see also State v. Minnitt*, 203 Ariz. 431, 440 ¶ 41 (2002) ("a prosecutor has an obligation not only to prosecute with diligence, but to seek justice.").

The special duties of a prosecutor dates back more than 150 years. The ABA's first Canons of Ethics was based on an 1854 essay by Hon. George Sharswood, writing that "[t]he office of the Attorney-General is a public trust, which involves in

the discharge of it, the exertion of an almost boundless discretion, by an officer who stands as impartial as a judge." Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 Fordham Urb. L.J. 607, 612-13 (1999) (internal quotation omitted). This tradition of impartiality and service of justice does not apply to defense counsel, whose duties are solely to her client.

Further, the prosecution's obligation to disclose material in its possession that is favorable to the defense is rooted in the Due Process Clause. *Brady v. Maryland*, 373 U.S. 83 (1963); U.S. Const. amends. V, XIV; Ariz. Const. art. 2, § 4. The State has no concomitant constitutional right. Similarly, defendants have constitutional rights to due process and to present a complete defense that can overcome state law privileges and even state constitutional rights of victims. *R.S. v. Thompson*, 251 Ariz. 111, 117-18 ¶¶ 13-21 (2021). The prosecution simply does not enjoy the protections the Framers created to protect the people from government overreach.

Defense counsel at all stages are bound by the ethical rules and corresponding statutes regarding privilege and confidentiality. Arizona's attorney-client privilege guarantees the privacy of criminal defendants' communications to their lawyers and their lawyers' advice. A.R.S. § 13-4062(2). Defense counsel's ethical duty to maintain the confidentiality of all information obtained during the course of their representation is far more extensive. The duty of confidentiality is even greater in a capital case, where the stakes could not be higher for the client and where counsel

face the sometimes-overwhelming challenge of developing life-saving mitigation. *See* Lawrence J. Fox, *Capital Guidelines and Ethical Duties: Mutually Reinforcing Responsibilities*, 36 Hofstra L. Rev. 775, 800-01 (Spring 2008). Protecting the confidentiality of defense counsel's investigation serves to ensure the defendant receives the Sixth Amendment's guarantee of the effective assistance of counsel and "assur[es] the proper functioning of the criminal justice system." *Id*. at 80; *United States v. Nobles*, 422 U.S. 225, 238 (1975).

Counsel has no way of knowing whether particular investigations will lead to evidence that will help or hurt the client. Unlike a prosecutor, who is under a duty to disclose all evidence that may help the defendant, the defense team need not—nay, ***must not*** disclose witnesses or evidence that will not be used at trial. *See Smith v. McCormick*, 914 F.2d 1153, 1160 (9th Cir. 1990) ("The attorney must be free to make an informed judgment with respect to the best course for the defense without the inhibition of creating a potential government witness.") (quoting *United States v. Alvarez*, 519 F.2d 1036, 1045-47 (3d Cir. 1975)); *see also* Fox, *supra*, 36 Hofstra L. Rev. at 801 ("Under no circumstances should counsel in a capital case proceed in a fashion that enables the prosecution to use members of the defense team as state's witnesses against the accused.").

IV. This Court should establish standards and practices for enforcing the limits of disclosing privileged and confidential information.

In keeping with all of these authorities, including current Arizona case law,

this Court should provide the following guidance to criminal law practitioners and courts with regard to putting Rule 32.6(f) into practice:

First, if a prosecutor wishes to speak with a defense attorney about privileged or confidential information, such a request should be made through the defendant's post-conviction attorney. In those cases where post-conviction counsel is unable to assist (for example, when counsel is uncooperative or unavailable), the prosecutor should seek a court order for the trial attorney to cooperate with both counsel.

Second, to the extent that the State cannot effectively respond to a petition's IAC claim without information from trial counsel, the State should submit written interrogatories for the trial attorney to answer and/or make a request for production of documents, so that post-conviction counsel has opportunity to object to any inappropriate question or request. Post-conviction counsel should have the opportunity to review the answers to ensure that they contain no unnecessary breach of privilege or confidentiality.

Third, the trial court should make itself available to resolve any discovery disputes. To the extent that *in camera* review is necessary, the court should appoint a special master for the purpose of reviewing privileged or confidential information. Ariz. R. Civ. P. 53; *see also Burch & Cracchiolo, P.A. v. Myers*, 237 Ariz. 369, 373 ¶ 11 (App. 2015) (describing use of special master to evaluate privilege claim).

Fourth, in the event of a discovery dispute resolved in the State's favor, the

trial court should grant a stay of the order on request so that post-conviction counsel may pursue a special action in the court of appeals. *See Lund v. Donohoe*, 227 Ariz. 572, 575-76 ¶ 1 (App. 2011) (trial court abuses discretion by imposing contempt for nondisclosure of information claimed to be privileged, without affording opportunity to seek special action relief). Furthermore, the court of appeals should be encouraged to grant jurisdiction of such petitions because of the important State interest in protecting privilege and confidentiality and the lack of an adequate remedy on appeal.

Fifth, when the trial attorney testifies in an evidentiary hearing, the trial court should be sensitive to what information is truly at issue and not err on the side of allowing more information than is truly necessary. *See State v. Haskie*, 242 Ariz. 582, 588 ¶ 25 (2017) (describing how trial courts should "carefully scrutinize" certain expert evidence when determining admissibility).

Sixth, where appropriate, the trial court should issue a protective order prohibiting the prosecutor receiving the information from revealing it to any other agency. As shown in *Lambright*, however, the mere issuance of the protective order is insufficient to ensure compliance. This Court should state that a prosecutor who is found to have violated such an order will be individually sanctioned through contempt and/or State Bar disciplinary proceedings. Otherwise, prosecutors may be willing to risk that the only sanction will be an informal slap on the wrist, particularly

in capital cases where the stakes are so high.

Throughout this process, prosecutors, defense attorneys, and trial judges alike should be keenly aware of the importance of protecting privileged and confidential information and only permitting release of information that is necessary to rebut an IAC claim. A defendant's right to counsel is the heart of our criminal justice system, and attorney-client privilege and confidentiality are its pulse. A precise and narrow approach to discovery is the only way to adequately safeguard this right.

CONCLUSION

This Court should hold that trial courts must carefully scrutinize prosecution requests for disclosure of privileged and confidential information from trial counsel to ensure that only information covered by Rule 32.6(f) is actually disclosed and that the prosecution does not disseminate it any further.

RESPECTFULLY SUBMITTED this 7th day of June, 2022.

By /s/ David J. Euchner

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